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Editorial Notes: (1) An erroneous editorial note was included in the printed version of the **Federal Register** Table of Contents for Thursday, November 29, 2018. The editorial note does not apply to that table of contents.

(2) In the printed version of the **Federal Register** Table of Contents for Tuesday, November 27, 2018, FR Doc. 2018-25846 was incorrectly indexed as ''Qualification of Drivers; Exemption Applications: Epilepsy and Seizure Disorders.'' This document should have been indexed as ''Agency Information Collection Activities; Proposals, Submissions, and Approvals: Pilot Program to Allow 18- to 21-Year-Old Persons with Military Driving Experience to Operate Commercial Motor Vehicles in Interstate Commerce.''

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Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

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FEDERAL RESERVE SYSTEM

12 CFR Part 210

[Regulation J; Docket No. R–1599]

RIN 7100–AE98

Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is publishing final amendments to Regulation J. The amendments clarify and simplify certain provisions Regulation J, remove obsolete provisions, and align the rights and obligations of sending banks, paying banks, and Federal Reserve Banks (Reserve Banks) with the Board's recent amendments to Regulation CC to reflect the virtually all-electronic check collection and return environment. The final rule also amends Regulation J to clarify that terms used in financial messaging standards, such as ISO 20022, do not confer legal status or responsibilities.

DATES: Effective January 1, 2019.

FOR FURTHER INFORMATION CONTACT: Clinton N. Chen, Senior Attorney (202) 452–3952, Legal Division; or Ian C.B. Spear, Manager (202) 452–3959; Division of Reserve Bank Operations and Payment Systems; for users of Telecommunication Devices for the Deaf (TDD) only, contact 202–263–4869; Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

I. Background

Subpart A of Regulation J governs the collection of checks and other items by the Reserve Banks. This subpart includes the warranties and indemnities that are given to the Reserve Banks by parties that send items to the Reserve Banks for collection and return, as well as the warranties and indemnities for which the Reserve Banks are responsible in connection with the items they handle. Subpart A also describes the methods by which the Reserve Banks may recover for losses associated with their collection of items. Subpart A authorizes the Reserve Banks to issue operating circulars governing the details of the collection of checks and other items and provides that such operating circulars have binding effect on all parties interested in an item handled by a Reserve Bank. The Reserve Banks' Operating Circular No. 3, ''Collection of Cash Items and Returned Checks'' (OC 3),[1] is the operating circular that is most relevant to the Reserve Banks' check collection activities. Subpart B of Regulation J provides rules to govern funds transfers through the Reserve Banks' Fedwire Funds Service. This service is also governed by the Reserve Banks' Operating Circular No. 6, ''Funds Transfers through the Fedwire Funds Service'' (OC 6).[2]

II. Overview of Proposal and Comments

In March 2018, the Board published a notice of proposed rulemaking (''proposal'') intended to align subpart A of Regulation J with the Board's 2017 amendments to Regulation CC and cross reference certain provisions (83 FR 11431). The proposal also included amendments to subpart B of Regulation J to clarify that terms used in financial messaging standards, such as ISO 20022, do not confer legal status or responsibilities. The Board received 25 comments in response to its proposal during the comment period from a variety of commenters, including financial institutions, trade associations, clearinghouses, and private individuals. The Board has considered all comments received and has adopted amendments to Regulation J as described below.

A. Alignment With Regulation CC Amendments Addressing Electronic Checks

Under subpart A of Regulation J, Reserve Banks handle ''items,'' which are defined to include ''electronic items.'' Regulation J currently defines an ''electronic item'' as an electronic image of, and information describing, an item that a Reserve Bank agrees to handle pursuant to an operating circular. Regulation J also sets forth certain warranties provided to the Reserve Banks by the sender of an electronic item and certain warranties provided by the Reserve Banks when sending or presenting an electronic item. Specifically, Regulation J provides that for electronic items, the sender and the Reserve Banks make warranties (1) as set forth in the Uniform Commercial Code (U.C.C.) and Regulation CC as if the electronic item were subject to their terms; and (2) similar to those made for substitute checks under the Check 21 Act (''Check-21-like warranties''). Regulation J also currently provides similar provisions related to checks that are returned as electronic items.

In 2017, the Board published a final rule amending Regulation CC to reflect the virtually all-electronic check collection and return environment (82 FR 27552). Among other things, the amendments created a regulatory framework for the collection and return of electronic items (*i.e.,* electronic images and electronic information derived from a paper item) by defining the terms ''electronic check'' and ''electronic returned check,'' creating Check-21-like warranties for electronic checks and electronic returned checks, and applying existing paper-check warranties to electronic checks and electronic returned checks.

In its proposal, the Board proposed to remove the term ''electronic item'' from Regulation J and define ''check'' and ''returned check'' to include an electronic check and electronic returned check as defined in § 229.2 of Regulation CC. The proposal defined the term ''item'' to include an electronic check as defined in Regulation CC. The Board also proposed to eliminate duplicative provisions by removing the Check-21-like warranties currently provided under Regulation J by the sender and the Reserve Banks. Instead, the proposal provided that the sender of an item (including an electronic check) and the Reserve Banks would (as applicable and unless otherwise provided) make all the warranties and indemnities set forth in and subject to the terms of subparts C and D in

[1] *See, https://www.frbservices.org/assets/resources/rules-regulations/072315-operating-circular-3.pdf.*

[2] *See, https://www.frbservices.org/assets/resources/rules-regulations/operating-circular-6-102917.pdf.*

Regulation CC. The Board proposed similar amendments to the provisions of Regulation J that currently address returning checks as electronic items.

Commenters generally supported aligning Regulation J with Regulation CC's amendments regarding electronic checks. The Board received specific comments on cross referencing Regulation CC electronic check warranties and indemnities, which is discussed in detail in the relevant section-by-section analysis. The Board has revised proposed §§ 210.6(b)(3) and 210.12(e) to extend the warranties with respect to electronic checks and electronic returned checks provided by Reserve Banks to the same scope of recipients as in Regulation CC, as discussed in detail in the relevant section-by-section analyses.

B. Electronically Created Items

In the 2017 amendments to Regulation CC, the Board included certain indemnities with respect to electronically-created items (ECIs), which are check-like items created in electronic form that never existed in paper form. ECIs can be difficult to distinguish from electronic images of paper checks. As a practical matter, a bank receiving an ECI often handles it as if it were derived from a paper check. However, because there was no original paper check corresponding to the ECI, the warranties, indemnities, and other provisions of Regulation CC would not apply to those items. As the Board explained in the 2017 Regulation CC amendments, the payee and the depositary bank are in the best position to know whether an item is electronically created and to prevent the item from entering the check-collection system. Therefore, to protect banks that receive ECIs during the check collection process, the Board's Regulation CC amendments provided indemnities that ultimately shift liability for losses to the depositary bank. These losses could arise because the ECI (1) is not derived from a paper check, (2) was unauthorized, or (3) was transferred or presented for payment more than once.[3] As described above, the final rule cross references Regulation CC's warranties and indemnities in Regulation J, including Regulation CC's ECI indemnities.

In its proposal, the Board explained that although Regulation J does not explicitly address ECIs, the definition of item in Regulation J does not encompass ECIs and therefore Regulation J does not allow for the handling of ECIs by the Reserve Banks. Specifically, Regulation J defines an item, in part, as ''an instrument or a promise or order to pay money, whether negotiable or not'' that meets several other requirements.[4] The terms ''instrument,'' ''promise,'' and ''order'' are defined under the U.C.C. as requiring a writing.[5] Because they never existed in tangible form and therefore do not qualify as writings, ECIs are not ''items'' as defined in Regulation J.

To provide greater clarity that Regulation J does not allow for the handling of ECIs by the Reserve Banks, the Board proposed to amend the definition of ''item'' in subpart A of Regulation J to state explicitly that the term does not include an ECI as defined in Regulation CC. Furthermore, because Regulation J is intended to provide rules for the collection and return of items by the Reserve Banks, the Board proposed to allow the Reserve Banks to require senders to provide warranties and indemnities that only ''items'' and any ''noncash items'' the Reserve Banks have agreed to handle will be provided to the Reserve Banks. The Board's proposal also permitted the Reserve Banks to provide a subsequent collecting bank and a paying bank the warranties and indemnities provided by the sender. The Board requested comment on possible implications that this clarification and change related to ECIs in Regulation J may have on financial institutions or the industry more broadly. The Board also requested comment on whether, and to what extent, the Board should consider amending Regulation J as part of a future rulemaking to permit the Reserve Banks to accept ECIs.

Three commenters, including a Federal Reserve Bank and a comment letter submitted by a group of trade associations (''group letter''), supported the Board's proposal on ECIs. The Reserve Bank commenter noted that it is aware that some advocates support allowing ECIs to be handled in the same manner as checks and has worked with these advocates to explore the possibility of making legal and operational changes to support ECIs. However, the Reserve Bank commenter stated that there is currently no consensus among industry participants to change laws or adopt standards necessary to support ECIs. In the absence of such laws and standards supporting ECIs, the Reserve Bank commenter believes that ECIs represent an unacceptable level of risk to financial institutions. Similarly, the group letter stated that ECIs lack legal status under existing laws and expose financial institutions to risks that cannot be effectively mitigated. The group letter stated that due to ECIs uncertain legal status, it is important to protect financial institutions that receive ECIs during the check collection process from damage or loss arising from the fact that ECIs are not derived from paper checks. Therefore, the group supported the Board's proposal to allow Reserve Banks to require senders to provide warranties and indemnities with respect to ECIs and did not support additional rulemaking to allow the handling of ECIs by the Reserve Banks.

Fourteen commenters, including a joint commenter letter submitted by businesses, financial institutions, and industry associations (''joint letter''), generally did not support the Board's proposed amendments on ECIs. The joint letter stated that the Board's proposal concerning ECIs is not in line with the Board's recent payment system improvement efforts.[6] Another commenter stated that the Board's proposal limited consumer choice because ECIs may be initiated by consumers that do not have access to a debit or credit card. Commenters stated that the Board's proposal discouraged the evolution of the check system to an all-electronic payment system that would result in lower barriers to entry, lower cost, increased speed, and increased parity among financial institutions. Two commenters requested

[3] 12 CFR 229.34(g) provides that each bank that transfers or presents an electronically-created item and receives a settlement or other consideration for it shall indemnify, as set forth in § 229.34(i), each transferee bank, any subsequent collecting bank, the paying bank, and any subsequent returning bank against losses that result from the fact that (1) the electronic image or electronic information is not derived from a paper check; (2) the person on whose account the electronically-created item is drawn did not authorize the issuance of the item in the amount stated on the item or to the payee stated on the item (for purposes of paragraph (g)(2), ''account'' includes an account as defined in § 229.2(a) as well as a credit or other arrangement that allows a person to draw checks that are payable by, through, or at a bank); or (3) a person receives a transfer, presentment, or return of, or otherwise is charged for an electronically-created item such that the person is asked to make payment based on an item or check it has already paid.

[4] 12 CFR 210.2(i).

[5] Terms not otherwise defined in Regulation J or Regulation CC have the meanings set forth in the U.C.C. Under the U.C.C., ''instrument'' means a ''negotiable instrument'' which is defined in part as ''unconditional promise or order to pay a fixed amount of money.'' U.C.C. 3–104. ''Promise'' is defined as ''a written undertaking to pay money signed by the person undertaking to pay.'' U.C.C. 3–103. ''Order'' is defined as ''a written instruction to pay money signed by the person giving the instruction.'' U.C.C. 3–103. ''Writing'' and ''written'' are defined as including ''printing, typewriting, or any other intentional reduction to tangible form.'' U.C.C. 1–201.

[6] The joint letter specifically cited the Federal Reserve's 2013 consultation paper. The Federal Reserve Banks, Payment System Improvement—Public Consultation Paper (2013).

the Board to conduct further studies on ECIs. One commenter expressed concern that institutions would be unable to identify ECIs and requested that the Board provide guidance on how banks can recognize ECIs. Another commenter requested that the Board expressly set out rules for alternative methods of direct exchange of ECIs in its final rule and guidance.

The Board has considered the comments received and has adopted the amendments concerning ECIs as proposed in its final rule. The Board notes that numerous comments erroneously viewed the Board's proposed amendments as substantive modifications that created a new prohibition on ECIs. However, as discussed above, ECIs are not ''items'' under the Board's current Regulation J and therefore cannot be handled by the Reserve Banks. This exclusion of ECIs under current Regulation J is already reflected in current OC 3, which requires that an ''electronic item'' contain an image and data captured from a paper check. The Board's amendments to the definition of ''item'' are intended only to provide additional clarity regarding these existing exclusions and do not create any new prohibitions. The Board believes this existing exclusion shifts liability to parties better positioned to know whether a purported item is electronically created and that can either prevent the ECI from entering the check-collection system or assume the risk of sending it forward. Moreover, the Board's amendments would not prevent entities that desire to exchange ECIs from doing so by agreement using direct exchange relationships or other methods not involving the Reserve Banks.

The Board appreciates comments regarding the Federal Reserve's payment system improvement efforts and continues to support technological innovation in the payments system. However, as set forth in the Federal Reserve's *Strategies for Improving the U.S. Payment System* paper,[7] the Federal Reserve is committed to improving the speed and efficiency of the U.S. payment system from end-to-end while maintaining a high level of safety and accessibility. As explained in that paper, ''credit-push payments,'' which allow the paying bank to authenticate the customer and confirm ''good funds'' are available to support the transaction, have become the expectation when making electronic person-to-person, business-to-business and certain bill payments. Unlike ''credit-push payments,'' ''debit-pull payments'' such as ECIs have a higher risk profile because they generally do not have the same authentication processes and may allow unauthorized parties who have access to a payer's account information to fraudulently pull funds out of the payer's account. To date, there has not been the industry support or necessary investment to address the heightened risk profiles created by processing electronically-created debit instruments through the check collection system. Moreover, there is legal uncertainty as to the status of ECIs that are processed as if they were checks under the U.C.C. and the Electronic Funds Transfer Act. The Board believes that the heightened risk profile and legal uncertainty surrounding ECIs currently outweigh the potential benefits of ECIs mentioned by the commenters and, accordingly, will not conduct further studies on ECIs at this time.

The Board does not believe it is appropriate to adopt guidance to clarify how banks can distinguish ECIs from electronic checks. As it stated in its proposal, the Board recognizes that a bank receiving an electronic image generally cannot distinguish an image that is derived from a paper check from an ECI. This inability to distinguish ECIs from electronic images of paper checks is the reason the Board adopted indemnities with respect to ECIs in Regulation CC. The parties in the best position to know whether a purported item is electronically created are also in the best position to assess and take on any associated risks that may arise from ECIs entering the check collection system and can also address such risk in agreements with their customers that deposit ECIs.

C. Settlement and Payment

Regulation J currently provides that settlement with a Reserve Bank for cash items ''shall be made by debit to an account on the Reserve Bank's books, cash, or other form of settlement'' to which the Reserve Bank has agreed.[8] With respect to noncash items, Regulation J provides that a Reserve Bank may require settlement by cash, by a debit to an account on a Reserve Bank's books or ''by any of the following that is in a form acceptable to the collecting Reserve Bank: Bank draft, transfer of funds or bank credit, or any other form of payment authorized by State law.'' [9] Regulation J also currently provides that a Reserve Bank may require a nonbank payor to settle for items by cash, or by ''any of the following that is in a form acceptable to the Reserve Bank: Cashier's check, certified check, or other bank draft or obligation.'' [10] In order to facilitate the efficient collection of items, the Reserve Banks' current practice is generally to settle for items by debit to an account on the Reserve Bank's books. The use of cash is rare, typically only done in emergency situations, and could be covered by a provision allowing ''other form of settlement to which the Reserve Bank agrees.''

The Board proposed to revise certain settlement provisions of Regulation J to remove references to cash and other specified forms of settlement (*e.g.,* cashier's checks or certified checks) and instead state that the Reserve Banks may settle by a debit to an account on the Reserve Bank's books, or another form of settlement acceptable to the Reserve Banks. The Board requested comment on possible implications that the proposed changes may have on financial institutions with which the Reserve Banks settle for the presentment of items.

The Board received one comment supporting the proposal and no opposing comments. The Board has adopted these amendments as proposed in the final rule.

D. Legal Status of Terms Used in Financial Messaging Standards

Financial messaging standards provide a common format that allows different financial institutions to communicate. The Board has separately requested comment on the Federal Reserve Banks' plan to migrate to the ISO 20022 financial messaging standard for the Fedwire Funds Service.[11] ISO 20022 is an international standard that employs terminology that differs in key respects from that used in U.S. funds-transfer law, including Regulation J. The Board proposed an amendment to subpart B of Regulation J that would clarify that terms used in financial messaging standards, such as ISO 20022, do not confer or connote legal status or responsibilities.

The Board received four comments supporting these proposed changes and no opposing comments. The Board has adopted these amendments as proposed.

[7] Federal Reserve System, Strategies for Improving the U.S. Payment System (2016).

[8] 12 CFR 210.9(b)(5).

[9] 12 CFR 210.9(c).

[10] 12 CFR 210.9(d).

[11] 83 FR 31391 (July 5, 2018).

III. Section-by-Section Analysis

Subpart A—Collection of Checks and Other Items by Federal Reserve Banks

Section 210.2 Definitions

1. Section 210.2(h)—Check

Regulation J defines the term ''check'' as a draft as defined in the U.C.C. drawn on a bank and payable on demand. The Board proposed to revise the definition of ''check'' to mean a ''check'' and an ''electronic check'' as those terms are defined in Regulation CC. This amendment aligns the terminology in the two regulations.

Regulation J also includes the term ''check as defined in 12 CFR 229.2(k)'' (the Regulation CC definition of ''check''). This term is used in Regulation J in those provisions that require specific references to the Regulation CC definition of ''check.'' (See §§ 210.2(m), 210.7(b)(2), and 210.12(a)(2).) The Board proposed to delete the definition of ''check as defined in 12 CFR 229.2(k)'' because it was no longer needed in light of the proposed revision of the Regulation J definition of ''check'' to cross-reference the Regulation CC definition. The Board also proposed to revise the three provisions where it is used by deleting the reference to ''check as defined in 12 CFR 229.2(k).''

Six commenters, including the group letter, were generally supportive of the Board's proposed changes to align Regulation J with Regulation CC. The Board did not receive specific comments on proposed § 210.2(h) or any opposing comments. The Board has adopted these changes as proposed.

2. Section 210.2(i)—Item

Regulation J uses the term ''item'' to refer to the instruments and electronic images that the Reserve Banks handle. Regulation J uses the term ''electronic item'' to refer to an electronic image of an item, and information describing that item, that a Reserve Bank agrees to handle as an item pursuant to an operating circular. To align the terminology of Regulation J with Regulation CC, the Board proposed to delete the definition of ''electronic item'' and revise the definition of ''item'' in § 210.2(i) to include a check, which, under the proposed amendment discussed above would include both a check and an electronic check as defined in Regulation CC. The Board also proposed to add a clarifying statement that the term ''item'' does not include an ECI as defined in § 229.2 of Regulation CC.

Six commenters, including the group letter, were generally supportive of alignment between Regulation J and Regulation CC. With respect to ECIs in particular, three commenters supported the Board's proposed amendments, while fourteen commenters generally opposed amendments that restricted the Reserve Banks' handling of ECIs. For reasons described in the overview section, the Board has adopted § 210.2(i) as proposed.

3. Section 210.2(m)—Returned Check

Current § 210.2(m) defines a ''returned check'' as ''a cash item or a check as defined in 12 CFR 229.2(k) returned by a paying bank.'' To align the definition of ''returned check'' with ''check,'' the Board proposed to delete the reference to ''check as defined in 12 CFR 229.2(k)'' and instead refer to the definition of ''electronic returned check'' in Regulation CC. The Board did not receive any comments on proposed § 210.2(m). The Board has adopted these changes as proposed.

4. Section 210.2(n)—Sender

A ''sender'' under § 210.2(n) is any of several listed entities that sends an item to a Reserve Bank for forward collection. The Board proposed to add ''member bank, as defined in section 1 of the Federal Reserve Act'' in § 210.2(n)(2) to include a bank or trust company that is a member of one of the Federal Reserve Banks to ensure inclusion of any member bank that does not fall under the existing definition. The Board proposed to redesignate current § 210.2(n)(2)–(6) to § 210.2(n)(3)–(7) to accommodate the insertion.

One commenter requested that the Board clarify whether its proposed changes to § 210.2(n) would expand the types of institutions that may directly participate as a sender in the Fedwire services subject to subpart B of Regulation J, such as nondepository trust companies. The commenter noted that revising the definition of sender to capture member nondepository trust companies would prompt concerns regarding payment system risk with respect to access to Federal Reserve financial services. The Board's proposed changes to the definition of ''sender'' does not affect the rights of any particular type of entity to obtain access to Federal Reserve services. (In any case, the definition of ''sender'' in § 210.2(n) applies only to the collection of checks and other items by the Reserve Banks and not to the Fedwire Funds Service.) As stated in the Board's proposal, proposed § 210.2(n) is intended to ensure inclusion of any member bank that does not fall under the existing list of entities that send items to a Reserve Bank for forward collection. Whether any particular member bank, including a nondepository trust company, obtains an account and access to Reserve Bank check services continues to be governed by existing laws, rules, and policies, including the Federal Reserve Act, the Board's Policy on Payment System Risk and the Reserve Banks' internal risk analysis. The Board intends no expansion of rights by this technical change. The Board has adopted the amendments as proposed.

5. Section 210.2(q)—Fedwire

Current § 210.2(q) defines ''Fedwire'' as having the same meaning set forth in § 210.26(e). The Board proposed to amend this definition to refer to both ''Fedwire Funds Service and Fedwire'' to conform to the proposed amendment to § 210.26(e). The Board did not receive any comments on proposed § 210.2(q) and has adopted the revisions as proposed.

Section 210.3 General Provisions

Section 210.3(a) provides general provisions concerning the obligations of Reserve Banks and the role of operating circulars. As discussed in the overview section on ECIs, the Board proposed to add a sentence to § 210.3(a) to permit Reserve Banks to require a sender to provide warranties and indemnities that only items and any noncash items the Reserve Banks have agreed to handle will be sent to the Reserve Banks. Additionally, in order to allow the Reserve Banks to pass any such warranties and indemnities forward, the Board proposed to authorize the Reserve Banks to provide to a subsequent collecting bank and to the paying bank any warranties and indemnities provided by the sender pursuant to this paragraph.

The Board received one comment, the group letter, supporting the proposal. The Board did not receive any comments opposing these particular amendments, although as discussed in the overview section, fourteen commenters generally opposed amendments that restricted the Reserve Banks' handling of ECIs. For the reasons described in the overview section, the Board has adopted these revisions as proposed.

Section 210.4 Sending Items to Reserve Banks

Section 210.4(a) sets forth the rule for determining the Reserve Bank to which an item should be sent. The Board proposed to clarify this paragraph to provide that a sender's Administrate Reserve Bank may direct a sender (other than a Reserve Bank) to send any item to a specified Reserve Bank, whether or

not the item is payable in the Reserve Bank's district. This amendment reflects current practice in the Reserve Banks' check service and is not expected or intended to have a substantive affect. The Board also proposed to capitalize the term ''Administrative Reserve Bank'' wherever it appears to conform to the defined term in § 210.2(c).

The Board did not receive any comments on proposed § 210.4 and has adopted the revisions as proposed.

Section 210.5 Sender's Agreement; Recovery by Reserve Bank

1. Section 210.5(a)—Sender's Agreement

Current § 210.5(a) lists the warranties, authorizations, and agreements made by a sender. The first two paragraphs (current § 210.5(a)(1) and (2)) apply to all items and require the sender to authorize the Reserve Banks to handle the item sent and warrant that the sender is entitled to enforce the item, that the item has not been altered, and that the item bears the indorsements applied by all prior parties. The Board did not propose to revise these paragraphs. Current § 210.5(a)(3) and (4) set out warranties for electronic items and electronic items that are not representations of substitute checks, respectively. These warranties are now specified in Regulation CC, and the Board proposed to revise Regulation J accordingly. Specifically, the Board proposed to amend § 210.5(a)(3) to require the sender to make all applicable warranties and indemnities set forth in Regulation CC and the U.C.C. The proposal retained the existing requirement that the sender make all warranties set forth in and subject to the terms of U.C.C. 4–207 for an electronic check as if it were an item subject to the U.C.C. The proposed changes were intended to streamline Regulation J, align § 210.5(a) with the Regulation CC provisions that set out warranties and indemnities for electronic checks, and ensure a seamless chain of warranties for the items handled by the Reserve Banks.

The Board also proposed to require a sender to make any warranties or indemnities regarding the sending of items that the Reserve Banks include in an operating circular issued in accordance with § 210.3(a) to ensure that only items and any noncash items the Reserve Banks have agreed to handle will be sent to the Reserve Banks (proposed § 210.5(a)(4)). Finally, the Board proposed to add a reference to ''indemnities'' to the introductory text of § 210.5(a) to reflect the coverage of sender indemnities in proposed § 210.5(a)(3) and (4).

One commenter, the group letter, requested that the Board add commentary concerning the cross referencing of Regulation CC's image quality warranty. Under Regulation CC, each bank that transfers an electronic check warrants that ''the electronic image accurately represents all of the information on the front and back of the original check as of the time the original check was truncated and the electronic information includes an accurate record of all MICR line information required for a substitute check under § 229.2(aa) and the amount of the check.'' [12] The group letter requests that the Board add commentary in Regulation J to clarify that the warranty does not require that the electronic check capture those characteristics of the paper check, such as watermarks, microprinting, or other physical security features, that cannot survive the imaging process.

The Board acknowledges that the warranty in § 229.34(a)(1)(i) does not require that the electronic check capture those characteristics of the paper check that cannot survive the imaging process. The commentary to § 229.34(a)(1)(i) states that the electronic check warranties correspond to the warranties made by a bank that transfers, presents, or returns a substitute check.[13] The commentary to the corresponding substitute check warranty states ''a substitute check need not capture other characteristics of the check, such as watermarks, microprinting, or other physical security features that cannot survive the imaging process or decorative images, in order to meet the accuracy requirement.'' [14] The Board's amendments to Regulation J requiring the sender to make all applicable warranties and indemnities set forth in Regulation CC also cross reference the relevant commentary in Regulation CC. Accordingly, the Board does not believe it is necessary to add additional commentary in Regulation J and adopts the revisions as proposed.

2. Section 210.5(a)(5)—Sender's Liability to Reserve Bank

Current § 210.5(a)(5) sets out the sender's liability to Reserve Banks. The Board proposed to amend this paragraph to align this paragraph to changes elsewhere in the proposed rule.

Current § 210.5(a)(5)(i)(C) states that the sender agrees to indemnify the Reserve Bank for any loss or expense resulting from ''[a]ny warranty or indemnity made by the Reserve Bank under § 210.6(b), part 229 of this chapter, or the U.C.C.'' The Board proposed to amend this provision to provide that the sender will also indemnify a Reserve Bank for any loss or expense sustained resulting from any warranties and indemnities regarding the sending of ''items'' required by the Reserve Bank in an operating circular issued pursuant to proposed § 210.3(a).

Current § 210.5(a)(5)(ii) specifies conditions and limitations to a sender's liability for warranties and indemnities that a Reserve Bank makes for a substitute check, a paper or electronic representation thereof, or any other electronic item. The Board proposed to delete the term ''electronic item'' in current § 210.5(a)(5)(ii) and replace it with ''electronic check.''

Current § 210.5(a)(5)(ii)(A) provides that a sender of an original check is not liable for any amount that the Reserve Bank pays under subpart D of Regulation CC for a subsequently created substitute check or under § 210.6(b)(3) for an electronic item, absent the sender's agreement to the contrary. The Board proposed to delete the reference to current § 210.6(b)(3), which lists warranties and an indemnity for an electronic item that is not a representation of a substitute check, and replace it with a reference to § 229.34 of Regulation CC with respect to an electronic check, consistent with other proposed amendments to § 210.6(b) described below.

Current § 210.5(a)(5)(ii)(B) provides that nothing in Regulation J alters the liability structure that applies to substitute checks and paper or electronic representations of substitute checks under subpart D of Regulation CC. The Board proposed to add that this subpart also does not alter the liability of a sender of an electronic check under § 229.34 of Regulation CC, consistent with the other proposed revisions to Regulation J.

Current § 210.5(a)(5)(ii)(C) provides that a sender of an electronic item that is not a representation of a substitute check is not liable for any related warranties or indemnities that a Reserve Bank pays that are attributable to the Reserve Bank's own lack of good faith or failure to exercise ordinary care. The Board proposed to broaden this provision by applying the limitation on liability to all senders for any amount that the Reserve Bank pays that is attributable to the Reserve Bank's own lack of good faith or failure to exercise

[12] 12 CFR 229.34(a)(1)(i).

[13] *See* Regulation CC, Official Staff Commentary Section 229.34(a)–2.

[14] *See* Regulation CC, Official Staff Commentary Section 229.51(a)–3; *see also First Am. Bank* v. *Fed. Reserve Bank of Atlanta,* 842 F.3d 487 (7th Cir. 2016).

ordinary care under Regulation J or Regulation CC. The Board proposed to redesignate this paragraph as § 210.5(a)(5)(iii) and make conforming changes to cross-references.

The Board did not receive any comments on proposed § 210.5(a). As discussed in the overview section, the Board received numerous comments generally supporting aligning Regulation J with Regulation CC. The Board has adopted these revisions as proposed.

3. Section 210.5(c) & (d)—Recovery by Reserve Bank and Methods of Recovery

Section 210.5(c) sets out the procedures by which a Reserve Bank may recover against a sender if certain actions or proceedings related to the sender's actions are brought against (or defense is tendered to) a Reserve Bank. A portion of this paragraph was inadvertently dropped from the Code of Federal Regulations. The Board proposed to reinstate the dropped language, which provides that, upon entry of a final judgment or decree, a Reserve Bank may recover from the sender the amount of attorneys' fees and other expenses of litigation incurred, as well as any amount the Reserve Bank is required to pay because of the judgment or decree or the tender of defense, with interest. In addition, the Board proposed to correct cross-references to this provision in § 210.5(d).

The Board did not receive any comments on proposed § 210.5(c) & (d). The Board has adopted these revisions as proposed.

4. Section 210.5(e)—Security Interest

Current § 210.5(e) provides that when a sender sends an item to a Reserve Bank, the sender and any prior collecting bank grant to the sender's Administrative Reserve Bank a security interest in all of their respective assets in the possession of, or held for the account of, any Reserve Bank to secure their respective obligations due or to become due to the Administrative Reserve Bank under this subpart or subpart C of part 229 (Regulation CC). The Board proposed to amend this paragraph to refer to subpart D of Regulation CC in addition to subpart C, as senders may have obligations to Reserve Banks under that subpart as well.

The Board did not receive any comments on proposed § 210.5(e). The Board has adopted these revisions as proposed.

Section 210.6 Status, Warranties, and Liability of Reserve Bank

1. Section 210.6(a)(2)—Limitations on Reserve Bank Liability

Section 210.6(a)(2) limits a Reserve Bank's liability with respect to an item to three instances: (1) The Reserve Bank's own lack of good faith or failure to exercise ordinary care, (2) as provided in this section of Regulation J, and (3) as provided in subparts C and D of Regulation CC. The Board proposed to expand this list to provide that a Reserve Bank may be liable under any warranties and indemnities provided in an operating circular issued in accordance with § 210.3(a) regarding the sending of items.

The Board received one comment, the group letter, supporting its proposal to allow the Reserve Banks to address warranties and indemnities for eligible items and non-cash items in the operating circular. The Board did not receive any opposing comments. The Board has adopted these revisions as proposed.

2. Section 210.6(b)—Warranties and Liability

Section 210.6(b) sets forth the warranties and indemnities made by a Reserve Bank when it presents or sends an item. In alignment with the Board's proposed amendments to the sender's warranties in § 210.5(a), the Board proposed to replace current § 210.6(b)(2) and (3), which provide warranties and indemnities for electronic items and electronic items that are not representations of substitute checks, respectively. Those warranties are now covered by Regulation CC. The Board also proposed to make a conforming amendment to § 210.6(b)(1)(iii) to eliminate the unnecessary reference to ''paper or electronic form.''

The Board proposed a new § 210.6(b)(2) to provide that a Reserve Bank would make any warranties or indemnities regarding the sending of items as set forth in an operating circular issued pursuant to proposed § 210.3(a). This language corresponds to the similar proposed provision for sender liability in § 210.5(a)(4).

The Board proposed a new § 210.6(b)(3) to provide that the Reserve Bank makes to a subsequent collecting bank and to the paying bank all the warranties and indemnities set forth in subparts C and D for Regulation CC. Proposed § 210.6(b)(3) would retain the existing application of U.C.C. 4–207 warranties to electronic items (now called electronic checks).

In § 210.6(b)(4), the Board proposed to retain the existing Reserve Bank indemnity for substitute checks created from electronic checks, which is in current § 210.6(b)(3)(ii). This provision provides an indemnity chain for substitute check indemnity claims under Regulation CC, enabling receiving banks (and, in turn, Reserve Banks) to pass the loss on such claims to the bank whose choice to handle an item electronically necessitated the later creation of a substitute check.

The Board received one comment, the group letter, on proposed § 210.6(b)(3). The group letter noted that the persons that receive the electronic check warranties from the Reserve Banks appeared to be more limited than the persons that receive the electronic check warranties under Regulation CC. Specifically, proposed § 210.6(b)(3) does not extend the electronic check warranties to the drawer of the check on the forward side, unlike the warranties in Regulation CC. The group letter noted, however, that proposed § 210.6(a)(2)(iv) provides that a Reserve Bank does not assume any liability with respect to an item or its proceeds ''except as provided under subparts C and D of Regulation CC.'' The group letter requested that the Board clearly require that the Reserve Banks provide the same scope and recipients of the new electronic check warranties in Regulation J as provided under Regulation CC.

The Board agrees with the group letter that Reserve Banks should provide the electronic check and electronic returned check warranties to the same scope of recipients in Regulation J as in Regulation CC, including to drawers and owners of checks. The Board believes that extending the warranties to the drawers and owners is consistent with the warranty flow set forth in section 5 of the Check 21 Act for substitute checks and will protect parties outside the banking system from any undesirable consequences resulting from check truncation. The Board has revised proposed § 210.6(b)(3) accordingly in the final rule. Otherwise, the Board has adopted § 210.6(b) as proposed, with minor revisions to correct typographical errors in § 210.6(b)(2) & (3).

3. Section 210.6(c)—Limitation on Liability

The limitations on Reserve Bank liability are set forth in proposed (and current) § 210.6(a)(2). The Board proposed to delete paragraph (c) as it is redundant and to redesignate current paragraph (d) as paragraph (c). The Board did not receive any comments on proposed § 210.6(c). The Board has adopted these revisions as proposed.

Section 210.7 Presenting Items for Payment

Section 210.7(b) provides the places of presentment for a Reserve Bank or subsequent collecting bank. Current § 210.7(b)(2) states ''In the case of a check as defined in 12 CFR 229.2(k), in accordance with 12 CFR 229.36.'' In alignment with the Board's proposed deletion of the defined term ''check as defined in 12 CFR 229.2(k),'' the Board proposed to delete the use of that term in § 210.7(b)(2), as it is no longer needed, and make other minor edits.

The Board did not receive any comments on proposed § 210.7. The Board has adopted these revisions as proposed.

Section 210.9 Settlement and Payment

1. Section 210.9(b)(5), (c), and (d)—Manner of Settlement, Noncash Items, and Nonbank Payor

Current § 210.9(b)(5) requires that settlement for cash items with a Reserve Bank be made by debit to an account on the Reserve Bank's books, cash, or other form of settlement to which the Reserve Bank agrees. The Board proposed to amend this provision by removing the reference to cash as a means of settlement. The Board also proposed to make conforming amendments to § 210.9(c) and (d), as well as to remove the references to other rarely-used forms of settlement (cashier's checks, certified checks, or other bank drafts or obligations). The Board proposed to correct cross-references and to capitalize the term ''Administrative Reserve Bank'' wherever it appears to conform to the defined term in § 210.2(c).

As discussed in the overview section, the Board received one comment, the group letter, supporting the proposal. The Board did not receive any opposing comments. The Board has adopted the revisions as proposed.

2. Section 210.9(e)—Handling of Payment

Current § 210.9(e) states that a Reserve Bank may handle a bank draft or other form of payment it receives in payment of a cash item as a cash item and that a Reserve Bank may handle a bank draft or other form of payment it receives in payment of a noncash item as either a cash item or a noncash item. The Board proposed to delete this paragraph as it is now obsolete.

The Board did not receive any comments on proposed § 210.9(e) and has deleted this paragraph as proposed.

3. Section 210.9(f)—Liability of Reserve Bank

Current § 210.9(f) states that a Reserve Bank that acts in good faith and exercises ordinary care shall not be liable for the nonpayment of, or failure to realize upon, any bank draft or other form of payment that it accepts pursuant to § 210.9(b)–(d). The Board proposed to renumber this paragraph as § 210.9(e) and to replace the reference to ''bank draft or other form of payment'' with ''any non-cash form of payment'' to conform to the proposed changes to the other provisions of this section.

The Board did not receive any comments on proposed § 210.9(f). The Board has adopted these revisions as proposed.

Section 210.10 Time Schedule and Availability of Credits for Cash Items and Returned Checks

Section 210.10(a) states that each Reserve Bank shall ''include in its operating circulars'' its time schedules for availability of cash items and returned checks and, correspondingly, when credits can be counted toward reserve balance requirements for purposes of Regulation D (12 CFR part 204). The Reserve Banks' practice is to publish the time schedules on the Federal Reserve website for financial services. Accordingly, the Board proposed to amend this paragraph to delete the requirement that time schedules be included in the operating circulars and, instead, require only that the time schedules be published.

The Board did not receive any comments on proposed § 210.10. The Board has adopted these revisions as proposed.

Section 210.11 Availability of Proceeds of Noncash Items; Time Schedule

1. Section 210.11(b)—Time Schedule

Section 210.11(b) states that a Reserve Bank may give credit for the proceeds of a noncash item subject to payment in actually and finally collected funds in accordance with a time schedule included in its operating circulars. To conform to amendments made in proposed § 210.10, the Board proposed to delete the reference to operating circulars and require only that the time schedule be published.

The Board did not receive any comments on proposed § 210.11(b). The Board has adopted these revisions as proposed.

2. Section 210.11(c)—Handling of Payment

Current § 210.11(c) prohibits a Reserve Bank from providing credit for a bank draft or other form of payment for a noncash item until it receives payment in actually and finally collected funds. The Board proposed to delete this paragraph, as actually and finally collected funds are already required by § 210.11(a).

The Board did not receive any comments on proposed § 210.11(c) and has adopted these revisions as proposed.

Section 210.12 Return of Cash Items and Handling of Returned Checks

Section 210.12 sets out provisions governing the handling of returned checks. It is the counterpart to §§ 210.5 and 210.6, which govern the handling of items for forward collection.

1. Section 210.12(a)—Return of Items

Current § 210.12(a)(2) sets out the procedures by which a paying bank may return checks not handled by Reserve Banks and refers to ''check as defined in § 229.2(k) of this chapter (Regulation CC).'' In alignment with the Board's proposal to delete the defined term ''check as defined in § 229.2(k)'' in § 210.2(h), the Board proposed to delete the use of this term in this paragraph, as it is no longer needed, and to use the term ''check'' instead.

The Board did not receive any comments on proposed § 210.12(a) and has adopted these revisions as proposed.

2. Section 210.12(c)—Paying Bank's and Returning Bank's Agreement

Current § 210.12(c) provides the warranties, authorizations, and agreements related to returned checks made by paying banks and returning banks. The Board proposed amendments to this paragraph that are parallel to the proposed amendments for forward-collection items with respect to the liability of the sender (§ 210.5(a)(3)) and the Reserve Banks (§ 210.6(b)(2)). Specifically, the Board proposed to replace current § 210.12(c)(3) and (4), which provide warranties for all returned checks that are electronic items and warranties for returned checks that are electronic items that are not representations of substitute checks, respectively, with a provision that requires the paying bank or returning bank to make all the warranties and indemnities as set forth in Regulation CC, as applicable (proposed § 210.12(c)(3)).

Current § 210.12(c)(5) sets out the conditions under which a paying bank

or returning bank is liable to a Reserve Bank. The Board proposed to redesignate this paragraph as § 210.12(c)(4) and amend the paragraph to correspond with the proposed amendments to the section on sender's liability to a Reserve Bank (§ 210.5(a)(4)). The proposed amendments were intended to create consistent liability provisions for senders, paying banks, and returning banks.

The Board did not receive any comments on proposed § 210.12(c) and has adopted these revisions as proposed, with a minor revision to correct a typographical error in § 210.12(c)(1).

3. Section 210.12(d)—Liability Under Other Law

Current § 210.12(d) is titled ''Preservation of other warranties and indemnities.'' The Board proposed to change the title of this paragraph to ''Returning bank's or paying bank's liability under other law'' to mirror the heading for the corresponding paragraph for senders (§ 210.5(b)).

The Board did not receive any comments on proposed § 210.12(d). The Board has adopted these revisions as proposed.

4. Section 210.12(e)—Warranties by and Liability of Reserve Bank

Current § 210.12(e) sets forth a Reserve Bank's liability when it handles a returned check, including warranties and liabilities. The Board proposed to amend this paragraph to correspond to the amendments proposed in § 210.6(b) related to the warranties and liabilities that are made by Reserve Banks when presenting or sending an item.

The Board receive one comment, the group letter, on proposed § 210.12(e). Corresponding to the comment discussed in the section-by-section analysis for § 210.6(b)(3), the group letter stated that the proposed Regulation J does not extend the electronic check warranties for returns to the owner of the check, unlike the warranties in Regulation CC. The group letter requested that the Board require the Reserve Banks provide in Regulation J the same scope and recipients of the new electronic check warranties as provided under Regulation CC.

For the reasons described in the section-by-section analysis for § 210.6(b), the Board has revised proposed § 210.12(e)(ii) to extend the warranties for electronic returned checks provided by Reserve Banks to the same scope of recipients as provided in Regulation CC. The Board has also revised proposed § 210.12(e)(2)(i) to correct a typographical error.

5. Section 210.12(f) & (g)—Recovery by Reserve Bank & Methods of Recovery

Section 210.12(f) parallels § 210.5(c) and sets out the procedures by which a Reserve Bank may recover against a paying bank or returning bank if certain actions or proceedings related to the paying bank's or returning bank's actions are brought against (or defense is tendered to) a Reserve Bank. A portion of this paragraph was inadvertently dropped from the Code of Federal Regulations. The Board proposed to reinstate the dropped language, which provides that, upon entry of a final judgment or decree, a Reserve Bank may recover from the paying bank or returning bank the amount of attorneys' fees and other expenses of litigation incurred, as well as any amount the Reserve Bank is required to pay because of the judgment or decree or the tender of defense, with interest. In addition, the Board proposed to correct cross-references and make organizational changes in § 210.12(g).

The Board did not receive any comments on proposed § 210.12(f) & (g) and has adopted these revisions as proposed.

Subpart B—Funds Transfers Through Fedwire

Section 210.25 Authority, Purpose, and Scope

Section 210.25 sets out the authority, purpose, and scope for subpart B of Regulation J, which governs Fedwire funds transfers. The Board proposed to add a new § 210.25(e) to clarify that financial messaging standards (*e.g.,* ISO 20022), including the financial messaging components, elements, technical documentation, tags, and terminology used to implement those standards, do not confer or connote legal status or responsibilities. The proposed amendment would specify that Regulation J, Article 4A of the U.C.C., and the operating circulars of the Reserve Banks govern the rights and obligations of parties to the Fedwire Funds Service and supersede any inconsistency between a financial messaging standard adopted by the Fedwire Funds Service. The proposal would also make a conforming change to § 210.25(b)(2). Additionally, the Board proposed to add in the commentary examples of inconsistent terminology between the ISO 20022 financial messaging standard and U.S. funds transfer law.

The Board received four comments supporting these proposed changes and no opposing comments. The Board has adopted these amendments as proposed.

Section 210.26 Definitions

Section 210.2(e) defines the term ''Fedwire'' to mean the funds-transfer system owned and operated by the Federal Reserve Banks that is used primarily for the transmission and settlement of payment orders governed by subpart B. The Board proposed to amend this definition so that it applies to the official title of the service, ''Fedwire Funds Service,'' as well as the shorthand term ''Fedwire.'' The Board also proposed to change references to ''Fedwire'' to ''Fedwire Funds Service'' in §§ 210.9(b)(4)(i), 210.25(a) and (b)(3), and 210.29(b).

The Board did not receive any comments on proposed § 210.26 and has adopted these revisions as proposed.

Section 210.32 Federal Reserve Bank Liability; Payment of Interest

Current § 210.32 sets out provisions that govern Federal Reserve Bank liability and payment of interest. Section 210.32(b) provides that compensation that is paid by Federal Reserve Banks in the form of interest shall be calculated in accordance with section 4A–506 of Article 4A. Under section 4A–506(a), the amount of interest may be determined by agreement between the sender and receiving bank or by funds-transfer system rule. If there is no such agreement, under section 4A–506(b), the amount of interest is based on the federal funds rate. The current commentary to § 210.32(b) states that ''Interest would be calculated in accordance with the procedures specified in section 4A–506(b).'' The Board proposed to delete this statement and rearrange the commentary to clarify that interest can be calculated in accordance with both section 4A–506(a) and (b).

The Board did not receive any comments on the proposed commentary to § 210.32. The Board has adopted these revisions as proposed.

IV. Competitive Impact Analysis

The Board conducts a competitive impact analysis when it considers an operational or legal change, if that change would have a direct and material adverse effect on the ability of other service providers to compete with the Federal Reserve in providing similar services due to legal differences or due to the Federal Reserve's dominant market position deriving from such legal differences. All operational or legal changes having a substantial effect on payments-system participants will be

subject to a competitive-impact analysis, even if competitive effects are not apparent on the face of the proposal. If such legal differences exist, the Board will assess whether the same objectives could be achieved by a modified proposal with lesser competitive impact or, if not, whether the benefits of the proposal (such as contributing to payments-system efficiency or integrity or other Board objectives) outweigh the materially adverse effect on competition.[15]

The Board does not believe that the amendments to Regulation J will have a direct and material adverse effect on the ability of other service providers to compete effectively with the Reserve Banks in providing similar services due to legal differences. The final rule would align the provisions in Regulation J governing Reserve Bank services to the generally applicable provisions in Regulation CC. The final rule would not affect the competitive position of private-sector presenting banks vis-à-vis the Reserve Banks.

V. The Riegle Community Development and Regulatory Improvement Act of 1994

The Riegle Community Development Regulatory Improvement Act of 1994 requires that agency regulations that impose additional reporting, disclosure, and other requirements on insured depository institutions take effect on the first calendar quarter following publication in final form, unless the agency determines for good cause that the regulation should become effective before such time. 12 U.S.C. 4802(b). Consistent with the Riegle Community Development Act, this final rule is effective on January 1, 2019.

VI. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320, appendix A.1), the Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a valid Office of Management and Budget (OMB) control number. The Board reviewed the final rule under the authority delegated to the Board by the OMB and determined that it contains no collections of information under the PRA.[16] Accordingly, there is no paperwork burden associated with the rule.

VII. Regulatory Flexibility Act

An initial regulatory flexibility analysis (IRFA) was included in the proposal in accordance with section 3(a) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.* (RFA). In the IRFA, the Board requested comment on the effect of the proposed rule on small entities and on any significant alternatives that would reduce the regulatory burden on small entities. The Board did not receive any comments. The RFA requires an agency to prepare a final regulatory flexibility analysis (FRFA) unless the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. In accordance with section 3(a) of the RFA, the Board has reviewed the final regulation. Based on its analysis, and for the reasons stated below, the Board certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The final rule will apply to all depository institutions regardless of their size.[17] Pursuant to regulations issued by the Small Business Administration (13 CFR 121.201), a ''small banking organization'' includes a depository institution with $550 million or less in total assets. Based on call report data, there are approximately 9,631 depository institutions that have total domestic assets of $550 million or less and thus are considered small entities for purposes of the RFA. The Board's final rule generally does not have any projected reporting, recordkeeping or other compliance requirements, as the revisions to Regulation J align the rights and obligations of sending banks, paying banks, and Federal Reserve Banks (Reserve Banks) with the Board's recent amendments to Regulation CC. The final rule's warranties and indemnities are similar to the warranties and indemnities that apply to paper and electronic checks under existing Regulation J and other law. The final rule does not require any bank to change the form in which it submits checks, nor do they require any bank to submit reports, maintain records, or provide notices or disclosures.

With respect to ECIs, provisions in the final rule would allow the Reserve Banks to require that senders provide certain warranties and indemnities. The Board recognizes these provisions may affect the creation and acceptance of ECIs by small entities. Neither Regulation J nor Regulation CC would prevent private-sector collecting banks from doing the same. In addition, the Board's final rule would not prevent small entities that desire to exchange ECIs from doing so by agreement using direct exchange relationships or other methods not involving the Reserve Banks. The Board believes the final rule will help to shift liability to parties better positioned to know whether an item is electronically created and that can either prevent the item from entering the check-collection system or assume the risk of sending it forward.

Furthermore, the Board does not expect the amendments that remove references to cash and other specified forms of settlement to burden small entities, as the use of cash as settlement is rare and typically only done in emergency situations. The Board's final rule will allow use of cash as settlement in emergency situations by continuing to permit other forms of settlement to which the Reserve Banks agree. The Board does not expect the rule to have a significant economic impact on a substantial number of small entities.

List of Subjects in 12 CFR Part 210

Banks, Banking, Federal Reserve System.

Authority and Issuance

For the reasons set forth in the preamble, the Board amends 12 CFR part 210 as follows:

PART 210—COLLECTION OF CHECKS AND OTHER ITEMS BY FEDERAL RESERVE BANKS AND FUNDS TRANSFERS THROUGH FEDWIRE (REGULATION J)

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 12 U.S.C. 248 (i), (j), and (o); 12 U.S.C. 342; 12 U.S.C. 360; 12 U.S.C. 464; 12 U.S.C. 4001–4010; 12 U.S.C. 5001–5018.

■ 2. In part 210, revise all references to ''article 4A'' to read ''Article 4A.''

Subpart A—Collection of Checks and Other Items by Federal Reserve Banks

■ 3. In § 210.2, revise paragraphs (h), (i), (m), (n), (q), and (s)(1) to read as follows:

§ 210.2 Definitions.

* * * * *

(h) *Check* means a check or an electronic check, as those terms are defined in § 229.2 of this chapter (Regulation CC).

(i) *Item.* (1) Means—

(i) An instrument or a promise or order to pay money, whether negotiable or not, that is—

(A) Payable in a Federal Reserve District [1] (District);

[15] Federal Reserve Regulatory Service, 7–145.2.

[16] *See* 44 U.S.C. 3502(3).

[17] The final rule would not impose costs on any small entities other than depository institutions.

[1] For purposes of this subpart, the Virgin Islands and Puerto Rico are deemed to be in the Second

Continued

(B) Sent by a sender to a Reserve Bank for handling under this subpart; and

(C) Collectible in funds acceptable to the Reserve Bank of the District in which the instrument is payable; or

(ii) A check.

(2) Unless otherwise indicated, *item* includes both a cash and a noncash item, and includes a returned check sent by a paying or returning bank. *Item* does not include a check that cannot be collected at par, or a *payment order* as defined in § 210.26(i) and handled under subpart B of this part. The term also does not include an electronically-created item as defined in § 229.2 of this chapter (Regulation CC).

* * * * *

(m) *Returned check* means a cash item returned by a paying bank, including an electronic returned check as defined in § 229.2 of this chapter (Regulation CC) and a notice of nonpayment in lieu of a returned check, whether or not a Reserve Bank handled the check for collection.

(n) *Sender* means any of the following entities that sends an item to a Reserve Bank for forward collection—

(1) A *depository institution,* as defined in section 19(b) of the Federal Reserve Act (12 U.S.C. 461(b));

(2) A member bank, as defined in section 1 of the Federal Reserve Act (12 U.S.C. 221);

(3) A clearing institution, defined as—

(i) An institution that is not a depository institution but that maintains with a Reserve Bank the balance referred to in the first paragraph of section 13 of the Federal Reserve Act (12 U.S.C. 342); or

(ii) A corporation that maintains an account with a Reserve Bank in conformity with § 211.4 of this chapter (Regulation K);

(4) Another Reserve Bank;

(5) An international organization for which a Reserve Bank is empowered to act as depositary or fiscal agent and maintains an account;

(6) A foreign correspondent, defined as any of the following entities for which a Reserve Bank maintains an account: A foreign bank or banker, a foreign state as defined in section 25(b) of the Federal Reserve Act (12 U.S.C. 632), or a foreign correspondent or agency referred to in section 14(e) of that act (12 U.S.C. 358); or

(7) A branch or agency of a foreign bank maintaining reserves under section 7 of the International Banking Act of 1978 (12 U.S.C. 347d, 3105).

* * * * *

(q) *Fedwire Funds Service* and *Fedwire* have the same meaning as that set forth in § 210.26(e).

* * * * *

(s) * * *

(1) The terms not defined herein have the meanings set forth in § 229.2 of this chapter applicable to subpart C or D of part 229 of this chapter (Regulation CC), as appropriate; and

* * * * *

■ 4. In § 210.3, revise paragraph (a) to read as follows:

§ 210.3 General provisions.

(a) *General.* Each Reserve Bank shall receive and handle items in accordance with this subpart, and shall issue operating circulars governing the details of its handling of items and other matters deemed appropriate by the Reserve Bank. The circulars may, among other things, classify cash items and noncash items, require separate sorts and letters, provide different closing times for the receipt of different classes or types of items, provide for instructions by an Administrative Reserve Bank to other Reserve Banks, set forth terms of services, and establish procedures for adjustments on a Reserve Bank's books, including amounts, waiver of expenses, and payment of compensation. As deemed appropriate by the Reserve Bank, the circulars may also require the sender to provide warranties and indemnities that only items and any noncash items the Reserve Banks have agreed to handle will be sent to the Reserve Banks. The Reserve Banks may provide to a subsequent collecting bank and to the paying bank any warranties and indemnities provided by the sender pursuant to this paragraph (a).

* * * * *

■ 5. In § 210.4, revise paragraphs (a), (b)(1)(ii) and (iii), and (b)(3) to read as follows:

§ 210.4 Sending items to Reserve Banks.

(a) *Sending of items.* A sender's Administrative Reserve Bank may direct a sender other than a Reserve Bank to send any item to a specified Reserve Bank, whether or not the item is payable in the Reserve Bank's district.

(b) * * *

(1) * * *

(ii) The initial sender's Administrative Reserve Bank (which is deemed to have accepted deposit of the item from the initial sender);

(iii) The Reserve Bank that receives the item from the initial sender (if different from the initial sender's Administrative Reserve Bank); and

* * * * *

(3) The identity and order of the parties under paragraph (b)(1) of this section determine the relationships and the rights and liabilities of the parties under this subpart, part 229 of this chapter (Regulation CC), section 13(1) and section 16(13) of the Federal Reserve Act, and the Uniform Commercial Code. An initial sender's Administrative Reserve Bank that is deemed to accept an item for deposit or handle an item is also deemed to be a sender with respect to that item. The Reserve Banks that are deemed to handle an item are deemed to be agents or subagents of the owner of the item, as provided in § 210.6(a).

* * * * *

■ 6. In § 210.5, revise paragraphs (a), (c), (d), and (e) to read as follows:

§ 210.5 Sender's agreement; recovery by Reserve Bank.

(a) *Sender's agreement.* The warranties, indemnities, authorizations, and agreements made pursuant to this paragraph (a) may not be disclaimed and are made whether or not the item bears an indorsement of the sender. By sending an item to a Reserve Bank, the sender does all of the following.

(1) *Authorization to handle item.* The sender authorizes the sender's Administrative Reserve Bank and any other Reserve Bank or collecting bank to which the item is sent to handle the item (and authorizes any Reserve Bank that handles settlement for the item to make accounting entries), subject to this subpart and to the Reserve Banks' operating circulars, and warrants its authority to give this authorization.

(2) *Warranties for all items.* The sender warrants to each Reserve Bank handling the item that—

(i) The sender is a person entitled to enforce the item or authorized to obtain payment of the item on behalf of a person entitled to enforce the item;

(ii) The item has not been altered; and

(iii) The item bears all indorsements applied by parties that previously handled the item for forward collection or return.

(3) *Warranties and indemnities as set forth in Regulation CC and U.C.C.* As applicable and unless otherwise provided, the sender of an item makes to each Reserve Bank that handles the item all the warranties and indemnities set forth in and subject to the terms of subparts C and D of part 229 of this chapter (Regulation CC) and Article 4 of the U.C.C. The sender makes all the warranties set forth in and subject to the terms of 4–207 of the U.C.C. for an electronic check as if it were an item subject to the U.C.C.

District, and Guam, American Samoa, and the Northern Mariana Islands in the Twelfth District.

(4) *Warranties and indemnities as set forth in Reserve Bank operating circulars.* The sender makes any warranties and indemnities regarding the sending of items as set forth in an operating circular issued in accordance with § 210.3(a).

(5) *Sender's liability to Reserve Bank.* (i) Except as provided in paragraphs (a)(5)(ii) and (iii) of this section, the sender agrees to indemnify each Reserve Bank for any loss or expense sustained (including attorneys' fees and expenses of litigation) resulting from—

(A) The sender's lack of authority to make the warranty in paragraph (a)(1) of this section;

(B) Any action taken by the Reserve Bank within the scope of its authority in handling the item; or

(C) Any warranty or indemnity made by the Reserve Bank under § 210.6(b), part 229 of this chapter, the U.C.C., or, regarding the sending of items, an operating circular issued in accordance with § 210.3(a).

(ii) A sender's liability for warranties and indemnities that the Reserve Bank makes for a substitute check, a paper or electronic representation thereof, or for an electronic check is subject to the following conditions and limitations—

(A) A sender of an original check shall not be liable under paragraph (a)(5)(i) of this section for any amount that the Reserve Bank pays under subpart D of part 229 of this chapter, or under § 229.34 of this chapter with respect to an electronic check, absent the sender's agreement to the contrary; and

(B) Nothing in this subpart alters the liability of a sender of a substitute check or paper or electronic representation of a substitute check under subpart D of part 229 of this chapter, or a sender of an electronic check under § 229.34 of this chapter.

(iii) A sender shall not be liable for any amount that the Reserve Bank pays under this subpart or part 229 of this chapter that is attributable to the Reserve Bank's own lack of good faith or failure to exercise ordinary care.

* * * * *

(c) *Recovery by Reserve Bank.* (1) A Reserve Bank that has handled an item may recover as provided in paragraph (c)(2) of this section if an action or proceeding is brought against (or if defense is tendered to) the Reserve Bank based on—

(i) The alleged failure of the sender to have the authority to make the warranty and agreement in paragraph (a)(1) of this section;

(ii) Any action by the Reserve Bank within the scope of its authority in handling the item; or

(iii) Any warranty or indemnity made by the Reserve Bank under § 210.6(b), part 229 of this chapter, or the U.C.C.

(2) Upon entry of a final judgment or decree in an action or proceeding described in paragraph (c)(1) of this section, a Reserve Bank may recover from the sender the amount of attorneys' fees and other expenses of litigation incurred, as well as any amount the Reserve Bank is required to pay because of the judgment or decree or the tender of defense, together with interest thereon.

(d) *Methods of recovery.* (1) The Reserve Bank may recover the amount stated in paragraph (c) of this section by charging any account on its books that is maintained or used by the sender (or by charging a Reserve Bank sender), if—

(i) The Reserve Bank made seasonable written demand on the sender to assume defense of the action or proceeding; and

(ii) The sender has not made any other arrangement for payment that is acceptable to the Reserve Bank.

(2) The Reserve Bank is not responsible for defending the action or proceeding before using this method of recovery. A Reserve Bank that has been charged under this paragraph (d) may recover from its sender in the manner and under the circumstances set forth in this paragraph (d).

(3) A Reserve Bank's failure to avail itself of the remedy provided in this paragraph (d) does not prejudice its enforcement in any other manner of the indemnity agreement referred to in paragraph (a)(5) of this section.

(e) *Security interest.* When a sender sends an item to a Reserve Bank, the sender and any prior collecting bank grant to the sender's Administrative Reserve Bank a security interest in all of their respective assets in the possession of, or held for the account of, any Reserve Bank to secure their respective obligations due or to become due to the Administrative Reserve Bank under this subpart or subpart C or D of part 229 of this chapter (Regulation CC). The security interest attaches when a warranty is breached or any other obligation to the Reserve Bank is incurred. If the Reserve Bank, in its sole discretion, deems itself insecure and gives notice thereof to the sender or prior collecting bank, or if the sender or prior collecting bank suspends payments or is closed, the Reserve Bank may take any action authorized by law to recover the amount of an obligation, including, but not limited to, the exercise of rights of set off, the realization on any available collateral, and any other rights it may have as a creditor under applicable law.

■ 7. In § 210.6:

■ a. Remove the word ''and'' at the end of paragraph (a)(2)(ii).

■ b. Revise paragraph (a)(2)(iii).

■ c. Add paragraph (a)(2)(iv).

■ d. Revise paragraphs (b) and (c).

■ e. Remove paragraph (d).

The revisions and addition read as follows:

§ 210.6 Status, warranties, and liability of Reserve Bank.

(a) * * *

(2) * * *

(iii) As provided in an operating circular issued in accordance with § 210.3(a) regarding the sending of items; and

(iv) As provided in subparts C and D of part 229 of this chapter (Regulation CC).

* * * * *

(b) *Warranties and liability.* The following provisions apply when a Reserve Bank presents or sends an item.

(1) *Warranties for all items.* The Reserve Bank warrants to a subsequent collecting bank and to the paying bank and any other payor that—

(i) The Reserve Bank is a person entitled to enforce the item (or is authorized to obtain payment of the item on behalf of a person that is either entitled to enforce the item or authorized to obtain payment on behalf of a person entitled to enforce the item);

(ii) The item has not been altered; and

(iii) The item bears all indorsements applied by parties that previously handled the item for forward collection or return.

(2) *Warranties and indemnities as set forth in Reserve Bank operating circulars.* The Reserve Bank makes any warranties and indemnities regarding the sending of items as set forth in an operating circular issued in accordance with § 210.3(a).

(3) *Warranties and indemnities as set forth in Regulation CC and U.C.C.* As applicable and unless otherwise provided, the Reserve Bank makes all the warranties and indemnities set forth in and subject to the terms of subparts C and D of part 229 of this chapter (Regulation CC) and Article 4 of the U.C.C. The Reserve Bank makes all the warranties set forth in and subject to the terms of 4–207 of the U.C.C. for an electronic check as if it were an item subject to the U.C.C.

(4) *Indemnity for substitute check created from an electronic check.* (i) Except as provided in paragraph (b)(4)(ii) of this section, the Reserve Bank shall indemnify the bank to which it transfers or presents an electronic check (the recipient bank) for the amount of any losses that the recipient bank incurs under subpart D of part 229

of this chapter (Regulation CC) for an indemnity that the recipient bank was required to make under subpart D of part 229 of this chapter in connection with a substitute check later created from the electronic check.

(ii) The Reserve Bank shall not be liable under paragraph (b)(4)(i) of this section for any amount that the recipient bank pays under subpart D of part 229 of this chapter that is attributable to the lack of good faith or failure to exercise ordinary care of the recipient bank or a person that handled the item, in any form, after the recipient bank.

(c) *Time for commencing action against Reserve Bank.* (1) A claim against a Reserve Bank for lack of good faith or failure to exercise ordinary care shall be barred unless the action on the claim is commenced within two years after the claim accrues. Such a claim accrues on the date when a Reserve Bank's alleged failure to exercise ordinary care or to act in good faith first results in damages to the claimant.

(2) A claim that arises under paragraph (b)(3) of this section shall be barred unless the action on the claim is commenced within one year after the claim accrues. Such a claim accrues as of the date on which the claimant first learns, or by which the claimant reasonably should have learned, of the facts and circumstances giving rise to the claim.

(3) This paragraph (c) does not alter the time limit for claims under § 229.38(g) of this chapter (which include claims for breach of warranty under § 229.34 of this chapter) or subpart D of part 229 of this chapter.

■ 8. In § 210.7, revise paragraphs (a)(1) and (b)(2) to read as follows:

§ 210.7 Presenting items for payment.

(a) * * *

(1) A Reserve Bank or a subsequent collecting bank may present an item for payment or send the item for presentment and payment; and

* * * * *

(b) * * *

(2) In accordance with § 229.36 of this chapter (Regulation CC);

* * * * *

■ 9. In § 210.9, revise paragraphs (b)(2)(i), (b)(3)(i)(A) and (B), (b)(4) through (6), and (c) through (e) and remove paragraph (f) to read as follows:

§ 210.9 Settlement and payment.

* * * * *

(b) * * *

(2) * * *

(i) On the day a paying bank receives a cash item from a Reserve Bank, it shall settle for the item so that the proceeds of the settlement are available to its Administrative Reserve Bank, or return the item, by the latest of—

(A) The next clock hour or clock half-hour that is at least one half-hour after the paying bank receives the item;

(B) 8:30 a.m. eastern time; or

(C) Such later time as provided in the Reserve Banks' operating circulars.

* * * * *

(3) * * *

(i) * * *

(A) On that day, settle for the item so that the proceeds of the settlement are available to its Administrative Reserve Bank, or return the item, by the latest of the next clock hour or clock half-hour that is at least one half-hour after it ordinarily would have received the item, 8:30 a.m. eastern time, or such later time as provided in the Reserve Banks' operating circulars; or

(B) On the next day that is a banking day for both the paying bank and the Reserve Bank, settle for the item so that the proceeds of the settlement are available to its Administrative Reserve Bank by 8:30 a.m. eastern time on that day or such later time as provided in the Reserve Banks' operating circulars; and compensate the Reserve Bank for the value of the float associated with the item in accordance with procedures provided in the Reserve Bank's operating circular.

* * * * *

(4) *Reserve Bank closed.* If a paying bank receives a cash item from a Reserve Bank on a banking day that is not a banking day for the Reserve Bank, the paying bank shall—

(i) Settle for the item so that the proceeds of the settlement are available to its Administrative Reserve Bank by the close of the Fedwire Funds Service on the Reserve Bank's next banking day, or return the item by midnight of the day it receives the item (if the paying bank fails to settle for or return a cash item in accordance with this paragraph (b)(4)(i), it shall become accountable for the amount of the item as of the close of its banking day on the day it receives the item); and

(ii) Settle for the item so that the proceeds of the settlement are available to its Administrative Reserve Bank by 8:30 a.m. eastern time on the Reserve Bank's next banking day or such later time as provided in the Reserve Bank's operating circular, or return the item by midnight of the day it receives the item. If the paying bank fails to settle for or return a cash item in accordance with this paragraph (b)(4)(ii), it shall be subject to any applicable overdraft charges. Settlement under this paragraph (b)(4)(ii) satisfies the settlement requirements of paragraph (b)(4)(i) of this section.

(5) *Manner of settlement.* Settlement with a Reserve Bank under paragraphs (b)(1) through (4) of this section shall be made by debit to an account on the Reserve Bank's books or other form of settlement to which the Reserve Bank agrees, except that the Reserve Bank may, in its discretion, obtain settlement by charging the paying bank's account. A paying bank may not set off against the amount of a settlement under this section the amount of a claim with respect to another cash item, cash letter, or other claim under § 229.34 of this chapter (Regulation CC) or other law.

(6) *Notice in lieu of return.* If a cash item is unavailable for return, the paying bank may send a notice in lieu of return as provided in § 229.31(f) of this chapter (Regulation CC).

(c) *Noncash items.* A Reserve Bank may require the paying or collecting bank to which it has presented or sent a noncash item to pay for the item by a debit to an account maintained or used by the paying or collecting bank on the Reserve Bank's books or by any other form of settlement acceptable to the Reserve Bank.

(d) *Nonbank payor.* A Reserve Bank may require a nonbank payor to which it has presented an item to pay for it by debit to an account on the Reserve Bank's books or other form of settlement acceptable to the Reserve Bank.

(e) *Liability of Reserve Bank.* Except as set forth in § 229.35(b) of this chapter (Regulation CC), a Reserve Bank shall not be liable for the failure of a collecting bank, paying bank, or nonbank payor to pay for an item, or for any loss resulting from the Reserve Bank's acceptance of any form of payment other than cash authorized in paragraphs (b), (c), and (d) of this section. A Reserve Bank that acts in good faith and exercises ordinary care shall not be liable for the nonpayment of, or failure to realize upon, any non-cash form of payment that it accepts under paragraphs (b), (c), and (d) of this section.

■ 10. In § 210.10, revise paragraph (a) to read as follows:

§ 210.10 Time schedule and availability of credits for cash items and returned checks.

(a) Each Reserve Bank shall publish a time schedule indicating when the amount of any cash item or returned check received by it is counted toward the balance maintained to satisfy a reserve balance requirement for purposes of part 204 of this chapter (Regulation D) and becomes available for use by the sender or paying or

returning bank. The Reserve Bank that holds the settlement account shall give either immediate or deferred credit to a sender, a paying bank, or a returning bank (other than a foreign correspondent) in accordance with the time schedule of the receiving Reserve Bank. A Reserve Bank ordinarily gives credit to a foreign correspondent only when the Reserve Bank receives payment of the item in actually and finally collected funds, but, in its discretion, a Reserve Bank may give immediate or deferred credit in accordance with its time schedule.

* * * * *

■ 11. In § 210.11, revise paragraph (b) and remove paragraph (c) to read as follows:

§ 210.11 Availability of proceeds of noncash items; time schedule.

* * * * *

(b) *Time schedule.* A Reserve Bank may give credit for the proceeds of a noncash item subject to payment in actually and finally collected funds in accordance with a published time schedule. The time schedule shall indicate when the proceeds of the noncash item will be counted toward the balance maintained to satisfy a reserve balance requirement for purposes of part 204 of this chapter (Regulation D) and become available for use by the sender. A Reserve Bank may, however, refuse at any time to permit the use of credit given by it for a noncash item for which the Reserve Bank has not yet received payment in actually and finally collected funds.

■ 12. In § 210.12, revise paragraphs (a) and (c) through (g) to read as follows:

§ 210.12 Return of cash items and handling of returned checks.

(a) *Return of items*—(1) *Return of cash items handled by Reserve Banks.* A paying bank that receives a cash item from a Reserve Bank, other than for immediate payment over the counter, and that settles for the item as provided in § 210.9(b), may, before it has finally paid the item, return the item to any Reserve Bank (unless its Administrative Reserve Bank directs it to return the item to a specific Reserve Bank) in accordance with subpart C of part 229 of this chapter (Regulation CC), the Uniform Commercial Code, and the Reserve Banks' operating circulars. A paying bank that receives a cash item from a Reserve Bank also may return the item prior to settlement, in accordance with § 210.9(b) and the Reserve Banks' operating circulars. The rules or practices of a clearinghouse through which the item was presented, or a special collection agreement under which the item was presented, may not extend these return times, but may provide for a shorter return time.

(2) *Return of checks not handled by Reserve Banks.* A paying bank that receives a check, other than from a Reserve Bank, and that determines not to pay the check, may send the returned check to any Reserve Bank (unless its Administrative Reserve Bank directs it to send the returned check to a specific Reserve Bank) in accordance with subpart C of part 229 of this chapter (Regulation CC), the Uniform Commercial Code, and the Reserve Banks' operating circulars. A returning bank may send a returned check to any Reserve Bank (unless its Administrative Reserve Bank directs it to send the returned check to a specific Reserve Bank) in accordance with subpart C of part 229 of this chapter (Regulation CC), the Uniform Commercial Code, and the Reserve Banks' operating circulars.

* * * * *

(c) *Paying bank's and returning bank's agreement.* The warranties, indemnities, authorizations, and agreements made pursuant to this paragraph (c) may not be disclaimed and are made whether or not the returned check bears an indorsement of the paying bank or returning bank. By sending a returned check to a Reserve Bank, the paying bank or returning bank does all of the following.

(1) *Authorization to handle returned check.* The paying bank or returning bank authorizes the paying bank's or returning bank's Administrative Reserve Bank, and any other Reserve Bank or returning bank to which the returned check is sent, to handle the returned check (and authorizes any Reserve Bank that handles settlement for the returned check to make accounting entries) subject to this subpart and to the Reserve Banks' operating circulars.

(2) *Warranties for all returned checks.* The paying bank or returning bank warrants to each Reserve Bank handling a returned check that the returned check bears all indorsements applied by parties that previously handled the returned check for forward collection or return.

(3) *Warranties and indemnities as set forth in Regulation CC.* As applicable and unless otherwise provided, a paying bank or returning bank makes to each Reserve Bank that handles the returned check all the warranties and indemnities set forth in and subject to the terms of subparts C and D of part 229 of this chapter (Regulation CC).

(4) *Paying bank or returning bank's liability to Reserve Bank.* (i) Except as provided in paragraph (c)(4)(ii) and (iii) of this section, a paying bank or returning bank agrees to indemnify each Reserve Bank for any loss or expense (including attorneys' fees and expenses of litigation) resulting from—

(A) The paying or returning bank's lack of authority to give the authorization in paragraph (c)(1) of this section;

(B) Any action taken by a Reserve Bank within the scope of its authority in handling the returned check; or

(C) Any warranty or indemnity made by the Reserve Bank under paragraph (e) of this section or part 229 of this chapter.

(ii) A paying bank's or returning bank's liability for warranties and indemnities that a Reserve Bank makes for a returned check that is a substitute check, a paper or electronic representation thereof, or an electronic returned check is subject to the following conditions and limitations—

(A) A paying bank or returning bank that sent an original returned check shall not be liable for any amount that a Reserve Bank pays under subpart D of part 229 of this chapter, or under § 229.34 of this chapter with respect to an electronic returned check, absent the paying bank's or returning bank's agreement to the contrary; and

(B) Nothing in this subpart alters the liability under subpart D of part 229 of this chapter of a paying bank or returning bank that sent a substitute check or a paper or electronic representation of a substitute check or under § 229.34 of this chapter of a paying bank or returning bank that sent an electronic returned check; and

(iii) A paying bank or returning bank shall not be liable for any amount that the Reserve Bank pays under this subpart or part 229 of this chapter that is attributable to the Reserve Bank's own lack of good faith or failure to exercise ordinary care.

(d) *Paying bank or returning bank's liability under other law.* Nothing in paragraph (c) of this section limits any warranty or indemnity by a returning bank or paying bank (or a person that handled an item prior to that bank) arising under state law or regulation (such as the U.C.C.), other federal law or regulation (such as part 229 of this chapter), or an agreement with a Reserve Bank.

(e) *Warranties by and liability of Reserve Bank*—(1) *Warranties and indemnities.* The following provisions apply when a Reserve Bank handles a returned check under this subpart.

(i) *Warranties for all items.* The Reserve Bank warrants to the bank to which it sends the returned check that the returned check bears all

indorsements applied by parties that previously handled the returned check for forward collection or return.

(ii) *Warranties and indemnities as set forth in Regulation CC.* As applicable and unless otherwise provided, the Reserve Bank makes all the warranties and indemnities set forth in and subject to the terms of subparts C and D of part 229 of this chapter (Regulation CC).

(2) *Indemnity for substitute check created from electronic returned check.* (i) Except as provided in paragraph (e)(2)(ii) of this section, the Reserve Bank shall indemnify the bank to which it transfers or presents an electronic returned check (the recipient bank) for the amount of any losses that the recipient bank incurs under subpart D of part 229 of this chapter (Regulation CC) for an indemnity that the recipient bank was required to make under subpart D of part 229 of this chapter in connection with a substitute check later created from the electronic returned check.

(ii) The Reserve Bank shall not be liable under paragraph (e)(2)(i) of this section for any amount that the recipient bank pays under subpart D of part 229 of this chapter that is attributable to the lack of good faith or failure to exercise ordinary care of the recipient bank or a person that handled the item, in any form, after the recipient bank.

(3) *Liability of Reserve Bank.* A Reserve Bank shall not have or assume any other liability to any person except—

(i) For the Reserve Bank's own lack of good faith or failure to exercise ordinary care;

(ii) As provided in this paragraph (e); and

(iii) As provided in subparts C and D of part 229 of this chapter (Regulation CC).

(f) *Recovery by Reserve Bank.* (1) A Reserve Bank that has handled a returned check may recover as provided in paragraph (f)(2) of this section if an action or proceeding is brought against (or if defense is tendered to) the Reserve Bank based on—

(i) The alleged failure of the paying bank or returning bank to have the authority to give the authorization in paragraph (c)(1) of this section;

(ii) Any action by the Reserve Bank within the scope of its authority in handling the returned check; or

(iii) Any warranty or indemnity made by the Reserve Bank under paragraph (e) of this section or part 229 of this chapter; and

(2) Upon entry of a final judgment or decree in an action or proceeding described in paragraph (f)(1) of this section, a Reserve Bank may recover from the paying bank or returning bank the amount of attorneys' fees and other expenses of litigation incurred, as well as any amount the Reserve Bank is required to pay because of the judgment or decree or the tender of defense, together with interest thereon.

(g) *Methods of recovery.* (1) The Reserve Bank may recover the amount stated in paragraph (f) of this section by charging any account on its books that is maintained or used by the paying bank or returning bank (or by charging another returning Reserve Bank), if—

(i) The Reserve Bank made seasonable written demand on the paying bank or returning bank to assume defense of the action or proceeding; and

(ii) The paying bank or returning bank has not made any other arrangement for payment that is acceptable to the Reserve Bank.

(2) The Reserve Bank is not responsible for defending the action or proceeding before using this method of recovery. A Reserve Bank that has been charged under this paragraph (g) may recover from the paying or returning bank in the manner and under the circumstances set forth in this paragraph (g).

(3) A Reserve Bank's failure to avail itself of the remedy provided in this paragraph (g) does not prejudice its enforcement in any other manner of the indemnity agreement referred to in paragraph (c)(4) of this section.

* * * * *

Subpart B—Funds Transfers Through Fedwire

■ 13. In § 210.25:

■ a. In paragraphs (a) and (b)(3), remove the word ''Fedwire'' and add in its place the words ''the Fedwire Funds Service''.

■ b. Revise the introductory text of paragraph (b)(2).

■ c. Add paragraph (e).

The revision and addition read as follows:

§ 210.25 Authority, purpose, and scope.

* * * * *

(b) * * *

(2) Except as otherwise provided in paragraphs (b)(3) and (4) of this section, including Article 4A as set forth in appendix B to this subpart, and operating circulars of the Reserve Banks issued in accordance with paragraph (c) of this section, this subpart governs the rights and obligations of:

* * * * *

(e) *Financial messaging standards.* Financial messaging standards (*e.g.,* ISO 20022), including the financial messaging components, elements, technical documentation, tags, and terminology used to implement those standards, do not confer or connote legal status or responsibilities. This subpart, including Article 4A as set forth in appendix B to this subpart, and the operating circulars of the Reserve Banks issued in accordance with paragraph (c) of this section govern the rights and obligations of parties to funds transfers sent through the Fedwire Funds Service as provided in paragraph (b) of this section. To the extent there is any inconsistency between a financial messaging standard adopted by the Fedwire Funds Service and this subpart, this subpart shall prevail.

■ 14. In § 210.26, revise paragraph (e) to read as follows:

§ 210.26 Definitions.

* * * * *

(e) *Fedwire Funds Service* and *Fedwire* means the funds-transfer system owned and operated by the Federal Reserve Banks that is used primarily for the transmission and settlement of payment orders governed by this subpart. Fedwire does not include the system for making automated clearing house transfers.

* * * * *

§ 210.29 [Amended]

■ 15. In § 210.29(b), remove the word ''Fedwire'' and add in its place the words ''the Fedwire Funds Service''.

■ 16. In appendix A to subpart B:

■ a. Under ''Section 210.25—Authority, Purpose, and Scope'', add paragraph (e).

■ b. Under ''Section 210.32—Federal Reserve Bank Liability; Payment of Interest'', revise paragraph (b).

The addition and revision read as follows:

Appendix A to Subpart B of Part 210—Commentary

* * * * *

Section 210.25—Authority, Purpose, and Scope

* * * * *

(e) *Financial messaging standards.* This paragraph makes clear that financial messaging standards, including the financial messaging components, elements, technical documentation, tags, and terminology used to implement those standards, do not confer or connote legal status or responsibilities. Instead, subpart B of this part and Federal Reserve Bank operating circulars govern the rights and obligations of parties to funds transfers sent through the Fedwire Funds Service as provided in § 210.25(b). Thus, to the extent there is any inconsistency between a financial messaging standard adopted by the Fedwire Funds Service and subpart B of this part, subpart B of this part, including Article 4A as adopted in appendix B to subpart B of this part, will prevail. In the ISO 20022 financial messaging standard, for

example, the term *agent* is used to refer to a variety of bank parties to a funds transfer (*e.g., debtor agent, creditor agent, intermediary agent*). Notwithstanding use of that term in the standard and in message tags, such banks are not the agents of any party to a funds transfer and owe no duty to any other party to such a funds transfer except as provided in subpart B of this part (including Article 4A) or by express agreement. The ISO 20022 financial messaging standard also permits information to be carried in a funds-transfer message regarding persons that are not parties to that funds transfer (*e.g., ultimate debtor, ultimate creditor, initiating party*) for regulatory, compliance, remittance, or other purposes. An ''ultimate debtor'' is not an ''originator'' as defined in Article 4A. The relationship between the ultimate debtor and the originator (what the ISO 20022 standard calls the ''debtor'') is determined by law other than Article 4A.

* * * * *

Section 210.32—Federal Reserve Bank Liability; Payment of Interest

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(b) *Payment of interest.* (1) Under article 4A, a Federal Reserve Bank may be required to pay compensation in the form of interest to another party in connection with its handling of a funds transfer. For example, payment of compensation in the form of interest is required in certain situations pursuant to sections 4A–204 (relating to refund of payment and duty of customer to report with respect to unauthorized payment order), 4A–209 (relating to acceptance of payment order), 4A–210 (relating to rejection of payment order), 4A–304 (relating to duty of sender to report erroneously executed payment order), 4A–305 (relating to liability for late or improper execution or failure to execute a payment order), 4A–402 (relating to obligation of sender to pay receiving bank), and 4A–404 (relating to obligation of beneficiary's bank to pay and give notice to beneficiary).

(2) Section 210.32(b) requires Federal Reserve Banks to provide compensation through an explicit interest payment. Under section 4A–506(a), the amount of such interest may be determined by agreement between the sender and receiving bank or by funds-transfer system rule. If there is no such agreement, under section 4A–506(b), the amount of interest is based on the federal funds rate. Similarly, compensation in the form of explicit interest will be paid to government senders, receiving banks, or beneficiaries described in § 210.25(d) if they are entitled to interest under this subpart. A Federal Reserve Bank may also, in its discretion, pay explicit interest directly to a remote party to a Fedwire funds transfer that is entitled to interest, rather than providing compensation to its direct sender or receiving bank.

(3) If a bank that received an explicit interest payment is not the party entitled to interest compensation under article 4A, the bank must pass the benefit of the explicit interest payment made to it to the party that is entitled to compensation in the form of interest from a Federal Reserve Bank. The benefit may be passed on either in the form of a direct payment of interest or in the form of a compensating balance, if the party entitled to interest agrees to accept the other form of compensation, and the value of the compensating balance is at least equivalent to the value of the explicit interest that otherwise would have been provided.

* * * * *

By order of the Board of Governors of the Federal Reserve System, November 14, 2018.

Ann Misback,

Secretary of the Board.

[FR Doc. 2018–25267 Filed 11–29–18; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–0642; Product Identifier 2018–NM–087–AD; Amendment 39–19507; AD 2018–24–03]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Dassault Aviation Model Falcon 10 airplanes. This AD was prompted by a determination that new and more restrictive maintenance requirements and airworthiness limitations are necessary. This AD requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive maintenance requirements and airworthiness limitations. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 4, 2019.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 4, 2019.

ADDRESSES: For service information identified in this final rule, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; internet *http://www.dassaultfalcon.com.* 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. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0642.

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–2018–0642; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations (phone: 800–647–5527) is 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: Tom Rodriguez, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226.

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 all Dassault Aviation Model Falcon 10 airplanes. The NPRM published in the **Federal Register** on August 10, 2018 (83 FR 39626). The NPRM was prompted by a determination that more restrictive maintenance requirements and airworthiness limitations are necessary. The NPRM proposed to require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive maintenance requirements and airworthiness limitations.

We are issuing this AD to address, among other things, fatigue cracking and damage in principal structural elements; such fatigue cracking and damage could result in reduced structural integrity of the airplane.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2018–0078, dated April 9, 2018 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Dassault Aviation Model Falcon 10 airplanes. The MCAI states:

The airworthiness limitations and certification maintenance instructions for the Dassault Falcon 10 aeroplanes, which are

approved by EASA, are currently defined and published in the Dassault Falcon 10 [Airplane Maintenance Manual] AMM, Chapter 5–40. These instructions have been identified as mandatory for continued airworthiness.

Failure to accomplish these instructions could result in an unsafe condition [fatigue cracking and damage in principal structural elements, which could result in reduced structural integrity of the airplane.]

Previously, EASA issued AD 2008–0221 to require accomplishment of the maintenance tasks, and implementation of the airworthiness limitations, as specified in the Dassault Falcon 10 AMM, Chapter 5–40, at Revision 8.

Since that [EASA] AD was issued, Dassault issued the [Airworthiness Limitations Section] ALS, which introduces new and more restrictive maintenance requirements and/or airworthiness limitations.

For the reason described above, this [EASA] AD takes over the requirements for Falcon 10 aeroplanes from EASA AD 2008–0221, and requires accomplishment of the actions specified in the ALS.

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–2018–0642.

Comments

We gave the public the opportunity to participate in developing this final rule. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting this final rule as proposed, except for minor editorial changes. We have determined that these minor changes:

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

Related Service Information Under 1 CFR Part 51

Dassault has issued Section 5–40–00, Airworthiness Limitations, Revision 13, dated July 2017, of the Dassault Falcon 10 Maintenance Manual. This service information describes repetitive mandatory maintenance tasks. 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 60 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

We have determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although we recognize that this number may vary from operator to operator. In the past, we have estimated that this action takes 1 work-hour per airplane. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), we have determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, we estimate the total cost per operator to be $7,650 (90 work-hours × $85 per work-hour).

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 and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

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):

2018–24–03 Dassault Aviation: Amendment 39–19507; Docket No. FAA–2018–0642; Product Identifier 2018–NM–087–AD.

(a) Effective Date

This AD is effective January 4, 2019.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Dassault Aviation Model Falcon 10 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Reason

This AD was prompted by a determination that new and more restrictive maintenance requirements and airworthiness limitations are necessary. We are issuing this AD to address, among other things, fatigue cracking and damage in principal structural elements; such fatigue cracking and damage could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Maintenance or Inspection Program Revision

Within 90 days after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate Section 5–40–00, Airworthiness Limitations, Revision 13, dated July 2017, of the Dassault Falcon 10 Maintenance Manual (''Section 5–40–00''). The initial compliance time for accomplishing the actions is at the applicable time specified in Section 5–40–00; or within 90 days after the effective date of this AD; whichever occurs later.

(h) No Alternative Actions or Intervals

After the maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (i)(1) of this AD.

(i) 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 (j)(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 Dassault Aviation's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(j) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2018–0078, dated April 9, 2018, 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–2018–0642.

(2) For more information about this AD, contact Tom Rodriguez, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226.

(k) 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) Section 5–40–00, Airworthiness Limitations, Revision 13, dated July 2017, of the Dassault Falcon 10 Maintenance Manual.

(ii) [Reserved]

(3) For service information identified in this AD, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; internet *http://www.dassaultfalcon.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 Des Moines, Washington, on November 8, 2018.

Chris Spangenberg,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2018–25658 Filed 11–29–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2017–1081; Product Identifier 2017–SW–090–AD; Amendment 39–19510; AD 2018–24–06]

RIN 2120–AA64

Airworthiness Directives; Leonardo S.p.A. (Type Certificate Previously Held by Finmeccanica S.p.A. and AgustaWestland S.p.A.) Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for Leonardo S.p.A. (Leonardo) Model AW189 helicopters. This AD requires replacing the tail plane lower fitting with an improved tail plane lower fitting. This AD was prompted by reports of cracks on the tail plane fittings of Model AW189 helicopters. The actions of this AD are intended to correct an unsafe condition on these products.

DATES: This AD is effective January 4, 2019.

ADDRESSES: For service information identified in this final rule, contact Leonardo S.p.A. Helicopters, Matteo Ragazzi, Head of Airworthiness, Viale G.Agusta 520, 21017 C.Costa di Samarate (Va) Italy; telephone +39–0331–711756; fax +39–0331–229046; or at *http://www.leonardocompany.com/-/bulletins.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

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–2017–1081; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the European Aviation Safety Agency (EASA) AD, any incorporated-by-reference service information, the economic evaluation, any comments received, and other information. The street address for Docket Operations (phone: 800–647–5527) is 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: Kristi Bradley, Aerospace Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *kristin.bradley@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On May 23, 2018, at 83 FR 23827, the **Federal Register** published our notice of proposed rulemaking (NPRM), which proposed to amend 14 CFR part 39 by adding an AD that would apply to AgustaWestland S.p.A. (now Leonardo) Model AW189 helicopters with a tail plane lower fitting part number (P/N) 8G5350A07051 installed. The NPRM proposed to require replacing the tail plane lower fitting with an improved tail plane lower fitting. The proposed requirements were intended to prevent a crack on a tail plane fitting, which could result in failure of the tail plane fitting and loss of helicopter control.

The NPRM was prompted by AD No. 2016–0161, dated August 8, 2016 (EASA AD 2016–0161), issued by EASA, which is the Technical Agent for the Member States of the European Union, to correct an unsafe condition for Leonardo Model AW189 helicopters. EASA advises that some cracks have been reported in-service on the tail plane fitting of AW189 helicopters following an onset of abnormal play. According to EASA, this condition, if not detected and corrected, could jeopardize structural integrity of the helicopter. EASA further advises that Leonardo developed a tail plane lower fitting with an improved design (P/N 8G0000P00511). Accordingly, EASA AD 2016–0161 requires repetitive inspections of the tail plane lower fitting assembly until the improved tail plane lower fitting is installed.

When the NPRM was issued, the FAA was in the process of updating AgustaWestland's name changes to Finmeccanica S.p.A. and then to Leonardo Helicopters on its FAA type certificate; therefore the NPRM specified AgustaWestland as the type certificate holder. Because this name change is now effective, this AD applies to Leonardo helicopters.

Comments

We gave the public the opportunity to participate in developing this AD, but we received no comments on the NPRM.

FAA's Determination

These helicopters have been approved by the aviation authority of Italy and are approved for operation in the United States. Pursuant to our bilateral agreement with Italy, EASA, its technical representative, has notified us of the unsafe condition described in the EASA AD. We are issuing this AD because we evaluated all information provided by Italy and determined the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed except for the name change from AgustaWestland to Leonardo. We have also updated the estimated costs to reflect that this AD affects 4 helicopters of U.S. Registry rather than 2 helicopters. These changes are consistent with the intent of the proposals in the NPRM (83 FR 23827, May 23, 2018) and will not increase the economic burden on any operator nor increase the scope of this AD.

Differences Between This AD and the EASA AD

The EASA AD requires inspecting the tail plane lower fitting for play within 50 flight hours and thereafter at intervals not to exceed 25 flight hours. If a crack or other damage exists, the EASA AD requires the improved tail plane lower fitting be installed within 10 flight hours. If no crack exists, the EASA AD requires that the improved tail plane lower fitting be installed within 200 flight hours or 2 months, whichever occurs first. This AD does not require inspections and requires installing the improved tail plane lower fitting within 50 hours time-in-service.

Related Service Information

We reviewed Leonardo Helicopters Bollettino Tecnico (BT) No. 189–038, Revision B, dated October 13, 2016, which specifies repetitively inspecting the tail plane assembly for a crack.

We also reviewed BT No. 189–070, Revision A, dated October 13, 2016, which provides instructions for replacing the tail plane lower fitting with the improved tail plane lower fitting retromodification P/N 8G0000P00511.

Costs of Compliance

We estimate that this AD affects 4 helicopters of U.S. Registry and that labor costs average $85 a work-hour. Based on these estimates, we expect that replacing the tail plane lower fitting with an improved tail plane lower fitting requires 64 work-hours and parts cost $15,424 for a total cost of $20,864 per helicopter and $83,456 for the U.S. fleet.

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 helicopters identified in this rulemaking action.

Regulatory Findings

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 DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; 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.

We prepared an economic evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

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):

2018–24–06 Leonardo S.p.A. (Type Certificate previously held by Finmeccanica S.p.A. and AgustaWestland S.p.A.): Amendment 39–19510; Docket No. FAA–2017–1081; Product Identifier 2017–SW–090–AD.

(a) Applicability

This AD applies to Leonardo S.p.A. (Type Certificate previously held by Finmeccanica S.p.A. and AgustaWestland S.p.A.) Model AW189 helicopters, certificated in any category, with a tail plane lower fitting part number (P/N) 8G5350A07051 installed.

(b) Unsafe Condition

This AD defines the unsafe condition as a crack on a tail plane fitting, which could result in failure of the tail plane fitting and loss of helicopter control.

(c) Effective Date

This AD becomes effective January 4, 2019.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

Within 50 hours time-in-service, install tail plane retromodification kit P/N 8G0000P00511.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Section, Rotorcraft Standards Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Kristi Bradley, Aerospace Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *9–ASW–FTW–AMOC-Requests@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office, before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

(1) Leonardo Helicopters Bollettino Tecnico (BT) No. 189–038, Revision B, and BT No. 189–070, Revision A, both dated October 13, 2016, which are not incorporated by reference, contain additional information about the subject of this AD. For service information identified in this AD, contact Leonardo S.p.A. Helicopters, Matteo Ragazzi, Head of Airworthiness, Viale G.Agusta 520, 21017 C.Costa di Samarate (Va) Italy; telephone +39–0331–711756; fax +39–0331–229046; or at *http://www.leonardocompany.com/-/bulletins.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177.

(2) The subject of this AD is addressed in European Aviation Safety Agency (EASA) AD No. 2016–0161, dated August 8, 2016. You may view the EASA AD on the internet at *http://www.regulations.gov* in Docket No. FAA–2017–1081.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 5510, Horizontal Stabilizer Structure.

Issued in Fort Worth, Texas, on November 21, 2018.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2018–26071 Filed 11–29–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–0633; Product Identifier 2018–NE–22–AD; Amendment 39–19470; AD 2018–21–12]

RIN 2120–AA64

Airworthiness Directives; General Electric Company Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain General Electric Company (GE) GEnx–2B67, –2B67B, and –2B67/P turbofan engines. This AD was prompted by low-cycle fatigue (LCF) cracking of the fuel manifold leading to an engine fire. This AD requires removal from service of certain fuel manifolds at the next engine shop visit and their replacement with parts eligible for installation. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 4, 2019.

ADDRESSES: For service information identified in this final rule, contact General Electric Company, GE Aviation, Room 285, 1 Neumann Way, Cincinnati, OH 45215; phone: 513–552–3272; email: *aviation.fleetsupport@ge.com.* You may view this service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0633.

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–2018–0633; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations (phone: 800–647–5527) is 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: Herman Mak, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7147; fax: 781–238–7199; email: *herman.mak@faa.gov.*

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 GE GEnx–2B67, –2B67B, and –2B67/P turbofan engines. The NPRM published in the **Federal Register** on August 3, 2018 (83 FR 38086). The NPRM was prompted by LCF cracking of the fuel manifold leading to an engine fire. The NPRM proposed to require removal from service of certain fuel manifolds at the next engine shop visit and their replacement with parts eligible for installation. We are issuing this AD to address the unsafe condition on these products.

Revision to Related Service Information

GE published GEnx–2B Service Bulletin (SB) 73–0038 R03, dated August 17, 2018, to provide operators with instructions for replacing the lower fuel manifold system when in the intermixed configuration. This SB eliminates the need to replace the top main and lower fuel manifolds in the shop.

Comments

We gave the public the opportunity to participate in developing this final rule. We have considered the comment received. The Boeing Company supported the NPRM.

Conclusion

We reviewed the relevant data, considered the comment received, and determined that air safety and the public interest require adopting this final rule as proposed.

Related Service Information

We reviewed GE GEnx–2B SB 73–0038 R02, dated November 19, 2015, and GEnx–2B SB 73–0038 R03, dated August 17, 2018. GE GEnx–2B SB 73–0038 R02, dated November 19, 2015 describes procedures for removing and replacing the fuel manifold system with parts eligible for installation. GE GEnx–2B SB 73–0038 R03, dated August 17, 2018 describes procedures for replacing the fuel manifold system when in the intermixed configuration.

Costs of Compliance

We estimate that this AD affects two engines installed on 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
Replace fuel manifolds	220 work-hours × $85 per hour = $18,700	$119,485	$138,185	$276,370

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 engines, propellers, and associated appliances to the Manager, Engine and Propeller Standards Branch, Policy and Innovation Division.

Regulatory Findings

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 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):

2018–21–12 General Electric Company: Amendment 39–19470; Docket No. FAA–2018–0633; Product Identifier 2018–NE–22–AD.

(a) Effective Date

This AD is effective January 4, 2019.

(b) Affected ADs

None.

(c) Applicability

This AD applies to General Electric Company (GE) GEnx–2B67, –2B67B, and –2B67/P turbofan engines with top main fuel manifolds, part numbers (P/Ns) 2419M11G01, 2561M11G01, or 2546M11G01, or lower fuel manifolds, P/Ns 2419M12G01, 2561M12G01, or 2546M12G01, installed.

(d) Subject

Joint Aircraft System Component (JASC) Code 7310, Engine Fuel Distribution.

(e) Unsafe Condition

This AD was prompted by low-cycle fatigue cracking of the fuel manifold leading to an engine fire. We are issuing this AD to prevent the failure of the fuel manifold. The unsafe condition, if not addressed, could result in failure of the fuel manifold, engine fire, and damage to the airplane.

(f) Compliance

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

(g) Required Actions

At the next engine shop visit, remove the applicable fuel manifolds from service and replace with parts eligible for installation.

(h) Installation Prohibition

After the effective date of this AD, do not install top main fuel manifolds, P/Ns 2419M11G01, 2561M11G01, or 2546M11G01, or lower fuel manifolds, P/Ns 2419M12G01, 2561M12G01, or 2546M12G01.

(i) Definition

For the purpose of this AD, an ''engine shop visit'' is the induction of an engine into the shop for maintenance involving the separation of pairs of major mating engine case flanges, except for the following situations, which do not constitute an engine shop visit:

(1) Separation of engine flanges solely for the purposes of transportation of the engine without subsequent maintenance.

(2) Separation of engine flanges solely for the purposes of replacing the fan or propulsor without subsequent maintenance.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO 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 manager of the certification office, send it to the attention of the person identified in paragraph (k) of this AD. You may email your request to: *ANE-AD-AMOC@faa.gov.*

(2) 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.

(k) Related Information

For more information about this AD, contact Herman Mak, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7147; fax: 781–238–7199; email: *herman.mak@faa.gov.*

(l) Material Incorporated by Reference

None.

Issued in Burlington, Massachusetts, on November 27, 2018.

Robert J. Ganley,

Manager, Engine and Propeller Standards Branch, Aircraft Certification Service.

[FR Doc. 2018–26038 Filed 11–29–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–0869; Product Identifier 2018–NE–32–AD; Amendment 39–19435; AD 2018–20–01]

RIN 2120–AA64

Airworthiness Directives; CFM International S.A. Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for all CFM International S.A. (CFM) LEAP–1B21, LEAP–1B23, LEAP–1B25, LEAP–1B27, LEAP–1B28, LEAP–1B28B1, LEAP–1B28B2, LEAP–1B28B2C, LEAP–1B28B3, LEAP–1B28BBJ1, and LEAP–1B28BBJ2 turbofan engines with a certain high-pressure turbine (HPT) stator case (HPT cases) installed. This AD requires removal of affected HPT cases from service and their replacement with a part eligible for installation. This AD was prompted by the discovery of a quality escape at a manufacturing facility involving unapproved welds on HPT cases. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 17, 2018.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 17, 2018.

We must receive comments on this AD by January 14, 2019.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* 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:* 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 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this final rule, contact CFM International Inc., Aviation Operations Center, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45125; phone: 877–432–3272; fax: 877–432–3329; email: *aviation.fleetsupport@ge.com*. You may view this service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0869.

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–2018–0869; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations (phone: 800–647–5527) is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Christopher McGuire, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7120; fax: 781–238–7199; email: *chris.mcguire@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

We learned from CFM of a quality escape at one of their suppliers, AECC Aero Science and Technology Co., Ltd., which was performing welds on newly-manufactured components to correct errors introduced in their manufacturing process. These welds were not reviewed or approved by either CFM or the FAA. CFM's review of manufacturing records determined that these parts include HPT cases installed on CFM LEAP–1B turbofan engines. These HPT cases are life limited. The unapproved repairs reduced the material capability of these cases which requires their removal prior to reaching their published Airworthiness Limitation Section life limit. This condition, if not addressed, could result in failure of the HPT case, engine fire, and damage to the airplane. We are issuing this AD to address the unsafe condition on these products.

Related Service Information Under 1 CFR Part 51

We reviewed CFM Service Bulletin (SB) LEAP–1B–72–00–0193–01A–930A–D, Issue 003, dated November 5, 2018. The SB describes procedures for removing the affected HPT cases from the engine. 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.

FAA's Determination

We are issuing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD requires removal of the affected HPT cases from service and their replacement with a part eligible for installation.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to the adoption of this rule because the compliance time for the required action is shorter than the time necessary for the public to comment and for us to publish the final rule. Certain HPTs cases must be removed within 200 cycles after the effective date of this AD to ensure they do not fail. Therefore, we find good cause that notice and opportunity for prior public comment are impracticable. In addition, for the reason stated above, we find that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2018–0869 and Product Identifier 2018–NE–32–AD at the beginning of your comments. We specifically invite comments on the overall regulatory,

economic, environmental, and energy aspects of this final rule. We will consider all comments received by the closing date and may amend this final rule because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this final rule.

Costs of Compliance

We estimate that this AD affects two engines installed on 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
Remove HPT case and FPI of forward flange	1000 work-hour × $85 per hour = $85,000	$179,400	$264,400	$528,800

We estimate the following costs to do any necessary replacements that would be required based on the results of the inspection. We have no way of determining the number of aircraft that might need this replacement:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace combustion case assembly	10 work-hours × $85 per hour = $850	$558,800	$559,650

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 engines, propellers, and associated appliances to the Manager, Engine and Propeller Standards Branch, Policy and Innovation Division.

Regulatory Findings

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 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):

2018–20–01 CFM International S.A.: Amendment 39–19435; Docket No. FAA–2018–0869; Product Identifier 2018–NE–32–AD.

(a) Effective Date

This AD is effective December 17, 2018.

(b) Affected ADs

None.

(c) Applicability

This AD applies to CFM International S.A. (CFM) LEAP–1B21, LEAP–1B23, LEAP–1B25, LEAP–1B27, LEAP–1B28, LEAP–1B28B1, LEAP–1B28B2, LEAP–1B28B2C, LEAP–1B28B3, LEAP–1B28BBJ1, and LEAP–1B28BBJ2 turbofan engines with a high-pressure turbine (HPT) stator case (HPT case), part number (P/N) 2541M81G01 installed, and with any HPT case serial number (S/N) listed in Table 1 or Table 2 of Planning Information, paragraph 3.A., of CFM Service Bulletin (SB) LEAP–1B–72–00–0193–01A–930A–D, Issue 003, dated November 5, 2018.

(d) Subject

Joint Aircraft System Component (JASC) Code 7250, Turbine Section.

(e) Unsafe Condition

This AD was prompted by the discovery of a quality escape at a manufacturing facility involving unapproved welds on HPT cases. We are issuing this AD to prevent failure of the HPT case. The unsafe condition, if not addressed, could result in engine fire and damage to the airplane.

(f) Compliance

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

(g) Required Actions

(1) After the effective date of this AD, remove the affected HPT case from service no later than the number of cycles in service specified in Table 1 or Table 2 of Planning Information, paragraph 3.A., of CFM SB LEAP–1B–72–00–0193–01A–930A–D, Issue 003, dated November 5, 2018.

(2) After removing the HPT case as required in paragraph (g)(1) of this AD, and before further flight, determine if the combustor diffuser nozzle (CDN) case, P/N 2548M30G01 to 2548M30G07, inclusive, and with any CDN case S/N listed in Table 1 or Table 2 of Planning Information, paragraph 3.A., of CFM SB LEAP–1B–72–00–0193–01A–930A–D, Issue 003, dated November 5, 2018, needs to be replaced as follows:

(i) Inspect the HPT case forward flange outer diameter using the Accomplishment Instructions, paragraphs 5.B.(1), 5.B.(2), and 5.B.(4) of CFM SB LEAP–1B–72–00–0193–01A–930A–D, Issue 003, dated November 5, 2018.

(ii) If, during the inspection required by paragraph (g)(2)(i) of this AD, you find an HPT case forward flange cracked across the full axial length of the outer diameter, remove the CDN case, P/N 2548M30G01 to 2548M30G07, inclusive, from service and, before further flight, replace with a part eligible for installation.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO 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 manager of the certification office, send it to the attention of the person identified in paragraph (i) of this AD. You may email your request to: *ANE-AD-AMOC@faa.gov*.

(2) 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.

(i) Related Information

For more information about this AD, contact Christopher McGuire, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7120; fax: 781–238–7199; email: *chris.mcguire@faa.gov*.

(j) 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 the AD specifies otherwise.

(i) CFM Service Bulletin LEAP–1B–72–00–0193–01A–930A–D, Issue 003, dated November 5, 2018.

(ii) [Reserved]

(3) For CFM service information identified in this AD, contact CFM International Inc., Aviation Operations Center, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45125; phone: 877–432–3272; fax: 877–432–3329; email: *aviation.fleetsupport@ge.com*.

(4) You may view this service information at FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759.

(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 Burlington, Massachusetts, on November 26, 2018.

Robert J. Ganley,

Manager, Engine and Propeller Standards Branch, Aircraft Certification Service.

[FR Doc. 2018–26026 Filed 11–29–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2018–1035]

Drawbridge Operation Regulation; Atlantic Intracoastal Waterway, Albemarle and Chesapeake Canal, Chesapeake, VA

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the S168/Great Bridge bridge. This bridge carries SR168 (Battlefield Boulevard South) over the Atlantic Intracoastal Waterway (AICW), Albemarle and Chesapeake Canal, mile 12.0, at Chesapeake, VA. The deviation is necessary to facilitate the Annual Chesapeake Rotary Christmas Parade. This deviation allows the bridge to remain in the closed-to-navigation position.

DATES: The deviation is effective from 4 p.m. to 10 p.m., on Saturday, December 1, 2018.

ADDRESSES: The docket for this deviation, USCG–2018–1035 is available at *http://www.regulations.gov.* Type the docket number in the ''SEARCH'' box and click ''SEARCH''. Click on Open Docket Folder on the line associated with this deviation.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Mr. Michael Thorogood, Bridge Administration Branch Fifth District, Coast Guard, telephone 757–398–6557, email *Michael.R.Thorogood@uscg.mil.*

SUPPLEMENTARY INFORMATION: The City of Chesapeake owner and operator of the S168/Great Bridge bridge has requested a temporary deviation from the current operating regulations to ensure the safety of the increased volumes of spectators that will be participating in the Annual Chesapeake Rotary Christmas Parade on Saturday, December 1, 2018. The S168/Great Bridge Bridge carries SR 168/Battlefield Boulevard South over the Atlantic Intracoastal Waterway (AICW), Albemarle and Chesapeake Canal, mile 12.0, at Chesapeake, VA. This bridge is a double bascule drawbridge and has a vertical clearance of 8 feet above mean high water in the closed position. The bridge has an unlimited vertical clearance in the open position.

The current operating regulation is set out in 33 CFR 117.997(g). Under this temporary deviation, the bridge will be maintained in the closed-to-navigation position from 4 p.m. to 6 p.m. and from 8 p.m. to 10 p.m. on Saturday, December 1, 2018.

The AICW, Albemarle and Chesapeake Canal, is used by a variety of vessels including U.S. government vessels, small commercial vessels, recreational vessels and tug and barge traffic. The Coast Guard has carefully considered the nature and volume of vessel traffic on the waterway in publishing this temporary deviation.

Vessels able to pass through the bridge in the closed-to-navigation position may do so at any time. The bridge will be able to open for emergencies and there is no immediate alternative route for vessels unable to pass through the bridge in the closed position. The Coast Guard will also inform the users of the waterway through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge so that vessel operators can arrange their transits to minimize any impact caused by the temporary deviation.

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

Dated: November 27, 2018.

Hal R. Pitts,

Bridge Program Manager, Fifth Coast Guard District.

[FR Doc. 2018–26051 Filed 11–29–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2018–1041]

Recurring Safety Zone; Steelers Fireworks, Pittsburgh, PA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the safety zone for the Pittsburgh Steelers Fireworks to provide for the safety of persons, vessels, and the marine environment on the navigable waters of the Allegheny, Ohio, and Monongahela Rivers during this event. Our regulation for marine events within the Eighth Coast Guard District identifies the regulated area for this event in Pittsburgh, PA. During the enforcement periods, entry into this zone is prohibited unless authorized by the Captain of the Port Marine Safety Unit Pittsburgh or a designated representative.

DATES: The regulations in 33 CFR 165.801, Table 1, Line 57 will be enforced from 7 p.m. through 11 p.m. on December 2, 2018.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email Petty Officer Jennifer Haggins, Marine Safety Unit Pittsburgh, U.S. Coast Guard; telephone 412–221–0807, email *Jennifer.L.Haggins@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce a safety zone for the Steelers fireworks listed in 33 CFR 165.801, Table 1, Line 57 from 7 p.m. through 11 p.m. on December 2, 2018. This action is being taken to provide for the safety of persons, vessels, and the marine environment on the navigable waters of the Allegheny, Ohio, and Monongahela Rivers during this event. Our regulation for marine events within the Eighth Coast Guard District, § 165.801, specifies the location of the safety zone for the Steelers fireworks, which covers a less than one-mile stretch of the Ohio, Allegheny, and Monongahela Rivers. Entry into the safety zone is prohibited unless authorized by the Captain of the Port Marine Safety Unit Pittsburgh (COTP) or a designated representative. Persons or vessels desiring to enter into or pass through the area must request permission from the COTP or a designated representative. They can be reached on VHF FM channel 16. If permission is granted, all persons and vessel shall comply with the instructions of the COTP or designated representative.

In addition to this notice of enforcement in the **Federal Register**, the COTP or a designated representative will inform the public through Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), Marine Safety Information Bulletins (MSIBs), and/or through other means of public notice as appropriate at least 24 hours in advance of each enforcement.

Dated: November 26, 2018.

F.M. Smith,

Commander, U.S. Coast Guard, Acting Captain of the Port Marine Safety Unit Pittsburgh.

[FR Doc. 2018–26050 Filed 11–29–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR Chapter II

[Docket ID ED–2018–OII–0062]

RIN 1855–AA14

Final Priorities, Requirements, Definitions, and Selection Criteria—Expanding Opportunity Through Quality Charter Schools Program; Grants to Charter Management Organizations for the Replication and Expansion of High-Quality Charter Schools

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Final priorities, requirements, definitions, and selection criteria.

SUMMARY: The Acting Assistant Deputy Secretary for Innovation and Improvement announces priorities, requirements, definitions, and selection criteria for Grants to Charter Management Organizations for the Replication and Expansion of High-Quality Charter Schools (CMO grants or CMO grant program) under the Expanding Opportunity Through Quality Charter Schools Program (CSP), Catalog of Federal Domestic Assistance (CFDA) number 84.282M. We may use one or more of these priorities, requirements, definitions, and selection criteria for competitions in fiscal year (FY) 2019 and later years. We take this action to support the replication and expansion of high-quality charter schools by charter management organizations (CMOs) throughout the Nation, particularly those that serve *educationally disadvantaged students,* such as students who are *individuals from low-income families,* students with disabilities, and English learners; and students who traditionally have been underserved by charter schools, such as *Native American* students and students in *rural communities.*

DATES: These priorities, requirements, definitions, and selection criteria are effective November 30, 2018.

FOR FURTHER INFORMATION CONTACT: Allison Holte, U.S. Department of Education, 400 Maryland Avenue SW, Room 4W243, Washington, DC 20202. Telephone: (202) 205–7726.

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

SUPPLEMENTARY INFORMATION: *Summary of the Major Provisions of This Regulatory Action:* We announce these final priorities, requirements, definitions, and selection criteria to achieve two main goals.

First, we seek to continue to use funds under this program to support high-quality applications from highly qualified applicants. To that end, we announce priorities, requirements, definitions, and selection criteria that encourage or require applicants to describe, for example: Past successes working with *academically poor-performing public schools*;[1] experience operating or managing multiple charter schools; plans to expand their reach into new and diverse communities; logical connections between their proposed projects and intended outcomes for the students they propose to serve; and plans to evaluate the extent to which their proposed projects, if funded, yield intended outcomes.

Second, these final priorities, requirements, definitions, and selection criteria are designed to increase the likelihood that CMO grants support expanded high-quality educational opportunities for *educationally disadvantaged students,* as well as students who traditionally have been underserved by charter schools, such as *Native American* students and students in *rural communities.* Specifically, among other things, the final priorities, requirements, definitions, and selection criteria enable the Department to give

[1] Italicized terms are defined in the Final Definitions section of this document.

priority to applications that propose to: Replicate or expand high-quality charter schools with an intentional focus on recruiting students from racially and socioeconomically diverse backgrounds, and maintaining racially and socioeconomically diverse student bodies, consistent with nondiscrimination requirements contained in the U.S. Constitution and Federal civil rights laws; serve a meaningful proportion of students who are *individuals from low-income families*; and replicate or expand high-quality charter schools that serve high school students, students in *rural communities,* and *Native American* students. Further, in order to meet the final requirements announced in this document, CMO applicants must describe how the schools they intend to replicate or expand would recruit and enroll *educationally disadvantaged students* and support such students in mastering State academic standards.

Costs and Benefits: The Department of Education (Department) believes that the benefits of this regulatory action outweigh any associated costs, which we believe would be minimal. While this action imposes cost-bearing requirements on participating CMOs, we expect that applicants will include requests for funds to cover such costs in their proposed project budgets. We believe this regulatory action strengthens accountability for the use of Federal funds by helping to ensure that the Department awards CSP grants to CMOs that are most capable of expanding the number of high-quality charter schools available to our Nation's students. Please refer to the *Regulatory Impact Analysis* in this document for a more detailed discussion of costs and benefits.

Purpose of Program: The major purposes of the CSP are to: Expand opportunities for all students, particularly students facing educational disadvantages and students who traditionally have been underserved by charter schools, to attend high-quality charter schools and meet challenging State academic standards; provide financial assistance for the planning, program design, and initial implementation of public charter schools; increase the number of high-quality charter schools available to students across the United States; evaluate the impact of charter schools on student achievement, families, and communities; share best practices between charter schools and other public schools; encourage States to provide facilities support to charter schools; and support efforts to strengthen the charter school authorizing process. Through the CMO grant program, the Department provides funds to CMOs on a competitive basis to enable them to replicate or expand one or more high-quality charter schools. More specifically, grant funds may be used to expand the enrollment of one or more existing high-quality charter schools, or to open one or more high-quality charter schools by replicating an existing high-quality charter school model.

Program Authority: Title IV, Part C of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (ESEA).

We published a notice of proposed priorities, requirements, definitions, and selection criteria for this program in the **Federal Register** on July 27, 2018 (83 FR 35571) (NPP). The NPP contained background information and our reasons for proposing the particular priorities, requirements, definitions, and selection criteria.

There are several significant differences between the NPP and this notice of final priorities, requirements, definitions, and selection criteria (NFP). First, we have revised the title and focus of Priority 2 (which was proposed as ''School Improvement through Restart Efforts'') to clarify that applicants addressing the priority should be focused on reopening, and not restarting, *academically low-performing public schools* as charter schools. In addition, we have revised Priority 2 to require applicants to address each subpart in order to meet the priority. Second, we have revised *Priority 3—High School Students* to clarify that there is a broad range of postsecondary education options for which high-quality charter schools that serve high school students may prepare their students, including certain one-year training programs as well as two- and four-year colleges and universities. We have also revised *Priority 3* to specify that high school students include *educationally disadvantaged students.* In addition, we have revised *Priority 4—Low-Income Demographic* to require applicants receiving priority points to demonstrate that they will maintain a poverty threshold that is the same as, or substantially similar to, the level specified in the grant application for the entire grant period. Further, we have revised *Priority 7* and related definitions to include students who are Native Hawaiian or Native American Pacific Islander, as well as students who are Indians (including Alaska Natives), and to clarify that applicants must meaningfully collaborate with community leaders. Finally, we have revised *Selection Criterion (b)—Significance of Contribution in Assisting Educationally Disadvantaged Students* to emphasize students with disabilities [2] and English learners. We discuss these changes in detail in the *Analysis of Comments and Changes* section of this document.

Public Comment: In response to our invitation in the NPP, 36 parties submitted comments on the proposed priorities, requirements, definitions, and selection criteria.

We group major issues according to subject. Generally, we do not address technical and other minor changes. In addition, we do not address comments that raised concerns not directly related to the proposed priorities, requirements, definitions, or selection criteria.

Analysis of Comments and Changes: An analysis of the comments and changes in the priorities, requirements, definitions, and selection criteria since publication of the NPP follows.

General

Comments: One commenter suggested that we include a focus on students from military families, noting that military families may not be able to afford charter school tuition.

Discussion: First, we note that charter schools are public schools and, by definition, may not charge tuition (ESEA section 4310(2)). Nonetheless, we agree that military- and veteran-connected students often face unique challenges. On March 2, 2018, the Department published in the **Federal Register** (83 FR 9096) the Secretary's Final Supplemental Priorities and Definitions for Discretionary Grant Programs (Supplemental Priorities), which are available for use in all of the Department's discretionary grant programs, including the CMO grant program. In recognition of the unique challenges faced by military families, Priority 11 in the Supplemental Priorities focuses on ensuring that service members, veterans, and their families have access to high-quality educational options. In any fiscal year in which the Department awards new grants under the CMO grant program, we may use this supplemental priority in conjunction with the priorities, requirements, definitions, and selection

[2] For purposes of these final priorities, requirements, definitions, and selection criteria, ''students with disabilities'' or ''student with a disability'' has the same meaning as ''children with disabilities'' or ''child with a disability,'' respectively, as defined in section 8101(4) of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (ESEA). Under section 8101(4), ''child with a disability'' has the same meaning given that term in section 602 of the Individuals with Disabilities Education Act.

criteria in the ESEA and established in this document. Therefore, we decline to revise the final priorities, requirements, definitions, and selection criteria to add a focus on military families.

Changes: None.

Comments: Seven commenters urged the Department to clarify through these final priorities, requirements, definitions, and selection criteria that virtual charter schools must ensure that all students, particularly students with disabilities, can access virtual and online content. Several commenters requested that we require all virtual public schools, including virtual charter schools, to demonstrate compliance with the Web Content Accessibility Guidelines (WCAG). Other commenters suggested that applicants proposing to replicate or expand virtual charter schools be required to focus on enrollment and retention of, and academic outcomes for, *educationally disadvantaged students,* and make performance and compliance data available publicly and in a timely manner. One commenter suggested that we refrain from awarding grants to virtual charter schools altogether.

Discussion: Section 4310(2)(G) of the ESEA requires charter schools receiving CSP funds to comply with various laws, including section 504 of the Rehabilitation Act of 1973 (Section 504), the Americans with Disabilities Act of 1990 (ADA), and Part B of the Individuals with Disabilities Education Act (IDEA). Thus, consistent with the requirements in Section 504 and Title II of the ADA, virtual charter schools must ensure that all content is accessible to students with disabilities enrolled in the school as well as prospective students with disabilities and parents or guardians. Similarly, like other local educational agencies (LEAs), public charter schools that operate as LEAs under State law, including virtual charter school LEAs and LEAs that include virtual charter schools among their public schools, must ensure that eligible students with disabilities enrolled in these schools receive a free appropriate public education (FAPE) in accordance with the requirements of Part B of the IDEA.[3] To meet this obligation, these schools must provide instructional materials to students with disabilities in accessible formats, consistent with the requirements in Section 504 and Title II of the ADA. If web-based instruction or online instructional platforms are used, these schools must ensure that the information provided through those sources is accessible to students with disabilities, consistent with the requirements in Section 504 and Title II of the ADA. Because these requirements are already established by Federal law, we decline to revise these final priorities, requirements, definitions, or selection criteria.

Further, while we understand that WCAG is designed to make web content accessible to a wide range of individuals with disabilities and that demonstrating compliance with WCAG is a widely accepted method for public schools, including virtual public charter schools, to meet the obligations discussed above, the Department does not require grantees to adopt a particular standard to ensure accessibility of web content or online platforms to meet their obligations under Section 504 or Title II of the ADA. Moreover, the WCAG standards are updated periodically.

With respect to requiring virtual charter schools to focus on the enrollment and retention of, and academic outcomes for, *educationally disadvantaged students,* to receive a grant under the CMO grant program, an applicant must provide, among other things, student assessment results and attendance and retention rates for all students served by its schools, including *educationally disadvantaged students* (ESEA section 4305(b)(3)(A)). Further, CMO grantees must assure that each charter school receiving CSP funds makes annual performance and enrollment data publicly available (ESEA section 4303(f)(2)(G)(v)). CMO applicants must also provide the Department with information on existing significant compliance and management issues (ESEA section 4305(b)(3)(A)(iii)). These requirements apply to all CMO grantees, regardless of whether they intend to replicate or expand virtual or brick-and-mortar charter schools.

Finally, while we recognize that virtual charter schools can present unique challenges with respect to the enforcement of CSP requirements, the ESEA does not preclude virtual charter schools from receiving CSP funds. For this reason, we decline to adopt the commenter's suggestion that we preclude applicants that propose to replicate or expand virtual charter schools from applying for funds under this program.

Changes: None.

Comments: Several commenters requested that we clarify that charter schools are obligated to serve students with disabilities. One commenter stated that charter schools must adhere to the IDEA, hold regular individualized education plan meetings, and offer face-inclusive policies as codified by State law. Another commenter urged the Department to focus specifically on the needs of students with Tourette's syndrome and obsessive compulsive disorder. Several commenters suggested that we include a priority for applicants that propose to replicate or expand high-quality charter schools that serve students with disabilities.

Discussion: It is unclear what the commenter meant by ''face-inclusive policies,'' but we agree that students with disabilities face unique educational challenges. As stated above, all eligible students with disabilities attending public charter schools and their parents retain all rights under Part B of the IDEA, including the right to receive FAPE. In addition, these final priorities, requirements, definitions, and selection criteria include a requirement that applicants for CMO grants describe how they intend to comply with Part B of the IDEA.

Further, a number of priorities, requirements, definitions, and selection criteria under this program focus on *educationally disadvantaged students,* which include students who are *children with disabilities,* as defined in section 8101(4) of the ESEA. The Supplemental Priorities also include two priorities that focus on the needs of students with disabilities and could be used in future CMO grant competitions. These priorities are: Priority 1—Empowering Families and Individuals to Choose a High-quality Education that Meets their Unique Needs (which includes a specific option for focusing on students with disabilities) and Priority 5—Meeting the Unique Needs of Students and Children with Disabilities and/or Those with Unique Gifts and Talents. For these reasons, we decline to include a specific priority for students with disabilities or to focus this priority on students with a particular disability or impairment, such as Tourette's Syndrome or obsessive compulsive disorder.

Changes: None.

Comments: Several commenters urged the Department to clarify whether applicants could still apply for CMO grants as groups or consortia and, if so, what the Department's expectations are for how a group or consortium application should be organized.

Discussion: Federal regulations at 34 CFR 75.127–75.129 specifically

[3] Students with disabilities attending public charter schools and their parents retain all rights under Part B of the IDEA. Further, charter schools that operate as LEAs under State law, as well as LEAs that include charter schools among their public schools, are responsible for ensuring that the requirements of Part B of the IDEA are met, unless State law assigns that responsibility to some other entity. *See* 34 CFR 300.209.

authorize applicants to apply as a group or consortium, and prescribe the requirements governing such applications. These final priorities, requirements, definitions, and selection criteria do not alter the requirements for group applications in 34 CFR 75.127–75.129. Therefore, we decline to make any changes in this area.

Changes: None.

Comments: One commenter suggested that the Department allow high-performing applicants to submit streamlined applications for CMO grants. The commenter also suggested that we increase per-seat funding caps for CMOs that are expanding grades in schools because grade expansion can often be as costly as opening new schools. In addition, the commenter asked that we allow CMOs to apply for CMO grants and subgrants under section 4303 of the ESEA. Finally, the commenter asked that we issue nonregulatory guidance that would broadly interpret the term ''minor facilities repairs'' to ensure that charter schools can use CSP funds to ensure that students attend safe, clean, and well-maintained schools.

Discussion: Although the Department may have information regarding the past performance of some applicants—in particular, CMOs that have received CSP grants previously—we rely on the expertise of independent peer reviewers to evaluate the quality of applications submitted under a grant competition in order to ensure the fairness and integrity of the competition. Further, each application proposes to carry out different activities, and an applicant's successful implementation of one project does not guarantee the successful implementation of subsequent projects. To ensure an equal playing field, we believe it is critical that all applicants be required to submit the same general information for review. Therefore, we decline to enable high-performing applicants to submit streamlined applications, as suggested by the commenter.

With respect to the commenter's suggestion to raise per-seat funding caps, no revisions to these final priorities, requirements, definitions, or selection criteria are necessary for the Department to change per-seat funding caps for CMO grants in a given year. Under 34 CFR 75.101 and 75.104(b), the Secretary may establish maximum funding amounts for grants by publishing a notice in the **Federal Register**. When establishing funding limits under a CMO grant competition for a given fiscal year, the Department considers a number of factors, including the availability of funds.

We also note that section 4303 of the ESEA authorizes the CSP Grants to State Entities (State Entities) program, under which the Department awards grants to State entities, and State entities, in turn, award subgrants to eligible applicants (*i.e.,* charter school developers and charter schools) to enable such eligible applicants to open and prepare for the operation of new charter schools and replicated high-quality charter schools, and to expand high-quality charter schools. The ESEA does not explicitly prohibit an entity that qualifies as a CMO and an eligible applicant from applying for both a CMO grant under section 4305(b) and a subgrant under section 4303(b). In order to receive funds under both programs, however, the CMO must propose to carry out different activities under each application and demonstrate that it has the resources and capability to administer multiple projects effectively and efficiently.

Finally, we agree that students learn best in safe, clean, and well-maintained environments. Section 4303(h)(3) of the ESEA authorizes the use of CSP funds to ''[carry] out necessary renovations to ensure that a new school building complies with applicable statutes and regulations, and minor facilities repairs (excluding construction)'' (20 U.S.C. 7221b(h)(3)).[4] We believe this provision affords CMO grantees the flexibility they need to ensure that the charter schools they manage occupy buildings and facilities that are safe, clean, and well-maintained. For examples of the types of repairs that could qualify as ''minor facilities repairs'' under section 4305(c), please see the Department's nonregulatory guidance entitled, ''Charter Schools Program New Flexibilities under the Every Student Succeeds Act (ESSA): Frequently Asked Questions.'' [5]

Changes: None.

Comments: One commenter suggested that we add a priority for CMOs that propose to replicate or expand high-quality charter schools that focus on dropout recovery and academic re-entry in order to maintain consistency with the authorizing statute.

Discussion: We agree that these final priorities, requirements, definitions, and selection criteria should align with the ESEA and believe that they do. Section 4305(b)(5)(D) of the ESEA authorizes the Secretary to give priority to applicants that ''propose to operate or manage high-quality charter schools that focus on dropout recovery and academic re-entry.'' We believe this statutory language is clear. Like the other statutory priorities as well as the priorities established under this NFP, the Secretary may choose to apply the statutory priority for dropout recovery and academic re-entry charter schools under a CMO grant competition in FY 2019 and future years. Accordingly, we decline to add a priority for CMOs that propose to replicate or expand high-quality charter schools that focus on dropout recovery and academic re-entry.

Changes: None.

Comments: Several commenters suggested that we designate specific priorities as absolute priorities or competitive preference priorities for competitions in FY 2019 and later years.

Discussion: Federal regulations at 34 CFR 75.105 authorize the Department to establish annual priorities and to designate the priorities as invitational, competitive preference, or absolute. Therefore, we do not need to revise the final priorities in order to designate them as absolute or competitive preference priorities for competitions in FY 2019 and in later years. In accordance with 34 CFR 75.105(c), we will designate specific priorities as invitational, absolute or competitive preference priorities for the FY 2019 competition, and competitions in later years, through a notice inviting applications (NIA) in the **Federal Register**.

Changes: None.

Priority 1—Promoting Diversity

Comments: Several commenters expressed support for a priority that encourages diverse student populations. One commenter recommended that we follow a specific methodology for assessing whether applicants meet the priority. Several commenters questioned whether an applicant could meet this priority and *Priority 4—Low-Income Demographic,* stating that it may be difficult for a school focused on socioeconomic diversity to maintain a high percentage of students who are *individuals from low-income families.* Some commenters recommended that the Department expand the scope of the priority to include students with disabilities, in addition to students from racially and socioeconomically diverse backgrounds. Finally, two commenters expressed concern about the priority's effect on communities and school districts more broadly. Specifically, one commenter argued that providing incentives for CMOs that propose to replicate or expand charter schools with diverse student bodies is unlikely to be

[4] Under section 4305(c) of the ESEA, ''the same terms and conditions'' that apply to State Entity grants under section 4303 apply to CMO grants.

[5] See *https://innovation.ed.gov/files/2017/12/CSP-ESSA-Flexibilities-FAQ-2017.pdf.*

successful because students typically attend schools in or near their neighborhoods, and neighborhoods, particularly in cities, tend to be segregated due to decades of deeply rooted societal forces, including racially motivated housing practices and school assignments. Another commenter suggested that we revise the priority to require that any efforts to replicate or expand high-quality charter schools with an intentional focus on diversity yield ''zero net effect'' on the demographics of the schools from which the students are recruited.

Discussion: We believe that students can benefit from attending high-quality charter schools with racially and socioeconomically diverse student bodies. We agree that following a rubric, or methodology, for determining whether an applicant meets the priority can be useful. We will determine an appropriate method for reviewing applications addressing this priority in the NIA for a given competition.

We agree with the commenters that some aspects of *Priority 1—Promoting Diversity* could potentially conflict with certain subparts of *Priority 4—Low-Income Demographic* and, as such, it may be challenging for a CMO grant application to meet both priorities. The Department has flexibility in choosing priorities, requirements, and selection criteria for its grant competitions. In FY 2019 and in future years, we will select a combination of priorities, requirements, and selection criteria that is appropriate for the CMO program and aligned with the Secretary's policy objectives.

In addition, we share the commenters' concerns about ensuring that students with disabilities receive FAPE. However, this priority focuses specifically on diversity with respect to race and socioeconomic status. Race and socioeconomic status are commonly cited in research on diversity and its relationship with student academic achievement as two demographic factors that have a major impact.[6] Further, we believe it is important that the final priority aligns with the statutory priority for this program in ESEA section 4305(b)(5)(A), which focuses on replicating or expanding *high-quality charter schools* with racially and socioeconomically diverse student bodies.

We agree with the commenter that cultivating and maintaining a diverse student body can be difficult and is unlikely to happen overnight. We also agree that high-quality charter schools can be a powerful option for *educationally disadvantaged students* but that many factors, such as safe and reliable transportation to and from school, can impact a family's realistic educational choices. This priority focuses on applicants that propose to replicate or expand high-quality charter schools with an intentional focus on racial and socioeconomic diversity, but it does not dictate how a CMO should approach this work. Promising practices for promoting diversity continue to emerge, and charter schools have great flexibility to choose an educational program that attracts students from diverse backgrounds and geographic areas outside of the immediate area surrounding the school. The intent of this priority is to encourage CMOs to replicate or expand high-quality charter schools with purposefully diverse student bodies through strategies that comply with non-discrimination requirements in the U.S. Constitution and in Federal civil rights laws, make sense for their local contexts, and are aligned with reliable research on the relationship between academic achievement and racial and socioeconomic diversity in schools.

Finally, we agree with the commenter that CMOs should consider the community context when replicating or expanding high-quality charter schools, particularly charter schools with an intentional focus on racial and socioeconomically diverse student bodies. However, we do not think it is appropriate or practical to require that CMOs demonstrate to the Department a net zero effect on surrounding schools. For these reasons, we decline to revise the priority.

Changes: None.

Comment: None.

Discussion: Upon further review, we determined that it is critical to remind applicants addressing Priority 1 of their nondiscrimination obligations under Federal law. As such, we are revising the priority to clarify that proposed projects must be consistent with nondiscrimination requirements contained in the U.S. Constitution and Federal civil rights laws.

Changes: We have added the phrase ''consistent with nondiscrimination requirements contained in the U.S. Constitution and Federal civil rights laws'' to the priority.

Priority 2—Reopening Academically Poor-Performing Public Schools as Charter Schools

Comments: Several commenters expressed support for this priority. One commenter asked that we revise the priority to encourage applications from CMOs that can share best practices for turning around low-performing traditional public schools. Two commenters requested that we clarify whether an applicant could address the priority by proposing to open a new charter school, rather than to reopen an *academically poor-performing public school* as a charter school. One commenter suggested that we focus the priority on reopening academically poor-performing middle and high schools as charter schools.

Discussion: We agree with the commenters that the purpose of this priority—to ''reopen'' academically poor-performing charter schools—could be clearer. An applicant proposing only to open new charter schools, and not ''reopen'' an *academically poor-performing public school* as a charter school, would not meet this specific priority (but could meet other priorities established in this NFP). Therefore, in order to clarify the purpose of this priority, we are replacing the term ''restart'' with ''reopen.'' In addition, we agree that starting a new school is an important endeavor, and note that opening new high-quality charter schools is a key element of the CSP. We also believe that charter schools can play an important role in helping to improve academic outcomes for students in low-performing public schools. Therefore, this priority is specifically focused on CMOs that propose to reopen *academically poor-performing public schools* as charter schools.

We also agree that applicants should be required to demonstrate past success working with low-achieving public schools in order to meet the priority. Accordingly, we are revising the stem of the priority to require applicants to address each subpart of the priority, including the subpart focused on demonstrating past success working with at least one *academically poor-performing public school* or schools that were designated as persistently lowest-achieving schools or priority schools under the School Improvement Grant program or ESEA flexibility. Under this standard, an applicant can share best practices working with traditional public schools as well as nontraditional public schools, such as public charter schools.

Finally, we agree that a focus on middle schools and high schools may be appropriate in specific contexts, and have included a priority for applications that propose to replicate or expand high-quality charter schools that serve high school students. Under this priority, an applicant can propose to

[6] *See, e.g.:* The Century Foundation (2018). *Diverse by Design Charter Schools. https://tcf.org/content/report/diverse-design-charter-schools/.*

reopen an academically poor-performing middle school or high school as a charter school as it sees fit. Therefore, we decline to revise the priority to focus on reopening academically poor-performing middle schools and high schools.

Changes: We have revised the priority to replace the term ''restart'' with ''reopen.'' In addition, we have revised the stem of the priority so that all subparts must be addressed in order for an applicant to meet the priority.

Comments: Several commenters opined that there is a disproportionately high percentage of students with disabilities in turnaround schools and suggested that we require CMOs proposing to reopen *academically poor-performing public schools* as charter schools to address the issue.

Discussion: A major goal of these priorities, requirements, definitions, and selection criteria is to expand high-quality educational opportunities for *educationally disadvantaged students,* including students with disabilities. CMO grantees, and the charter schools they manage, must comply with applicable laws, including Part B of the IDEA, Section 504, and Title II of the ADA. Further, to meet the priority, an applicant must propose a strategy that targets a student population that is demographically similar to that of the *academically poor-performing public school.* Therefore, we decline to revise this priority in the manner suggested by the commenter.

Changes: None.

Comments: Several commenters requested that the Department clarify its policy regarding admissions lotteries, including how a CMO might use a weighted lottery to address this priority. One commenter urged the Department to ensure that any grantee using a weighted lottery meet all relevant statutory requirements, and another commenter suggested that we ensure that any weighted lotteries are designed to enroll students with disabilities in proportion to the enrollment of such students in neighboring schools. Several commenters suggested that the Department update its nonregulatory guidance to clarify that CMOs that are reopening *academically poor-performing public schools* as charter schools could exempt from admissions lotteries students who are enrolled in the *academically poor-performing public school* at the time it is reopened.

Discussion: Under section 4303(c)(3) of the ESEA, charter schools receiving funds under a CMO grant generally may use ''a weighted lottery to give slightly better chances for admission to all, or a subset of, educationally disadvantaged students,'' so long as weighted lotteries in favor of such students are not prohibited under State law and are not used to create schools that would serve a particular group of students exclusively.[7] Therefore, a charter school could use a weighted lottery for the purpose of enrolling a proportionate number of students with disabilities in the charter school as compared to the number of such students enrolled in neighboring schools. As such, the Department declines to expand the statutory requirements for weighted lotteries as they apply to CMO grants.

Further, the Department's most recent update to the CSP nonregulatory guidance was issued in January 2014.[8] Although that guidance was issued prior to enactment of the ESSA, much of it is applicable to the CSP lottery requirement in section 4310(2)(H) of the ESEA. Specifically, the January 2014 CSP Nonregulatory Guidance identifies several categories of students who may be exempted from a charter school's lottery, including students who are enrolled in a public school at the time it is converted into a charter school. The Department may update this guidance to address changes to the CSP made by the ESSA. In the meantime, CMO grantees may continue to follow the guidelines in the January 2014 CSP Nonregulatory Guidance regarding the categories of students who may be exempted from the lottery requirement.

Changes: None.

Comments: One commenter recommended that we use Priority 2 cautiously because available research on charter school performance is mixed.

Discussion: We agree that, where possible, Federal funding should be used primarily to support strategies that are based on research. To meet this priority, applicants would need to demonstrate past success working with *academically poor-performing public schools.* In addition, all applicants, regardless of whether they address this priority, must disclose compliance issues, provide a logic model for how they will replicate or expand high-quality charter schools, and describe how they currently operate or manage high-quality charter schools. This program specifically supports the replication and expansion of high-quality charter schools, and the final priorities, requirements, definitions, and selection criteria are designed to differentiate between high-quality applications that are likely to be successful and low-quality applications that have little chance of succeeding.

Changes: None.

Comment: None.

Discussion: Upon further review, we determined that it is critical to remind applicants addressing Priority 2 of their nondiscrimination obligations under Federal law. As such, we are revising the priority to clarify that proposed projects must be consistent with nondiscrimination requirements contained in the U.S. Constitution and Federal civil rights laws.

Changes: We have added the phrase ''consistent with nondiscrimination requirements contained in the U.S. Constitution and Federal civil rights laws'' to the priority.

Priority 3—High School Students

Comments: Several commenters expressed support for the priority but asked that we revise it to require applicants to demonstrate that their proposed strategy for replicating or expanding high-quality charter high schools is evidence-based. One commenter also suggested that applicants be required to provide data on former students' postsecondary degree attainment and employment. Conversely, another commenter suggested we use this priority cautiously due to a lack of research on charter high schools.

Discussion: We agree that using research to inform CMO grant proposals is useful in certain contexts, but we also understand that research in this area is limited. The Department's regulations at 34 CFR 75.226 specifically authorize the Secretary to give priority to applications that are supported by ''evidence.'' The Department may choose to implement such a priority under the CMO grant competition in a given year.

Likewise, we agree that obtaining data on students' postsecondary degree attainment and employment may be relevant and encourage applicants to submit such information, as appropriate. On the other hand, the Department must balance its interest in obtaining sufficient information to assist peer reviewers in evaluating the quality of applications with its interest in minimizing the burden on applicants. In order to meet the priority, an applicant must describe how it will prepare students for postsecondary education and provide support for its graduates who enroll in institutions of higher education (IHEs) and certain one-year training programs that prepare students for gainful employment in a recognized occupation. In addition, applicants must establish one or more project-specific

[7] As stated above, under section 4305(c) of the ESEA, CMO grantees generally are subject to the same terms and conditions as State entity grantees funded under section 4303.

[8] See *http://www2.ed.gov/programs/charter/fy14cspnonregguidance.doc.*

performance measures that will provide reliable information about the grantee's progress in meeting the objectives of the project. We believe these requirements will generate the necessary information to enable peer reviewers to evaluate the quality of applications without placing an undue burden on applicants. For these reasons, we decline to revise the priority in the manner suggested by the commenters.

Changes: None.

Comments: Several commenters suggested that we broaden the priority to focus on high schools that prepare students for paths to career and technical training and military service, as well as enrollment in two- and four-year colleges and universities. Several other commenters suggested that we revise the priority to encompass high schools that focus on transitional programming for students with disabilities.

Discussion: We agree that sending students to two- or four-year colleges and universities is not the only measure of a charter high school's success and that, for some students, getting a job or attending technical school may be the best option immediately after high school. Accordingly, we are revising subparts (ii) and (iii) of the priority to encompass a broader range of postsecondary education, training, and career options. Specifically, for this priority, postsecondary education institutions include both IHEs and educational institutions that offer one-year training programs that prepare students for gainful employment in a recognized occupation (as described in section 101(b)(1) of the Higher Education Act of 1965, as amended (HEA)). For clarity, we are also defining ''IHE'' in this NFP. The definition we are adding to the NFP is the same as the definition of ''IHE'' in section 8101(29) of the ESEA.

Further, while a career in the military can be very rewarding, the Department's mission is to promote student academic achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access. Therefore, we believe the primary goal of elementary and secondary education should be preparing students for success at the postsecondary education level. Nevertheless, charter schools have great flexibility to establish a unique mission and educational focus. Thus, an applicant may propose to replicate or expand charter schools with a wide range of educational programs, including a military (*i.e.,* Reserve Officers' Training Corps (ROTC)) focus, so long as the charter school meets the definition of ''high-quality charter school'' in section 4310(8) of the ESEA and the terms of its charter. Our ultimate focus remains on ensuring that students graduate from high school prepared to succeed in a wide variety of postsecondary education options.

We also agree with the commenters that ensuring that students with disabilities (as well as other *educationally disadvantaged students*) graduate from high school with adequate preparation for postsecondary education options is paramount. Therefore, we are revising the priority to include specific references to *educationally disadvantaged students* where appropriate. Also, as stated above, eligible students with disabilities attending public charter schools and their parents retain their right to receive FAPE, and the IDEA requirements for transition services apply beginning with the first individualized education plan (IEP) to be in effect when the student turns 16, or younger if determined appropriate by the IEP team.[9] Further, in order to be considered a high-quality charter school (a key aspect of this program), a charter school that serves high school students must have demonstrated success in increasing student academic achievement and graduation rates, and must provide that information disaggregated by subgroups of students defined in section 1111(c)(2) of the ESEA, which includes children with disabilities, as defined in the IDEA. Therefore, while we are revising the priority to include specific references to *educationally disadvantaged students,* we decline to revise the priority to include a specific focus on high schools that provide transitional programming (*i.e.,* preparation for specific postsecondary education options) for students with disabilities.

Changes: We have revised *Priority 3—High School Students* to include specific references to *educationally disadvantaged students* and to clarify that the priority applies to high-quality charter schools that prepare high school students to attend IHEs, which generally consist of two- and four-year colleges and universities, as well as certain postsecondary education institutions that offer one-year training programs. We have also added a definition for ''IHE;'' this change is discussed later in this notice.

Priority 4—Low-Income Demographic

Comments: Several commenters expressed support for the priority but requested that we revise it to support only CMOs that can demonstrate that at least 60 percent of the students across all of the charter schools they operate or manage are *individuals from low-income families.* One commenter stated that the vast majority of CMOs operate schools with at least 60 percent students who are *individuals from low-income families,* so this priority would not meaningfully differentiate applicants. Another commenter suggested that we keep the priority's original structure but revise it to support CMOs that can demonstrate that 60 to 90 percent, instead of 40 to 60 percent, of the students across all of the charter schools that they operate or manage are *individuals from low-income families.*

Discussion: We believe that this priority is essential to provide incentives for CMOs to support charter schools that serve student populations with the most need. As written, the priority affords the Secretary discretion to establish a poverty threshold of 40 percent, 50 percent, or 60 percent *individuals from low-income families* under the CMO grant competition in a given fiscal year. We believe that 40 percent is an appropriate lower bound for this priority because it is aligned with the poverty threshold a Title I school generally must meet in order to operate a schoolwide program under section 1114 of the ESEA. For this reason, we decline to revise the priority to establish only one poverty threshold of 60 percent *individuals from low-income families.*

We also decline to revise the priority to require that CMOs operate or manage charter schools with 60 to 90 percent students who are *individuals from low-income families* since, as stated above, the priority could potentially conflict with *Priority 1—Promoting Diversity* in a single competition. We recognize that many CMOs focus their efforts in high-need communities, but we believe it is also important to support high-quality charter schools that are designed with an intentional focus on racial and socioeconomic diversity. In any given year, we may include in an NIA one or more of these final priorities, requirements, definitions, and selection criteria individually or in combination with each other; therefore, we decline to revise the priority as suggested by the commenters.

Changes: None.

Comments: One commenter stated that applicants addressing this priority must demonstrate past success. The commenter also suggested that we revise the priority to encourage applicants to provide transportation and meal services to students.

[9] *See* 20 U.S.C. 1414(d)(1)(A)(i)(VIII) and 34 CFR 300.320(b); *see also* 20 U.S.C. 1401(34) and 34 CFR 300.43.

Discussion: While applicants' past performance is not an explicit focus of this priority, it is embedded in the program through the various application priorities, requirements, definitions, and selection criteria, including the *Quality of the Eligible Applicant* selection criterion. We also recognize that transportation and meals are important issues for charter schools that serve large numbers of low-income students. While CSP funds may be used to provide transportation and ''healthy snacks'' for students in limited circumstances, a number of other Federal, State, and local programs (such as the United States Department of Agriculture's National School Lunch Program) provide resources specifically for those purposes. For this reason, we decline to revise the priority to encourage applicants to provide transportation and meal services to students.

Changes: None.

Comments: One commenter asked that we expand the priority to focus on other high-need populations, such as students with disabilities and English learners.

Discussion: Many aspects of the CMO grant program and these priorities, requirements, definitions, and selection criteria focus on *educationally disadvantaged students,* which include students with disabilities and English learners. In addition, we are revising some selection factors under the *Contribution in Assisting Educationally Disadvantaged Students* criterion to include specific references to students with disabilities and English learners. Further, the Supplemental Priorities, which may be used under the CMO grant program, include several priorities (*e.g.,* Priority 1(b)(ii) and (iii) and Priority 5) that focus on students with disabilities and English learners. Therefore, we decline to revise this priority to focus on other high-need groups, such as students with disabilities or English learners.

Changes: None.

Comments: One commenter requested that we clarify how the priority would work as a competitive preference priority in a competition. Specifically, the commenter asked us to clarify whether points would be awarded on a sliding scale (*e.g.,* one point for an applicant that can demonstrate its schools have at least 40 percent students who are *individuals from low-income families,* two points for an applicant that can demonstrate its schools have at least 50 percent students who are *individuals from low-income families,* and three points for an applicant that can demonstrate its schools have at least 60 percent students who are *individuals from low-income families*). The commenter expressed concern that an applicant could receive the maximum number of priority points for a higher poverty threshold, but only be required to maintain the minimum threshold throughout its grant project. The commenter also expressed concern that the focus of the priority is on all schools operated or managed by the CMO, and not only on the charter schools to be replicated or expanded as part of the grant project.

Discussion: While the priority is written in a manner that gives the Department flexibility to apply one, two, or all three poverty standards in a single competition, we do not anticipate applying more than one poverty standard in a single competition or assigning points on a sliding scale.

We agree with the commenter that an applicant receiving points for this priority should be required to maintain the same, or a substantially similar, poverty threshold throughout the life of the grant. As such, we are revising the priority to clarify that an applicant must demonstrate not only that its current portfolio of schools meets the specified poverty threshold, but also that it will maintain the same, or a substantially similar, poverty level in the charter schools that it replicates or expands, as well as its other schools, for the entire grant period. We recognize that the percentage of students who are *individuals from low-income families* may fluctuate on an annual basis and, for this reason, believe the priority should focus on all schools operated by a CMO and not just the charter schools to be replicated or expanded as part of the grant project.

Changes: We have added a requirement that applicants demonstrate that they will maintain for the entire grant period a poverty threshold across the schools they operate or manage that is the same as, or substantially similar to, the poverty level proposed in the grant application.

Priority 5—Number of Charter Schools Operated or Managed by the Eligible Applicant

Comments: Several commenters suggested that we use the priority sparingly or remove it altogether. One commenter noted that the size of a CMO does not directly correlate to the quality of its schools, and another cited recent research suggesting that CMO size should not be used as a proxy for other characteristics. Other commenters expressed concern that the priority would dilute the quality of funded applications because it would create several smaller competitions for CMO grants. One commenter questioned the purpose of the priority, noting that if the intent is to support smaller, less-established CMOs, we may get better results using the priority for novice applicants in 34 CFR 75.225.

Discussion: We agree that size is not necessarily positively correlated with quality. We note, however, that the Department can employ several mechanisms, established in the ESEA and these final priorities, requirements, definitions, and selection criteria, to assess the quality of an applicant and its proposal. This priority, by itself, is not intended to assess quality with respect to the size of the applicant. Rather, this priority is designed primarily to enable the Secretary to give a competitive advantage to small, medium, or large CMOs in a given year based on the Department's policy objectives for that year. We understand the concern that this priority could be used to create smaller sub-competitions that would decrease the amount of available funds for other CMOs. In any year in which we announce a competition, we will select a combination of priorities, requirements, and selection criteria that meet the requirements of the CMO grant program and is aligned with the Secretary's policy objectives.

Finally, we agree that 34 CFR 75.225 provides a useful tool for encouraging applications from novice applicants. The Department will continue to follow the requirements in 34 CFR 75.225 to give priority to novice applicants in future CMO grant competitions, as we deem appropriate.

Changes: None.

Priority 6—Rural Community

Comments: Several commenters expressed support for the priority but questioned whether an applicant could meet the priority by proposing to replicate or expand schools in a combination of *rural communities* and other communities.

Discussion: As written, this priority gives the Department flexibility to establish an absolute or competitive preference priority for applications that propose to replicate or expand one or more high-quality charter schools in a *rural community* or one or more high-quality charter schools in a non-rural community. To meet the priority, an applicant would need to propose to replicate or expand at least one high-quality charter school in a *rural community* or at least one high-quality charter school in a non-rural community, depending on the Department's policy objectives in a given year and which prong of the

priority the applicant is addressing. The priority language does not preclude an applicant from also proposing to replicate or expand high-quality charter schools in other communities. We believe the priority is clear and, therefore, decline to revise it.

Changes: None.

Comments: One commenter asked that we revise the priority to focus on opening new charter schools in rural areas. Conversely, another commenter raised concerns that new charter schools in rural areas would drain resources from traditional public schools.

Discussion: The purpose of the CMO grant program is to replicate or expand high-quality charter schools. Although replicated charter schools are based on educational models at existing high-quality charter schools, for all practical purposes, they are new charter schools. Further, in light of the unique challenges faced by *rural communities,* we believe prospective applicants for CMO grants should have the flexibility to design their projects in a way that meets the specific needs of the communities they plan to serve, including determining whether a particular *rural community* would be best served by creating a new, or replicated, charter school or by expanding an existing charter school.

In addition, we recognize that replicating or expanding high-quality charter schools will impact the surrounding community and is likely to have a greater impact in a rural community. The Department's broad focus is on expanding high-quality educational options for all students, including students in rural communities. Ideally, increasing access to high-quality educational options in *rural communities* will help improve student academic achievement not only in charter schools, but also in traditional public schools in the community. For these reasons, we decline to revise the priority.

Changes: None.

Priority 7—Replicating or Expanding High-Quality Charter Schools To Serve Native American Students

Comments: Several commenters urged the Department to add a priority that would support Indian students by encouraging CMOs to replicate or expand dual language immersion schools that focus primarily on Indian languages. Another commenter suggested that the Department consider a CMO's ability to meaningfully engage with Tribal communities when making CMO grant decisions.

Discussion: As discussed in the ''Definitions'' section below, we have replaced the term ''students who are Indians'' with the term ''*Native American* students'' in this priority. These changes allow applicants to receive priority points for proposing to replicate or expand high-quality charter schools that serve Native Hawaiian and Native American Pacific Islander students, as well as students who are Indians (including Alaska Natives). We agree with the commenters that cultivating strong relationships with the communities to be served is crucial, and that focusing on *Native American language* immersion is a promising strategy for building and maintaining those relationships and improving academic outcomes for *Native American* students. To meet this priority, an applicant must propose to replicate or expand a high-quality charter school that will meet the unique needs of *Native American* students. The applicant may employ various strategies that reflect and preserve *Native American language,* culture, and history, including a ''dual language immersion'' program that focuses on *Native American languages.* Thus, an applicant proposing to replicate or expand a high-quality charter school with a dual language immersion program that focuses on *Native American languages* could meet this priority.

In addition, while we believe that a requirement for applicants to demonstrate a commitment to meaningfully collaborate with Tribal communities would result in actual collaborations, we agree that the language in the priority could be clearer with respect to requiring applicants to meaningfully engage with Tribal communities. Therefore, we are revising the priority to clarify that applicants must do more than demonstrate a commitment to collaborate.

Changes: We have revised the priority to replace the phrase ''demonstrate a commitment to meaningfully collaborate'' with ''meaningfully collaborate.''

Comments: One commenter expressed support for the priority but suggested that we revise it to require applicants to submit a resolution or official document, rather than a letter, from surrounding *Indian Tribes* or *Indian organizations* that demonstrates their support for the proposed project. The commenter also suggested that we clarify our expectations for the composition of the board for a charter school to be replicated or expanded under the grant, and suggested that we require the board to have a percentage of *Indian Tribe* or *Indian organization* members that is comparable to the percentage of *Native American* students enrolled in the school. Finally, the commenter suggested that we revise the priority to require that applicants demonstrate a record of success in Tribal communities, particularly for applicants proposing to replicate or expand virtual charter schools.

Discussion: We agree that a CMO with strong support from surrounding *Indian Tribes* or *Indian organizations* is more likely to succeed in replicating or expanding high-quality charter schools that serve a *high proportion* of *Native American* students. Accordingly, in order to meet this priority, the applicant must submit a letter of support from an *Indian Tribe* or *Indian organization* located in the area to be served by the charter school. While a resolution is not required, an applicant is not precluded from submitting a resolution, or other official document, to demonstrate support.

Likewise, we believe that charter school developers and charter schools in the communities where the charter school will be located are best suited to assemble a school board that understands the unique educational needs of the students to be served. We believe that requiring a specific percentage or number of board members from *Indian Tribes* or *Indian organizations* could limit the ability of applicants to fully respond to the needs of the communities they propose to serve. In order to meet the priority, however, CMOs will need to collaborate with an Indian Tribe or Indian organization in the communities in which they propose to replicate or expand high-quality charter schools to ensure that school boards represent their students appropriately. While a school board with a percentage of members of *Indian Tribes* or *Indian organizations* that is comparable to the percentage of *Native American* students to be served could satisfy the substantial percentage requirement in this priority, there may be circumstances where a smaller or larger percentage of members from an Indian Tribe or Indian organization is appropriate. For these reasons, we decline to revise the priority as suggested by the commenter.

Finally, while an applicant is not precluded from demonstrating past success working with Tribal communities, we decline to revise the priority to impose such a requirement. In order to receive CMO funds, all applicants must describe how they operate or manage the charter schools (including virtual charter schools) for which they have presented evidence of success (*see* Requirement (e)). We believe that *Indian Tribes* and *Indian*

organizations located in the community to be served by the replicated or expanded charter school are in the best position to determine whether a particular CMO applicant has the requisite knowledge and experience to serve *Native American* students effectively. Therefore, the requirements that an applicant obtain a letter of support from, and meaningfully collaborate with, a local *Indian Tribe* or *Indian organization* should prevent CMOs that lack the knowledge and experience necessary to serve Tribal communities successfully from meeting the priority. For these reasons, we decline to revise the priority in the manner suggested by the commenter.

Changes: None.

Comment: None.

Discussion: Upon further review, we determined that it is critical to remind applicants addressing Priority 7 of their nondiscrimination obligations under Federal law. As such, we are revising the priority to clarify that proposed projects must be consistent with nondiscrimination requirements contained in the U.S. Constitution and Federal civil rights laws.

Changes: We have added the phrase ''consistent with nondiscrimination requirements contained in the U.S. Constitution and Federal civil rights laws'' to the priority.

Requirements

Comments: A few commenters requested that we clarify which requirements we would include in future CMO grant competitions. One commenter also requested that we clarify which requirements represent existing obligations under Federal law.

Discussion: As a general matter, the CSP statute prescribes the priorities, requirements, definitions, and selection criteria that apply to all CMO grants, regardless of the fiscal year in which the grant is awarded. In addition, the Department's regulations at 34 CFR part 75 prescribe the procedures the Department must follow when awarding and administering discretionary grants. The main purposes of these final priorities, requirements, definitions, and selection criteria are to clarify the Department's interpretation of certain statutory requirements and to establish other priorities, requirements, definitions, and selection criteria consistent with congressional intent. The Department generally has discretion to choose specific priorities, requirements, definitions, and selection criteria to apply to CMO grants in a given year based on the Department's policy objectives for that year. All of the requirements in this NFP are aligned with existing requirements for CMO grants under the ESEA and the Department's regulations.

Changes: None.

Comments: One commenter suggested that we require applicants to disclose whether any charter schools in their network meet the definition of ''*academically poor-performing public school.*'' The commenter also suggested that we differentiate between ''schools'' and ''campuses'' because States vary in how they define the two terms.

Discussion: We agree that knowing whether an applicant has ''*academically poor-performing public schools*'' in its network could give the Department an indication of the overall quality of the CMO's charter schools. On the other hand, there are many reasons why a charter school may qualify as an *academically poor-performing public school* and, ultimately, the existence of one or more *academically poor-performing public schools* in a CMO's network is not necessarily dispositive proof that the CMO is unable to administer a CMO grant effectively and efficiently. For example, it would not be unusual for an applicant that has reopened one or more low-achieving public schools to have an *academically poor-performing public school* in its network. Under Requirement (e), any CMO that receives a grant must provide evidence of success, regardless of whether the CMO has operated or managed *academically poor-performing public schools.*

In addition, Requirement (a) provides that applicants must demonstrate that they operate more than one charter school. Requirement (a) clearly states that, for purposes of the CMO grant program, multiple charter schools are considered to be separate schools if each school meets the definition of ''charter school'' in section 4310(2) of the ESEA and is treated as a separate school by its authorized public chartering agency and the State in which the charter school is located, including for purposes of accountability and reporting under Title I, Part A of the ESEA. For these reasons, we decline to revise the priority as suggested by the commenter.

Changes: None.

Definitions

Comments: Several commenters requested that we clarify the definition of ''*high proportion,*'' as that term is used in Priority 7. One commenter provided data suggesting that the definition of ''*high proportion*'' may not be ambitious enough. Conversely, one commenter suggested that we define ''*high proportion*'' as 25 percent students who are Indians, consistent with one of the requirements in section 6112 of the ESEA.

Discussion: As discussed above, we are revising *Priority 7—Replicating or Expanding High-Quality Charter Schools to Serve Native American Students* to replace ''students who are Indians'' with ''*Native American* students.'' As written, the priority gives applicants an opportunity to explain why the number of *Native American* students it proposes to serve constitutes a ''*high proportion,*'' based on the specific circumstances and context of the community in which the charter school is or will be located. For this reason, we decline to require charter schools to serve a specific percentage of *Native American* students, such as 25 percent, in order to meet the priority.

We appreciate that some data may suggest that many charter schools have student bodies comprised of 75 percent or more *Native American* students. Such schools would generally meet the definition of *high proportion* established in this document. On the other hand, if an applicant proposes to replicate or expand a charter school that has less than a majority of *Native American* students but provides a compelling rationale for why the school should be considered to have a *high proportion* of *Native American* students, we may consider the applicant to have met the standard. Applicants addressing Priority 7 must, among other things, meaningfully collaborate with *Indian Tribes* or *Indian organizations* and must replicate or expand high-quality charter schools that have an academic program purposely designed to meet the unique needs of *Native American* students. We believe that all of the components of Priority 7, including the definition of ''*high proportion,*'' set an appropriately rigorous bar for CMO applicants while also affording some flexibility. Therefore, we decline to revise the definition of *high proportion* as suggested by the commenters.

Changes: None.

Comments: A few commenters suggested that we revise the definition of ''Indian'' to include Native Hawaiians.

Discussion: We agree that Native Hawaiian students have many of the same unique educational needs as students who are Indians. We also believe that students who are Native American Pacific Islanders have similar educational needs. Therefore, as stated above, we are replacing the terms ''Indian'' and ''Indian language,'' respectively, with ''*Native American*'' and ''*Native American language*'' throughout the final priorities, requirements, definitions, and selection criteria. Likewise, we are removing the definition of the term ''Indian'' and

adding definitions for ''*Native American*'' and ''*Native American language,*'' based on the definitions for those terms in section 8101(34) of the ESEA.[10] The ESEA definition of ''*Native American*'' explicitly includes Indians (including Alaska Natives), Native Hawaiians, and Native American Pacific Islanders.

Changes: We have removed the definition of ''Indian'' and added definitions for ''*Native American*'' and ''*Native American language.*''

Comments: One commenter suggested that we use the term ''Tribal organization'' instead of ''*Indian organization*'' because ''Tribal organization'' is the term used in the ESEA.

Discussion: While the term ''Tribal organization'' is used under several ESEA programs, the term is not defined in section 8101 of the ESEA, which provides general definitions that apply to programs authorized under the ESEA. The term ''*Indian organization*'' is used in the authorizing statute for the Department's Indian Education program (20 U.S.C. 7401–7492) and defined in the Department's regulations implementing the Indian Education program at 34 CFR 263.20. We think it is important to maintain consistency with the Indian Education program.

Changes: None.

Selection Criteria

Comments: One commenter suggested that we revise *Selection Criterion (b)—Contribution in assisting educationally disadvantaged students* to enable the Department to assess better the extent to which an applicant would effectively support students with disabilities. Specifically, the commenter suggested that we add a selection factor focused on attendance rates and outcomes for *educationally disadvantaged students,* including students with disabilities and English learners, and revise the existing selection factors to focus on effective instructional strategies for *educationally disadvantaged students.*

Discussion: Two major purposes of the CSP are to expand educational opportunities for *educationally disadvantaged students* and to assist such students in meeting State academic content and performance standards. As written in the NPP, this selection criterion would enable the Department to evaluate the quality of an application with respect to achieving these two objectives. While *educationally disadvantaged students* include students with disabilities, we agree with the commenter that an emphasis should be placed on students with disabilities and English learners because enrollment of such students in charter schools tends to be lower than enrollment of such students in neighboring traditional public schools. Therefore, we are revising the selection criterion to emphasize students with disabilities and English learners.

Changes: We have revised two selection factors in Selection Criterion (b) to sharpen the criterion's focus on serving *educationally disadvantaged students.* We also have revised the title of the criterion to clarify the focus on the significance of the contribution in assisting educationally disadvantaged students.

Final Priorities

Priority 1—Promoting Diversity

Under this priority, applicants must propose to replicate or expand high-quality charter schools that have an intentional focus on recruiting students from racially and socioeconomically diverse backgrounds and maintaining racially and socioeconomically diverse student bodies in those charter schools, consistent with nondiscrimination requirements contained in the U.S. Constitution and Federal civil rights laws.

Priority 2—Reopening Academically Poor-Performing Public Schools as Charter Schools

Under this priority, applicants must—

(i) Demonstrate past success working with one or more *academically poor-performing public schools* or schools that previously were designated as persistently lowest-achieving schools or priority schools under the former School Improvement Grant program or in States that exercised ESEA flexibility, respectively, under the ESEA, as amended by the No Child Left Behind Act of 2001; and

(ii) Propose to use grant funds under this program to reopen one or more *academically poor-performing public schools* as charter schools during the project period by—

(A) Replicating one or more high-quality charter schools based on a successful charter school model for which the applicant has provided evidence of success; and

(B) Targeting a demographically similar student population in the replicated charter schools as was served by the *academically poor-performing public schools,* consistent with nondiscrimination requirements contained in the U.S. Constitution and Federal civil rights laws.

Priority 3—High School Students

Under this priority, applicants must propose to—

(i) Replicate or expand high-quality charter schools to serve high school students, including *educationally disadvantaged students;*

(ii) Prepare students, including *educationally disadvantaged students,* in those schools for enrollment in postsecondary education institutions through activities such as, but not limited to, accelerated learning programs (including Advanced Placement and International Baccalaureate courses and programs, dual or concurrent enrollment programs, and early college high schools), college counseling, career and technical education programs, career counseling, internships, work-based learning programs (such as apprenticeships), assisting students in the college admissions and financial aid application processes, and preparing students to take standardized college admissions tests;

(iii) Provide support for students, including *educationally disadvantaged students,* who graduate from those schools and enroll in postsecondary education institutions in persisting in, and attaining a degree or certificate from, such institutions, through activities such as, but not limited to, mentorships, ongoing assistance with the financial aid application process, and establishing or strengthening peer support systems for such students attending the same institution; and

(iv) Propose one or more project-specific performance measures, including aligned leading indicators or other interim milestones, that will provide valid and reliable information about the applicant's progress in preparing students, including *educationally disadvantaged students,* for enrollment in postsecondary education institutions and in supporting those students in persisting in and attaining a degree or certificate from such institutions. An applicant addressing this priority and receiving a CMO grant must provide data that are responsive to the measure(s), including performance targets, in its annual performance reports to the Department.

(v) For purposes of this priority, postsecondary education institutions include institutions of higher education, as defined in section 8101(29) of the Elementary and Secondary Education Act of 1965, as amended by the Every

[10] Section 8101(34) defines ''Native American'' and ''Native American language'' as having the same meaning given those terms in section 103 of the Native American Languages Act of 1990 (NALA). Under section 103, ''Native American'' includes Indians (including Alaska Natives), Native Hawaiians, and Native American Pacific Islanders.

Student Succeeds Act, and one-year training programs that meet the requirements of section 101(b)(1) of the HEA.

Priority 4—Low-Income Demographic

Under this priority, applicants must demonstrate one of the following—

(i) That at least 40 percent of the students across all of the charter schools the applicant operates or manages are *individuals from low-income families,* and that the applicant will maintain the same, or a substantially similar, percentage of such students across all of its charter schools during the grant period;

(ii) That at least 50 percent of the students across all of the charter schools the applicant operates or manages are *individuals from low-income families,* and that the applicant will maintain the same, or a substantially similar, percentage of such students across all of its charter schools during the grant period; or

(iii) That at least 60 percent of the students across all of the charter schools the applicant operates or manages are *individuals from low-income families,* and that the applicant will maintain the same, or a substantially similar, percentage of such students across all of its charter schools during the grant period.

Priority 5—Number of Charter Schools Operated or Managed by the Eligible Applicant

Under this priority, applicants must demonstrate one of the following—

(i) That they currently operate or manage two to five charter schools;

(ii) That they currently operate or manage six to 20 charter schools; or

(iii) That they currently operate or manage 21 or more charter schools.

Priority 6—Rural Community

Under this priority, applicants must propose to replicate or expand one or more high-quality charter schools in—

(i) A *rural community;* or

(ii) A community that is not a *rural community.*

Priority 7—Replicating or Expanding High-Quality Charter Schools To Serve Native American Students

Under this priority, applicants must—

(i) Propose to replicate or expand one or more high-quality charter schools that—

(A) Utilize targeted outreach and recruitment in order to serve a *high proportion* of *Native American* students, consistent with nondiscrimination requirements contained in the U.S. Constitution and Federal civil rights laws;

(B) Have a mission and focus that will address the unique educational needs of *Native American* students, such as through the use of instructional programs and teaching methods that reflect and preserve *Native American language,* culture, and history; and

(C) Have a governing board with a substantial percentage of members who are members of *Indian Tribes* or *Indian organizations* located within the area to be served by the replicated or expanded charter school;

(ii) Submit a letter of support from at least one *Indian Tribe* or *Indian organization* located within the area to be served by the replicated or expanded charter school; and

(iii) Meaningfully collaborate with the *Indian Tribe(s)* or *Indian organization(s)* from which the applicant has received a letter of support in a timely, active, and ongoing manner with respect to the development and implementation of the educational program at the charter school.

Types of Priorities

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

Final Requirements

Applicants for funds under this program must meet one or more of the following requirements—

(a) Demonstrate that the applicant currently operates or manages more than one charter school. For purposes of this program, multiple charter schools are considered to be separate schools if each school—

(i) Meets each element of the definition of ''charter school'' under section 4310(2) of the ESEA; and

(ii) Is treated as a separate school by its authorized public chartering agency and the State in which the charter school is located, including for purposes of accountability and reporting under title I, part A of the ESEA.

(b) Provide information regarding any compliance issues, and how they were resolved, for any charter schools operated or managed by the applicant that have—

(i) Closed;

(ii) Had their charter(s) revoked due to problems with statutory or regulatory compliance, including compliance with sections 4310(2)(G) and (J) of the ESEA; or

(iii) Had their affiliation with the applicant revoked or terminated, including through voluntary disaffiliation.

(c) Provide a complete logic model (as defined in 34 CFR 77.1) for the grant project. The logic model must include the applicant's objectives for replicating or expanding one or more high-quality charter schools with funding under this program, including the number of high-quality charter schools the applicant proposes to replicate or expand.

(d) If the applicant currently operates, or is proposing to replicate or expand, a single-sex charter school or coeducational charter school that provides a single-sex class or extracurricular activity (collectively referred to as a ''single-sex educational program''), demonstrate that the existing or proposed single-sex educational program is in compliance with title IX of the Education Amendments of 1972 (20 U.S.C. 1681, *et seq.*) and its implementing regulations, including 34 CFR 106.34.

(e) Describe how the applicant currently operates or manages the high-quality charter schools for which it has presented evidence of success and how the proposed replicated or expanded charter schools will be operated or managed, including the legal relationship between the applicant and its schools. If a legal entity other than the applicant has entered or will enter into a performance contract with an authorized public chartering agency to operate or manage one or more of the applicant's schools, the applicant must also describe its relationship with that entity.

(f) Describe how the applicant will solicit and consider input from parents and other members of the community on the implementation and operation of each replicated or expanded charter

school, including in the area of school governance.

(g) Describe the lottery and enrollment procedures that will be used for each replicated or expanded charter school if more students apply for admission than can be accommodated, including how any proposed weighted lottery complies with section 4303(c)(3)(A) of the ESEA.

(h) Describe how the applicant will ensure that all eligible children with disabilities receive a free appropriate public education in accordance with part B of the IDEA.

(i) Describe how the proposed project will assist *educationally disadvantaged students* in mastering challenging State academic standards.

(j) Provide a budget narrative, aligned with the activities, target grant project outputs, and outcomes described in the logic model, that outlines how grant funds will be expended to carry out planned activities.

(k) Provide the applicant's most recent independently audited financial statements prepared in accordance with generally accepted accounting principles.

(l) Describe the applicant's policies and procedures to assist students enrolled in a charter school that closes or loses its charter to attend other high-quality schools.

(m) Provide—

(i) A request and justification for waivers of any Federal statutory or regulatory provisions that the applicant believes are necessary for the successful operation of the charter schools to be replicated or expanded; and

(ii) A description of any State or local rules, generally applicable to public schools, that will be waived, or otherwise not apply, to such schools.

Final Definitions

Academically poor-performing public school means:

(a) A school identified by the State for comprehensive support and improvement under section 1111(c)(4)(D)(i) of the ESEA; or

(b) A public school otherwise identified by the State or, in the case of a charter school, its authorized public chartering agency, as similarly academically poor-performing.

Educationally disadvantaged student means a student in one or more of the categories described in section 1115(c)(2) of the ESEA, which include children who are economically disadvantaged, students who are children with disabilities, migrant students, English learners, neglected or delinquent students, homeless students, and students who are in foster care.

High proportion, when used to refer to *Native American* students, means a fact-specific, case-by-case determination based upon the unique circumstances of a particular charter school or proposed charter school. The Secretary considers ''high proportion'' to include a majority of *Native American* students. In addition, the Secretary may determine that less than a majority of *Native American* students constitutes a ''high proportion'' based on the unique circumstances of a particular charter school or proposed charter school, as described in the application for funds.

Indian organization means an organization that—

(1) Is legally established—

(i) By Tribal or inter-Tribal charter or in accordance with State or Tribal law; and

(ii) With appropriate constitution, by-laws, or articles of incorporation;

(2) Includes in its purposes the promotion of the education of Indians;

(3) Is controlled by a governing board, the majority of which is Indian;

(4) If located on an Indian reservation, operates with the sanction or by charter of the governing body of that reservation;

(5) Is neither an organization or subdivision of, nor under the direct control of, any institution of higher education; and

(6) Is not an agency of State or local government.

Indian Tribe means a federally-recognized or a State-recognized Tribe.

Individual from a low-income family means an individual who is determined by a State educational agency or local educational agency to be a child from a low-income family on the basis of (a) data used by the Secretary to determine allocations under section 1124 of the ESEA, (b) data on children eligible for free or reduced-price lunches under the Richard B. Russell National School Lunch Act, (c) data on children in families receiving assistance under part A of title IV of the Social Security Act, (d) data on children eligible to receive medical assistance under the Medicaid program under title XIX of the Social Security Act, or (e) an alternate method that combines or extrapolates from the data in items (a) through (d) of this definition.

Institution of higher education means an educational institution in any State that—

(i) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, or persons who meet the requirements of section 484(d)of the HEA;

(ii) Is legally authorized within such State to provide a program of education beyond secondary education;

(iii) Provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;

(iv) Is a public or other nonprofit institution; and

(v) Is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

Native American means an Indian (including an Alaska Native), Native Hawaiian, or Native American Pacific Islander.

Native American language means the historical, traditional languages spoken by *Native Americans.*

Rural community means a community that is served by a local educational agency that is eligible to apply for funds under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under title V, part B of the ESEA. Applicants may determine whether a particular local educational agency is eligible for these programs by referring to information on the following Department websites. For the SRSA program: *www2.ed.gov/programs/reapsrsa/eligible16/index.html.* For the RLIS program: *www2.ed.gov/programs/reaprlisp/eligibility.html.*

Final Selection Criteria

(a) *Quality of the eligible applicant.* In determining the quality of the eligible applicant, the Secretary considers one or more of the following factors:

(i) The extent to which the academic achievement results (including annual student performance on statewide assessments, annual student attendance and retention rates, and, where applicable and available, student academic growth, high school graduation rates, college attendance rates, and college persistence rates) for *educationally disadvantaged students* served by the charter schools operated or managed by the applicant have exceeded the average academic

achievement results for such students served by other public schools in the State.

(ii) The extent to which one or more charter schools operated or managed by the applicant have closed; have had a charter revoked due to noncompliance with statutory or regulatory requirements; or have had their affiliation with the applicant revoked or terminated, including through voluntary disaffiliation.

(iii) The extent to which one or more charter schools operated or managed by the applicant have had any significant issues in the area of financial or operational management or student safety, or have otherwise experienced significant problems with statutory or regulatory compliance that could lead to revocation of the school's charter.

(b) *Significance of contribution in assisting educationally disadvantaged students.*

In determining the significance of the contribution the proposed project will make in expanding educational opportunities for *educationally disadvantaged students* and enabling those students to meet challenging State academic standards, the Secretary considers one or more of the following factors:

(i) The extent to which charter schools currently operated or managed by the applicant serve *educationally disadvantaged students,* particularly students with disabilities and English learners, at rates comparable to surrounding public schools or, in the case of virtual charter schools, at rates comparable to public schools in the State.

(ii) The quality of the plan to ensure that the charter schools the applicant proposes to replicate or expand will recruit, enroll, and effectively serve *educationally disadvantaged students,* particularly students with disabilities and English learners.

(c) *Quality of the evaluation plan for the proposed project.*

In determining the quality of the evaluation plan for the proposed project, the Secretary considers the extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the proposed project, as described in the applicant's logic model (as defined in 34 CFR 77.1), and that will produce quantitative and qualitative data by the end of the grant period.

(d) *Quality of the management plan.*

In determining the quality of the applicant's management plan, the Secretary considers the ability of the applicant to sustain the operation of the replicated or expanded charter schools after the grant has ended, as demonstrated by the multi-year financial and operating model required under section 4305(b)(3)(B)(iii) of the ESEA.

This document does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This document does *not* solicit applications. In any year in which we choose to use one or more of these priorities, requirements, definitions, and selection criteria, we invite applications through a notice in the **Federal Register**.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, it must be determined whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

Under Executive Order 13771, for each new rule that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866, and that imposes total costs greater than zero, it must identify two deregulatory actions. For Fiscal Year 2019, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. Because the proposed regulatory action is not significant, the requirements of Executive Order 13771 do not apply.

We have also reviewed this final regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these final priorities, requirements, definitions, and selection criteria only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that this regulatory action is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, and Tribal

governments in the exercise of their governmental functions.

In accordance with these Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

Discussion of Potential Costs and Benefits

The Department believes that this regulatory action does not impose significant costs on eligible entities, whose participation in this program is voluntary. While this action does impose some requirements on participating CMOs that are cost-bearing, the Department expects that applicants for this program will include in their proposed budgets a request for funds to support compliance with such cost-bearing requirements. Therefore, costs associated with meeting these requirements are, in the Department's estimation, minimal.

This regulatory action strengthens accountability for the use of Federal funds by helping to ensure that the Department selects for CSP grants the CMOs that are most capable of expanding the number of high-quality charter schools available to our Nation's students, consistent with a major purpose of the CSP as described in section 4301(3) of the ESEA. The Department believes that these benefits to the Federal government and to State educational agencies outweigh the costs associated with this action.

Regulatory Alternatives Considered

The Department believes that the priorities, requirements, definitions, and selection criteria are needed to administer the program effectively. As an alternative to the selection criteria announced in this document, the Department could choose from among the selection criteria authorized for CSP grants to CMOs in section 4305(b) of the ESEA (20 U.S.C. 7221c) and the general selection criteria in 34 CFR 75.210. We do not believe that these criteria provide a sufficient basis on which to evaluate the quality of applications. In particular, the criteria do not sufficiently enable the Department to assess an applicant's past performance with respect to the operation of high-quality charter schools or with respect to compliance issues that the applicant has encountered.

We note that several of the final priorities, requirements, definitions, and selection criteria are based on priorities, requirements, definitions, selection criteria, and other provisions in the authorizing statute for this program.

Paperwork Reduction Act of 1995

The final priorities, requirements, and selection criteria contain information collection requirements that are approved by OMB under OMB control number 1894–0006; the final priorities, requirements, and selection criteria do not affect the currently approved data collection.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of the Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: November 27, 2018.

James C. Blew,

Acting Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2018–26095 Filed 11–29–18; 8:45 am]

BILLING CODE 4000–01–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 201 and 202

[Docket Nos. 2018–2, 2018–3]

Group Registration of Newsletters and Serials

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The U.S. Copyright Office is amending its regulations governing the group registration options for newsletters and serials. With respect to group newsletters, the final rule amends the definition of ''newsletter,'' eliminating the requirement that each issue must be a work made for hire, and the provision stating that group newsletter claims must be received within three months after publication. Under the final rule, newsletter publishers now should register their issues with the online application and upload a digital copy of each issue through the electronic registration system instead of submitting them in a physical form. With respect to group serials, the final rule clarifies that serials governed by the rule generally must be published at intervals of a week or longer, and that the publication dates provided in the application need not match the dates appearing on the issues themselves. In addition, the rule phases out the paper application for group serials and the submission of physical copies. Beginning one year after the rule goes into effect, serial publishers will be required to use the online application for group serials and to upload a digital copy of each issue, rather than submitting them in a physical form. The final rule updates the regulations for both newsletters and serials by confirming that publishers do not need to provide the Library of Congress with complimentary subscriptions to or microfilm of each issue as a condition for registering their works with the Office, but newsletter and serial issues that are submitted for purposes of registration will no longer satisfy the mandatory deposit requirement. Publishers will be expected to separately provide the Library with two complimentary subscriptions if the newsletter or serial is published in the United States in a physical format (unless the publisher is informed that the publication is not needed for the Library's collections). If the newsletter or serial is published solely in electronic form, the publisher will remain exempt from mandatory deposit

unless the Office issues a formal demand for copies of that publication.

DATES: *Effective date:* December 31, 2018.

FOR FURTHER INFORMATION CONTACT: Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice, or Erik Bertin, Deputy Director of Registration Policy and Practice, by telephone at 202–707–8040, or by email at *rkas@copyright.gov* or *ebertin@copyright.gov; or* Cindy Paige Abramson, Assistant General Counsel, by telephone at 202–707–0676, or by email at *ciab@copyright.gov.*

SUPPLEMENTARY INFORMATION: On May 17, 2018, the Copyright Office (the ''Office'') published two notices of proposed rulemaking (''NPRMs'') setting forth proposed amendments to the regulations governing the group registration options for newsletters and serials. 83 FR 22902 (May 17, 2018); 83 FR 22896 (May 17, 2018). The Office did not receive any comments in response to the NPRM on group newsletters. In response to the NPRM on group serials, the Office received comments from the Copyright Alliance and one individual.[1] Having reviewed and carefully considered these comments, the Office is issuing a final rule that is nearly identical to the rule proposed in the NPRM on group newsletters, and substantially similar to the rule proposed in the NPRM on group serials; in both cases, the Office has made a few modifications reflecting the concerns raised by the comments regarding online registration and electronic submission of deposits regarding group registration of serials, which are discussed in more detail below.[2]

Topics Involving Solely the Group Registration Option for Newsletters

The final rule revises current practices for the group registration option for newsletters. It clarifies and expands the category of works eligible for this option by amending the definition of what constitutes a ''newsletter'' and by making clear that newsletters need not be collective works. It also eliminates the work-made-for-hire requirement and the requirement that the issues must be submitted within three months after publication.

The final rule also phases out the paper application (known as Form G/DN) and generally requires applicants to register their newsletters using the designated online application. In addition, it requires applicants to upload their newsletters in a digital format through the electronic registration system. If an applicant submits Form G/DN after the effective date of the final rule, the Office will refuse to register the claim. Likewise, the Office will refuse registration if an applicant submits physical copies of a newsletter, such as printed copies or photocopies, or digital copies that have been saved onto a flash drive, disc, or other physical storage medium.

Topics Involving Solely the Group Registration Options for Serials

The final rule codifies, clarifies, and revises current practices for the group registration option for serials.

First, the final rule requires that each claim must include at least two issues, that each issue must be a work made for hire, and that the author and copyright claimant for each issue must be the same person or organization.

Second, the final rule eliminates the current requirement that each issue must have been created no more than one year prior to publication.

Third, the final rule requires that applicants may only register serials that are ''generally . . . published at intervals of a week or longer'' (*e.g.,* weekly, every two weeks, monthly), and requires that the issues be ''published in a given three month period'' within ''the same calendar year.'' The proposed rule reflected the current practice that issues must be published at intervals of one week or more, however, the Copyright Alliance noted that publishers sometimes distribute two issues during the same week, such as when a ''special'' issue is published in addition to a regularly scheduled issue.[3] To accommodate these practices, the final rule clarifies that a serial must ''generally'' be published at intervals of one week or more. The Copyright Alliance also explained that issues may be published in one month but contain an issue date for the following month and, in the case of issues published in December, may contain the issue date for January of the following year.[4] Based on this information, the final rule eliminates the requirements that the issues themselves must bear issue dates reflecting the same three-month period and the same calendar year. Instead, applicants will be required to provide a publication date for each issue in the group.

Fourth, the final rule requires that each issue must be an ''all-new'' collective work that has not been previously published, and each issue must be fixed and distributed as a discrete, self-contained collective work. The Copyright Alliance expressed concern that this requirement may prevent publishers from registering ''enhanced, digital issues which may contain content hosted on and linked to another platform such as videos and blogs that allow the reader to manipulate or interact with the issue.'' [5] The Office does not believe a change to the language of the rule is necessary. If a particular issue contains enhanced content, such as an embedded video, the registration will cover that material if it is included within the deposit and if the examiner can access and view that material in the context where it appears within the actual serial.[6] Any additional content that appears on the publisher's website—but does not appear within the issues themselves—must be registered separately.

Fifth, the final rule generally requires applicants to register their issues using the online application designated for group serial claims, and eliminates the paper application known as Form SE/Group.[7]

Finally, the final rule amends the deposit requirements by requiring applicants to upload their issues in digital form through the electronic registration system, instead of submitting them in a physical form, absent exceptional cases. While the Copyright Alliance agreed that requiring publishers to upload a digital copy of each issue ''will generally 'increase the efficiency of the group registration

[1] The comments can be found on the Copyright Office's website at *https://www.copyright.gov/rulemaking/group-serials/.*

[2] The final rule also includes a few technical amendments. The rule has been revised to account for a recent amendment that was made by the final rule on group registration of newspapers. *See* 83 FR 25375 (June 1, 2018). The rule removes cross-references to the prior regulations on newsletters and serials. *See* 37 CFR 202.4(l), 202.6(e)(1). It also corrects an error made by the **Federal Register** in publishing the regulation on supplementary registration. *See* 82 FR 27424 (June 15, 2017). Specifically, the rule removes the term ''SE.'' (which is an abbreviation for ''southeast'') and replaces it with the term ''SE'' (which is the correct abbreviation for the term ''serials''). *See* 37 CFR 202.6(e)(1).

[3] Copyright Alliance Comment at 2–3.

[4] Copyright Alliance Comment at 2.

[5] Copyright Alliance Comment at 2.

[6] *See* U.S. Copyright Office, Compendium of U.S. Copyright Office Practices, sec. 1508.1 (3d ed. 2017) (noting that the Office ''must be able to perceive the entire content of the work, including the context where each element appears within the work as a whole'').

[7] An individual filed a public comment supporting the requirement for applicants to file electronically and stated that he believed this would promote efficiency, reduce the burden on applicants, and encourage broader participation in the registration system. Kotelnikov Comment at 1. The Copyright Alliance also agreed that eliminating the paper form and requiring publishers to use the online application will ''facilitate economy and efficiency.'' Copyright Alliance Comment at 3.

process,' '' it questioned whether the electronic registration system is capable of handling large digital files, whether the process of uploading these files may be burdensome for some publishers, and whether the Office has implemented and deployed robust security measures to protect its digital deposits.[8] The Copyright Alliance suggested that the Office should gradually phase out the paper application and continue to accept physical deposits ''[u]ntil the registration system is able to fully accommodate the digital deposit process.'' [9] After carefully reviewing these comments, the Office has decided to adopt the online digital deposit requirement proposed in the NPRM, but to give publishers time to adjust to this change, the Office will continue to accept physical deposits and paper applications for another twelve months. Generally, if a publisher submits a Form SE/Group or submits a physical deposit after the phase-out period has expired, the Office will refuse to register the claim.

The Office has concluded that the other concerns raised by the Copyright Alliance about digital deposits were already adequately addressed by the proposed rule. The Office has accepted digital deposits from serial publishers since September 14, 2012, and is not aware of any technical issues that have prevented them from using the upload feature. The current registration system will accept any digital deposit, as long as it is submitted in an acceptable file format and does not exceed 500MB. And as noted in the proposed rule, the files may be compressed to comply with this limit, if necessary.

The Office first introduced its electronic registration system more than a decade ago, and as the Copyright Alliance acknowledged, the Office has not experienced any issues concerning the security of its digital deposits.[10] The Office utilizes a multi-level security design to ensure the confidentiality and integrity of the files that are stored within this system. The system is certified to operate at the moderate security level, as defined by the FIPS 200 and SP 800–53 standards published by the National Institute of Standards and Technology.[11] The entire system operates on hardware and software that is dedicated to this system and it does not share storage resources with other systems. Strict access controls have been placed throughout the system that enforce the principle of ''least privilege,'' meaning that each type of user may access only what is needed for that particular role. The system is also protected by multiple levels of network firewalls and other network-based security, such as anti-malware protection, and it is continuously monitored to ensure that these security controls remain effective.

In addition to these technical measures, the Office's regulations restrict the parties who may obtain access to its digital registration deposits. Briefly stated, the Office will provide a copy of a registration deposit only if it receives (i) written authorization from the copyright claimant or the owner of the exclusive rights in the work, (ii) a written request from an attorney representing a plaintiff or defendant in litigation involving that work, or (iii) a court order directing the Office to produce a copy of that work for use in a legal proceeding.[12]

Similarly, regulations restrict how parties may access digital registration deposits that have been transferred to the Library of Congress. Specifically, the Library currently provides access to the digital registration deposits that it receives through the group registration option for newspaper issues, subject to certain conditions specified in the regulations.[13] But the Library currently does not provide public access to digital registration deposits for any other type of work, including deposits submitted under the group registration option for serial issues. As noted in the NPRM on group newspapers, the Library would like to expand the regulation to include other types of digital registration deposits, but before doing so, the Office will conduct separate rulemakings to provide notice and seek comment from the public.[14]

Topics Involving Both the Group Registration Option for Newsletters and the Group Registration Option for Serials

The final rule makes four changes that modify the regulations governing both newsletters and serials.

First, the rule memorializes the Office's longstanding position regarding the scope of a group registration. It confirms that a registration for a group of newsletter or serial issues covers each issue in the group. It also confirms that if each issue is a collective work, the registration will cover the articles, photographs, illustrations, or other contributions appearing within those issues if they are fully owned by the copyright claimant and if they were first published in those issues.

Second, the rule confirms that newsletter and serial publishers will no longer be required to provide the Library of Congress with complimentary subscriptions to or microfilm copies of their issues as a condition for seeking a group registration under section 408(c)(1) of the Copyright Act. The Copyright Alliance applauded the elimination of this requirement.[15] But newsletter and serial issues that are submitted to the Office for purposes of registration will no longer satisfy the mandatory deposit requirement set forth in section 407 of the Copyright Act.[16]

Third, the rule provides guidance on how newsletter and serial publishers may comply with the mandatory deposit requirement. If a newsletter or serial is published in the United States in a physical format, the publisher will be expected to provide the Library with two complimentary subscriptions to physical copies of that publication, unless the publisher is notified that the newsletter or serial is not needed for the Library's collections. The rule does not change for newsletters or serials published solely in electronic format; in that case, the publisher will not be expected to provide copies of that publication unless the Office issues a formal demand for that newsletter or serial under section 202.24 of the regulations.

Fourth, the final rule includes provisions to address the Copyright Alliance's concerns about the potential burdens of electronic filing and digital deposit on applicants transitioning from traditional print to digital media.[17] These provisions permit the Office to waive the online filing requirement in ''an exceptional case'' and ''subject to such conditions as the Associate Register and Director of the Office of Registration Policy and Practice may impose on the applicant.'' Registrants who do not have internet access or are unable to use the online applications may contact the Office, and the Office will review the specific details of their cases and determine their eligibility.

[8] Copyright Alliance Comment at 3.

[9] Copyright Alliance Comment at 3.

[10] Copyright Alliance Comment at 3.

[11] *See* NIST, Federal Information Processing Standards Publication 200, Minimum Security Requirements for Federal Information and Information Systems, and NIST, Special Publication 800–53, Recommended Security Controls for Federal Information Systems, *available at https://csrc.nist.gov/publications/*.

[12] *See* 37 CFR 201.2(d)(2).

[13] *See* 37 CFR 202.18 (limiting access to electronic works to ''two Library of Congress authorized users via a secure server over a secure network that serves Library of Congress premises'').

[14] *See* 82 FR at 51377.

[15] Copyright Alliance Comment at 1.

[16] The final rule does not apply to newspapers; deposits submitted in compliance with group registration of newspapers also satisfy the mandatory deposit requirement. 37 CFR 202.19(d)(2)(x).

[17] Copyright Alliance Comment at 3.

The rule also provides that applicants may request special relief under § 202.20(d) if they are unable to comply with the deposit requirements for these group options. These provisions are consistent with recently amended rules for group registration of contributions to periodicals and of photographs (published and unpublished) and for supplemental registration.[18]

The Office plans to offer several resources for newsletter and serial publishers that should ease the transition to these new requirements, including an updated version of the *Compendium of U.S. Copyright Office Practices, Third Edition* and updated Circulars that discuss these group registration options and the mandatory deposit requirements for these types of works. The Office will also update the onscreen instructions and help text that accompanies the online applications for each type of claim, and add warnings to the corresponding paper applications to notify applicants that Forms G/DN and SE/Group will soon be phased out.

List of Subjects

37 CFR Part 201

Copyright.

37 CFR Part 202

Copyright.

Final Regulations

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR parts 201 and 202 as follows:

PART 201—GENERAL PROVISIONS

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

■ 2. Amend § 201.1 by revising paragraph (c)(6) to read as follows:

§ 201.1 Communication with the Copyright Office.

* * * * *

(c) * * *

(6) *Mandatory Deposit Copies.* Mandatory deposit copies of published works submitted for the Library of Congress under 17 U.S.C. 407 and § 202.19 of this chapter (including complimentary subscriptions to serial publications), and newspaper microfilm copies submitted under § 202.4(e) of this chapter, should be addressed to: Library of Congress, U.S. Copyright Office, Attn: 407 Deposits, 101 Independence Avenue SE, Washington, DC 20559–6600.

* * * * *

■ 3. Amend § 201.3 by revising paragraph (c)(6) to read as follows:

§ 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Division.

* * * * *

(c) * * *

Registration, recordation and related services	Fees ($)
* * * * * * *	
(6) Registration of a claim in a group of serials (per issue, minimum two issues)	25
* * * * * * *	

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PART 202—PREREGISTRATION AND REGISTRATION OF CLAIMS TO COPYRIGHT

■ 4. The authority citation for part 202 continues to read as follows:

Authority: 17 U.S.C. 408(f), 702.

§ 202.3 [Amended]

■ 5. Amend § 202.3 by removing and reserving paragraphs (b)(6) and (9).

■ 6. Amend § 202.4 as follows:

■ a. Add paragraphs (d) and (f).

■ b. In paragraph (l) remove ''through (7), or (9)''.

■ c. Revise the first sentence of paragraph (n).

The additions and revision read as follows:

§ 202.4 Group registration.

* * * * *

(d) *Group registration of serials.* Pursuant to the authority granted by 17 U.S.C. 408(c)(1), the Register of Copyrights has determined that a group of serial issues may be registered with one application, the required deposit, and the filing fee required by § 201.3(c) of this chapter, if the following conditions are met:

(1) *Eligible works.* (i) All the issues in the group must be serials.

(ii) The group must include at least two issues.

(iii) Each issue in the group must be an all-new collective work that has not been previously published, each issue must be fixed and distributed as a discrete, self-contained collective work, and the claim in each issue must be limited to the collective work.

(iv) Each issue in the group must be a work made for hire, and the author and claimant for each issue must be the same person or organization.

(v) The serial generally must be published at intervals of a week or longer. All of the issues must be published within three months, under the same continuing title, within the same calendar year, and the applicant must specify the date of publication for each issue in the group.

(2) *Application.* The applicant may complete and submit the online application designated for a group of serial issues. Alternatively, the applicant may complete and submit a paper application using Form SE/Group, provided that the application is received on or before December 30, 2019. The application may be submitted by any of the parties listed in § 202.3(c)(1).

(3) *Deposit.* The applicant must submit one complete copy of each issue that is included in the group. Copies submitted under this paragraph will be considered solely for the purpose of registration under 17 U.S.C. 408, and will not satisfy the mandatory deposit requirement under 17 U.S.C. 407.

(i) The issues may be submitted in digital form if the following requirements have been met. Each issue must be contained in a separate electronic file. The applicant must use the file-naming convention and submit digital files in accordance with instructions specified on the Copyright Office's website. The files must be submitted in Portable Document Format (PDF), they must be assembled in an orderly form, and they must be uploaded to the electronic registration system as individual electronic files (*i.e.,* not .zip files). The files must be viewable and searchable, contain

[18] 37 CFR 202.4(g)(9), (h)(11), (i)(11), 202.6(e)(7); *see also* 82 FR 47415, 47419 (Oct. 12, 2017) (proposing same for group registration of unpublished works).

embedded fonts, and be free from any access restrictions (such as those implemented through digital rights management) that prevent the viewing and examination of the work. The file size for each uploaded file must not exceed 500 megabytes, but files may be compressed to comply with this requirement.

(ii) Alternatively, the applicant may submit a physical copy of each issue, provided that the deposit is received on or before December 30, 2019. If the claim is submitted with an online application, the copies must be accompanied by the required shipping slip generated by the electronic registration system, the shipping slip must be attached to one of the copies, the copies and the shipping slip must be included in the same package, and the package must be sent to the address specified on the shipping slip.

(4) *Exceptional cases.* In an exceptional case, the Copyright Office may waive the online filing requirement set forth in paragraph (d)(2) of this section or may grant special relief from the deposit requirement under § 202.20(d), subject to such conditions as the Associate Register of Copyrights and Director of the Office of Registration Policy and Practice may impose on the applicant.

* * * * *

(f) *Group registration of newsletters.* Pursuant to the authority granted by 17 U.S.C. 408(c)(1), the Register of Copyrights has determined that a group of newsletter issues may be registered with one application, the required deposit, and the filing fee required by § 201.3(c) of this chapter, if the following conditions are met:

(1) *Eligible works.* (i) All the issues in the group must be newsletters. For purposes of this section, a newsletter is a serial that is published and distributed by mail, electronic media, or other medium, including paper, email, or download. Publication must usually occur at least two days each week and the newsletter must contain news or information that is chiefly of interest to a special group, such as trade and professional associations, colleges, schools, or churches. Newsletters are typically distributed through subscriptions, but are not distributed through newsstands or other retail outlets.

(ii) The group must include at least two issues.

(iii) Each issue in the group must be an all-new issue or an all-new collective work that has not been previously published, and each issue must be fixed and distributed as a discrete, self-contained work.

(iv) The author and claimant for each issue must be the same person or organization.

(v) All the issues in the group must be published under the same continuing title, they must be published within the same calendar month and bear issue dates within that month, and the applicant must identify the earliest and latest date that the issues were published during that month.

(2) *Application.* The applicant must complete and submit the online application designated for a group of newsletter issues. The application may be submitted by any of the parties listed in § 202.3(c)(1).

(3) *Deposit.* The applicant must submit one complete copy of each issue that is included in the group. The issues must be submitted in digital form, and each issue must be contained in a separate electronic file. The applicant must use the file-naming convention and submit digital files in accordance with instructions specified on the Copyright Office's website. The files must be submitted in Portable Document Format (PDF), they must be assembled in an orderly form, and they must be uploaded to the electronic registration system as individual electronic files (*i.e.,* not .zip files). The files must be viewable and searchable, contain embedded fonts, and be free from any access restrictions (such as those implemented through digital rights management) that prevent the viewing and examination of the work. The file size for each uploaded file must not exceed 500 megabytes, but files may be compressed to comply with this requirement. Copies submitted under this paragraph will be considered solely for the purpose of registration under 17 U.S.C. 408, and will not satisfy the mandatory deposit requirement under 17 U.S.C. 407.

(4) *Exceptional cases.* In an exceptional case, the Copyright Office may waive the online filing requirement set forth in paragraph (f)(2) of this section or may grant special relief from the deposit requirement under § 202.20(d), subject to such conditions as the Associate Register of Copyrights and Director of the Office of Registration Policy and Practice may impose on the applicant.

* * * * *

(n) *The scope of a group registration.* When the Office issues a group registration under paragraphs (d), (e), or (f) of this section, the registration covers each issue in the group and each issue is registered as a separate work or a separate collective work (as the case may be). * * *

* * * * *

§ 202.6 [Amended]

■ 7. In § 202.6(e)(1) remove ''§ 202.3(b)(6) through (10) or''; and remove ''SE.'' and add ''SE'' in its place.

■ 8. Amend § 202.19 by adding paragraph (d)(2)(xi) to read as follows:

§ 202.19 Deposit of published copies or phonorecords for the Library of Congress.

* * * * *

(d) * * *

(2) * * *

(xi) In the case of serials (as defined in § 202.3(b)(1)(v), but excluding newspapers) published in the United States in a physical format, or in both a physical and an electronic format, the copyright owner or the owner of the exclusive right of publication must provide the Library of Congress with two complimentary subscriptions to the serial, unless the Copyright Acquisitions Division informs the owner that the serial is not needed for the Library's collections. Subscription copies must be physically mailed to the Copyright Office, at the address for mandatory deposit copies specified in § 201.1(c) of this chapter, promptly after the publication of each issue, and the subscription(s) must be maintained on an ongoing basis. The owner may cancel the subscription(s) if the serial is no longer published by the owner, if the serial is no longer published in the United States in a physical format, or if the Copyright Acquisitions Division informs the owner that the serial is no longer needed for the Library's collections. In addition, prior to commencing the subscriptions, the owner must send a letter to the Copyright Acquisitions Division at the address specified in § 201.1(b) of this chapter confirming that the owner will provide the requested number of subscriptions for the Library of Congress. The letter must include the name of the publisher, the title of the serial, the International Standard Serial Number (''ISSN'') that has been assigned to the serial (if any), and the issue date and the numerical or chronological designations that appear on the first issue that will be provided under the subscriptions.

* * * * *

§ 202.20 [Amended]

■ 9. Amend § 202.20 by removing and reserving paragraph (c)(2)(xvii).

■ 10. In Appendix B to Part 202, revise the last sentence of paragraph a. to read as follows:

Appendix B to Part 202—''Best Edition'' of Published Copyrighted Works for the Collections of the Library of Congress

a. * * * (For works first published only in a country other than the United States, the law requires the deposit of the work as first published.)

* * * * *

Dated: November 5, 2018.

Karyn A. Temple,

Acting Register of Copyrights.

Approved by:

Carla D. Hayden,

Librarian of Congress.

[FR Doc. 2018–26091 Filed 11–29–18; 8:45 am]

BILLING CODE 1410–30–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2018–0413; FRL–9985–75–Region 9]

Revisions to California State Implementation Plan; South Coast Air Quality Management District; Stationary Source Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing action on a revision to the South Coast Air Quality Management District (SCAQMD or District) portion of the California State Implementation Plan (SIP). We are finalizing a conditional approval of one rule governing issuance of permits for stationary sources, including review and permitting of major sources and major modifications under part D of title I of the Clean Air Act (CAA). Specifically, the revision pertains to SCAQMD Rule 1325—*Federal $PM_{2.5}$ New Source Review Program.*

DATES: This rule will be effective on December 31, 2018.

ADDRESSES: The EPA has established a docket for this action under Docket No. EPA–R09–OAR–2018–0413. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *http://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region 9, (415) 972–3534, *yannayon.laura@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, the terms ''we,'' ''us,'' and ''our'' refer to EPA.

Table of Contents

I. Proposed Action

On August 8, 2018 (83 FR 39012), the EPA proposed to conditionally approve the following rule that was submitted for incorporation into the SCAQMD portion of the California SIP.

TABLE 1—SUBMITTED RULE

Rule No.	Rule title	Amended	Submitted
1325	Federal $PM_{2.5}$ New Source Review Program	11/4/16	5/8/17

We proposed a conditional approval of this rule because we determined that, separate from the deficiencies listed in Section II.B of our proposed rulemaking action, the rule met the statutory requirements for SIP revisions as specified in section 110(l) of the CAA, as well as the substantive statutory and regulatory requirements for a nonattainment New Source Review (NSR) permit program as contained in CAA sections 110(a)(2)(C) and 173(a) through (c), and 40 CFR 51.165 that pertain to a $PM_{2.5}$ nonattainment area classified as Serious. Moreover, we concluded that if the State submits the changes it committed to submit in its July 16, 2018 commitment letter, the identified deficiencies will be cured.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. During this period, we received two comments on the proposed rule. These comments raised issues that are outside the scope of our proposed approval of Rule 1325, including air pollution monitoring in China and India, climate change, and wind and solar power costs and regulations. None of those comments are germane to our evaluation of Rule 1325.

III. EPA Action

No comments were submitted that change our assessment that submitted Rule 1325 satisfies the applicable CAA requirements. Therefore, under CAA sections 110(k)(4) and 301(a), and for the reasons set forth in our August 8, 2018 proposed rule, we are finalizing the conditional approval of Rule 1325. This action incorporates Rule 1325 into the federally enforceable SIP and will be codified through revisions to 40 CFR 52.220 (Identification of plan) and 40 CFR 52.248 (Identification of plan—conditional approval).

If the State meets its commitment to submit the required changes, the revisions to Rule 1325 will remain a part of the SIP until EPA takes final action approving or disapproving the new SIP revisions. However, if the State fails to submit these revisions within the required timeframe, the conditional approval will automatically become a disapproval, and EPA will issue a finding of disapproval. EPA is not required to propose the finding of disapproval.

In addition, because we are finalizing our proposed action, we are removing the existing Rule 1325 from the SCAQMD portion of the California SIP.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the SCAQMD rule listed in Table 1 of this preamble. The EPA has made, and will continue to make, these materials available electronically through *www.regulations.gov* and in hard copy at the EPA Region IX Office (please contact the person identified in the **FOR**

FURTHER INFORMATION CONTACT section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the 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 the 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).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, New Source Review, Particulate matter, Reporting and recordkeeping requirements.

Dated: October 11, 2018.

Deborah Jordan,

Acting Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(458)(i)(A)(*2*) and (c)(509) to read as follows:

§ 52.220 Identification of plan—in part.

* * * * *

(c) * * *

(458) * * *

(i) * * *

(A) * * *

(*2*) Previously approved on May 1, 2015 in paragraph (c)(458)(i)(A)(*1*) of this section and now deleted with replacement in paragraph (c)(509)(i)(A)(*1*), Rule 1325.

* * * * *

(509) New and amended regulations for the following APCDs were submitted on May 8, 2017 by the Governor's designee.

(i) *Incorporation by reference.* (A) South Coast Air Quality Management District.

(1) Rule 1325, ''Federal $PM_{2.5}$ New Source Review Program'' amended on November 4, 2016.

(*2*) [Reserved]

(B) [Reserved]

(ii) [Reserved]

* * * * *

■ 3. Section 52.248 is amended by adding paragraph (f) to read as follows:

§ 52.248 Identification of plan—conditional approval.

* * * * *

(f) The EPA is conditionally approving a California State Implementation Plan (SIP) revision submitted on May 8, 2017, updating Rule 1325—Federal $PM_{2.5}$ New Source Review Program, for the South Coast Air Quality Management District. The conditional approval is based on a commitment from the State to submit a SIP revision that will correct the identified deficiencies. If the State fails to meet its commitment by December 30, 2019, the conditional approval is treated as a disapproval.

* * * * *

[FR Doc. 2018–25900 Filed 11–29–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260, 261, and 262

[EPA–HQ–OLEM–2018–0646; FRL9986–91–OLEM]

Safe Management of Recalled Airbags

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule with request for comments.

SUMMARY: The Environmental Protection Agency (EPA) is issuing this interim final rule in response to the urgent public health issue posed by recalled Takata airbag inflators still installed in vehicles. With this rule, EPA is facilitating a more expedited removal of defective Takata airbag inflators from vehicles by dealerships, salvage yards and other locations for safe and environmentally sound disposal by exempting the collection of airbag waste

from hazardous waste requirements so long as certain conditions are met. The Agency is also seeking comment on this interim final rule.

DATES: This interim final rule is effective on November 30, 2018. Comments must be received on or before January 29, 2019. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions must be received on or before January 29, 2019.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OLEM–2018–0646, at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. 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, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, MC 5304P, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460, Tracy Atagi, at (703) 308–8672, (*atagi.tracy@epa.gov*).

SUPPLEMENTARY INFORMATION:

Preamble Outline

I. General Information

A. Does this action apply to me?

This action applies to entities that manage airbag waste (*i.e.,* discarded airbag modules and airbag inflators) that are subject to hazardous waste regulations. The dealerships performing the Takata recall work constitute the majority of the facilities that will be impacted by this rule. These dealerships fall under NAICS code 441: Motor Vehicle and Parts Dealers. EPA estimates that about 15,256 dealerships may be affected by this rule. Other potentially affected entities include those in NAICS code 336: Transportation Equipment Manufacturing, and in NAICS code 562: Waste Management and Remediation Services.

B. Why is EPA issuing an interim final rule?

Section 553(b)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedures are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for issuing this interim final rule without prior proposal and opportunity for comment because such notice and opportunity for comment would be impracticable and contrary to the public interest. Specifically, prompt promulgation of this rule without delay is necessary to protect human health and the environment by facilitating the urgent removal of dangerously defective Takata airbag inflators from vehicles, and by preventing defective Takata airbag inflators from scrap vehicles from being reused, while maintaining protection of human health and the environment during airbag waste collection, storage and disposal.

In its November 3, 2015 Coordinated Remedy Order, the U.S. Department of Transportation (DOT) National Highway Traffic Safety Administration (NHTSA) found that it was imperative to accelerate the rate of the recalls because ''[e]ach airbag inflator with the capacity to rupture, as the recalled Takata inflators do, presents an unreasonable risk of serious injury or death . . . Since the propensity for rupture increases with the age of the inflator, and increases even more when the vehicle has been exposed to consistent long-term HAH [high absolute humidity] conditions, the risk for injurious or lethal rupture increases with each passing day.'' [1] This report emphasizes that as the inflators get older, each day that passes brings forth an increased danger. In addition, as noted in a November 15, 2017 report prepared by the Independent Monitor for the Takata Restructuring on *The State of the Takata Recalls,* ''[t]he words 'grenade' and 'ticking time bomb' accurately convey the lethal potential of these defective inflators.'' [2]

Delaying promulgation of this rule through notice and comment procedures would be impracticable and contrary to the public interest because such a delay would further increase the risk of death or serious injury by slowing down the removal of defective Takata airbag inflators from vehicles and impeding the collection of defective airbag inflators from salvage yards and other locations (and increasing the potential for defective airbag inflators in scrap vehicles to be reused). This existing risk has now increased significantly since the date of the 2015 NHTSA report because of recent events that further heighten the urgency to accelerate the recall.

First, more time has passed since the date of the 2015 NHTSA study, and as noted in that study and reiterated in the 2017 study by the Independent Monitor, each passing day brings forth more danger. The danger is greater today than in 2015 because of the increased age of the inflators.

Second, with the recent amendment to DOT's Preservation Order on April 12, 2018, and with Takata's restructuring due to bankruptcy finalized on February 21, 2018, vehicle manufacturers no longer have to send recalled inflators to Takata warehouses

[1] National Highway Traffic Safety Administration (NHTSA), *Coordinated Remedy Order,* November 3, 2015, Docket No. NHTSA–2015–0055, paragraph 32. *https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/nhtsa-coordinatedremedyorder-takata.pdf.*

[2] The Independent Monitor of Takata and the Coordinated Remedy Program, *The State of the Takata Airbag Recalls,* November 15, 2017, page 1, paragraph 1. *https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/the_state_of_the_takata_airbag_recalls-report_of_the_independent_monitor_112217_v3_tag.pdf.*

for long-term storage but may now send them directly for disposal. EPA is encouraging this through today's conditional exemption, since long-term storage of recalled inflators can make the defect more dangerous. These recalled inflators that are sent directly to disposal are not covered by the amended Preservation Order and thus are regulated as hazardous waste, whereas in the past they were not regulated as waste under the original Preservation Order. As a result, many automobile dealers and other entities who continue to replace recalled airbag inflators at the current rate of repair could become subject to additional hazardous waste generator requirements in 40 CFR part 262, which would impose additional regulatory obligations on the dealers' and salvage vendors' management of the inflators. Through our conversations with DOT, the automobile manufacturers, automotive salvage vendors, and other affected stakeholders, EPA has learned that imposing full generator requirements on automobile dealers and salvage vendors who lack the expertise and experience in managing hazardous waste would result in the slowdown, rather than the necessary acceleration, of the recall effort, resulting in even greater harm to human health and the environment.[3]

This rule is intended to assist the automobile dealers and other entities in their handling of the airbags, and ensure delivery of the airbags to facilities that can more expertly manage these airbags in order to accelerate the recall. Thus, it is essential that there be no delay in promulgating this rule.

Third, there have continued to be deaths as recently as 2018 as a result of Takata airbag explosions. On January 1, 2018, there was a death in Malaysia[4], and before that, on July 13, 2017, a death in Australia[5] as well as another on July 19, 2017 in Florida[6] as a result of defective Takata airbags.

Finally, with respect to the effective date, EPA finds that it has good cause to make the revisions immediately effective under section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. 553(d), and section 3010(b) of RCRA, 42 U.S.C. 6930(b). Section 553(d) provides in pertinent part that final rules shall not become effective until 30 days after publication in the **Federal Register**, ''except . . . a substantive rule which grants or recognizes an exemption or relieves a restriction . . . or as otherwise provided by the agency for good cause''. RCRA section 3010(b) has similar provisions for an immediate effective date. It provides for an immediate effective date, rather than the usual six month period, for ''(1) a regulation with which the Administrator finds the regulated community does not need six months to come into compliance . . . . or (3) other good cause found and published with the regulation,'' among other exceptions.

The purpose of section 553(d) of the APA is to ''give affected parties a reasonable time to adjust their behavior before the final rule takes effect.'' *Omnipoint Corp.* v. *FCC,* 78 F.3d 620, 630 (D.C. Cir. 1996); *see also United States* v. *Gavrilovic,* 551 F.2d 1099, 1104 (8th Cir. 1977) (quoting legislative history). Similarly, as noted above, whether the regulated community needs a period of time to come into compliance is relevant to the application of RCRA section 3010(b). Because this rule grants a conditional exemption from certain RCRA hazardous waste requirements, it qualifies for the APA exemption for any rule that ''recognizes or grants an exemption or relieves a restriction'' as well as the RCRA exemption for any rule for which ''the regulated community does not need six months to come into compliance.''

Moreover, EPA has determined that for purposes of both the APA and RCRA effective date provisions, there is good cause for making this final rule effective immediately. In determining whether good cause exists to waive the 30-day effective date under the APA, an agency should ''balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling.'' *Gavrilovic,* 551 F.2d at 1105. EPA has also applied this balancing test to the RCRA effective date provision for purposes of this rule. This rule facilitates a more expedited removal of defective Takata airbag inflators from vehicles by dealerships, salvage yards and other locations for safe and environmentally sound disposal by exempting the collection of airbag waste from hazardous waste requirements so long as certain conditions are met. Because this action provides an exemption to certain requirements that automobile dealers and other parties would otherwise need to follow under RCRA, and because this exemption is optional, the regulated community does not need time to prepare for this rule. Specifically, as further discussed in this preamble, the conditions for the exemption mirror how recalled airbag modules and airbag inflators have been managed under the DOT Preservation Order during the past three years, and therefore no additional time is needed to start operating under the exemption. In contrast, the necessity of immediate implementation is great, as previously discussed.

As a result, EPA is making this interim final rule effective upon publication.

II. Statutory Authority

These regulations are promulgated under the authority of sections 2002, 3001, 3002, 3003, 3004, 3006, 3010, and 3017 of the Solid Waste Disposal Act of 1965, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA). This statute is commonly referred to as ''RCRA.''

III. When will this interim final rule be effective?

The revisions to 40 CFR 260.10, CFR 261.4 and CFR 262.14 become effective on November 30, 2018.

IV. Background Information

A. Regulation of Airbag Modules and Airbag Inflators Under RCRA

An airbag module is a fully assembled unit including both the airbag inflator and the fabric cushion. An airbag inflator is the small metal canister within the airbag module that generally houses explosive propellant and an initiator. The airbag module is deployed when the airbag inflator receives an electronic pulse from a vehicle's crash sensor. In properly functioning airbag modules that use a gas generating system, chemical propellant contained in an airbag inflator unit burns in a fast and controlled manner, quickly emitting an inert gas through vents in the canister out into the airbag module, which inflates the cushion. Airbag modules across the automobile safety industry utilize explosive propellants for rapid response to an automobile accident.

Most airbag inflators use oxidizers as part of the gas generating composition of

[3] EPA 2018. *Compilation of Stakeholder Meeting Summaries Regarding RCRA Regulation of Airbag Waste.*

[4] *Confirmed Rupture of Takata Driver's Airbag Inflator in Malaysia on January 1, 2018* (Jan. 30, 2018), *https://www.honda.com.my/corporate/press_release_details/660/Confirmed-Rupture-of-Takata-Driver%E2%80%99s-Airbag-Inflator-in-Malaysia-on-January-1,-2018.*

[5] *Takata Recall: Sydney man was due to replace airbag two days before fatal accident* (last updated Sept. 6, 2018), *https://www.theguardian.com/world/2018/sep/07/takata-recall-sydney-man-was-due-to-replace-airbag-two-days-before-fatal-accident.*

[6] *20th death from faulty Takata airbags reported by Honda* (Dec. 20, 2017), *https://www.cbsnews.com/news/20th-death-from-faulty-takata-air-bags-reported-by-honda/.*

the propellant and, therefore, when discarded, would meet the definition of ignitable hazardous waste under the RCRA hazardous waste regulations at 40 CFR 261.21(a)(4), which states that a solid waste exhibits the characteristic of ignitability if, ''[i]t is an oxidizer.'' [7] In addition, due to the explosive propellant component, discarded airbag modules and airbag inflators meet the definition of reactive hazardous waste at 40 CFR 261.23(a)(6), which states that a solid waste exhibits the characteristic of reactivity if, ''[i]t is readily capable of detonation or explosive reaction if it is subjected to a strong initiating source or if heated under confinement.'' [8] The deployment of airbag inflators generally results in the depletion of the ignitable and/or reactive components to cause the release of inert gas, after which the inflators would no longer exhibit the ignitable or reactive characteristics under the RCRA regulations.

Airbag modules and airbag inflators that exhibit hazardous waste characteristics under 40 CFR part 261 subpart C may be exempt from hazardous waste regulations under certain scenarios, as summarized in an EPA memorandum signed on July 19, 2018.[9] As the memo explains, the applicable RCRA hazardous waste regulations for airbag modules and airbag inflators depend on the type of device, and how it is managed. However, it is important to note that, as the memo explains, recalled Takata airbag modules and airbag inflators removed from vehicles do *not* qualify for the exemptions and exclusions available to non-recalled airbag modules and airbag inflators because, as described in this preamble, the Takata recalled airbag inflators cannot be safely reused or deployed.

B. Background on the Takata Inflator Recalls

In May 2015, the U.S. Department of Transportation (DOT) announced a national recall of airbag inflators manufactured by Takata due to a defect in their phase-stabilized ammonium nitrate (PSAN) propellant, which has resulted in fifteen deaths and at least 250 injuries in the U.S. as of August 2018.[10] These airbag inflator recalls constitute the largest automotive recall in U.S. history, with 19 vehicle manufacturers affected and approximately 65–70 million airbag inflators scheduled to be recalled by December 2019. Of these affected airbag inflators, 50 million inflators in an estimated 37 million vehicles were recalled as of August 2018 and the remaining inflators will be recalled by December 2019.[11] Included in this number are tens of thousands of ''Alpha'' airbag inflators, which have a significantly higher risk of rupture due to a manufacturing defect resulting in low-density propellant in addition to the propellant defect described below. Nine of the 15 fatalities in the U.S. were caused by Alpha airbag inflators.[12]

On November 3, 2015, the National Highway Traffic Safety Administration (NHTSA) issued a Coordinated Remedy Order that set forth the requirements and obligations of certain motor vehicle manufacturers and the airbag manufacturer, Takata, in connection with the recall and remedy of certain types of Takata airbag inflators.[13] In its Coordinated Remedy Order, NHTSA found that it was imperative to accelerate the rate of the recalls because ''[e]ach airbag inflator with the capacity to rupture, as the recalled Takata inflators do, presents an unreasonable risk of serious injury or death. . . . Since the propensity for rupture increases with the age of the inflator, and increases even more when the vehicle has been exposed to consistent long-term HAH [high absolute humidity] conditions, the risk for injurious or lethal rupture increases with each passing day.'' [14]

The PSAN propellant used in the recalled Takata airbag inflators degrades over time when moist propellant is exposed to long-term daily temperature cycling. Moisture from the air adsorbs to PSAN particles, changing the structure of the propellant and causing the inflator to over-pressurize during deployment.[15] In some cases, this over-pressurization causes the metal canister to rupture, producing shrapnel-like metal shards during airbag inflation. To mitigate these effects, Takata began manufacturing PSAN airbag inflators containing desiccant to prevent the adsorption of moisture to the PSAN particles. While some inflators with desiccant have been recalled, others are still under evaluation and may or may not be recalled in the future.[16]

A 2015 Safety Data Sheet (SDS) for Takata pyrotechnic automotive safety devices, including airbag modules and airbag inflators, describes the hazards of the devices, including an ''[i]nitiation hazard of an uncontrolled activation of the safety device due to: Fire; heat; electrostatic discharge; inductions through electromagnetic radiation; or, excessive mechanical load'' and a ''[b]urn hazard when there is direct contact with pyrotechnic safety device during activations.'' [17] The firefighting measures described in the SDS include evacuating personnel and emergency responders for 1500 feet (⅓ mile). In the event of spilled material from damaged devices, the SDS recommends that an explosive expert conduct the cleanup using anti-static equipment.

Propagation and bonfire testing results submitted to EPA by Takata provides further information regarding the hazards posed by recalled Takata inflators.[18] In September 2016, a third-party company performed sympathetic propagation testing on two types of recalled Takata airbag inflators for Takata. The testing generally consisted of bundling several inflators together and deploying the center inflator in order to observe the effects of deployment on the surrounding inflators. The results of the testing showed that deployment of one inflator does not cause deployment of surrounding inflators. In some tests, the center inflator fragmented, but it still did not cause surrounding inflators to deploy or fragment, although some superficial damage to the surrounding inflators did occur. In April 2017, a third-party company performed the UN 6(c) external fire (bonfire) test on recalled Takata airbag inflators in individual fiberboard boxes. The inflators did not mass detonate when exposed to fire, but they did initiate, as

[7] Ignitable hazardous waste carries the waste code D001.

[8] Reactive hazardous waste carries the waste code D003.

[9] U.S. EPA, *Regulatory Status of Automotive Airbag Inflators and Fully Assembled Airbag Modules,* July 19, 2018.

[10] National Highway Traffic Safety Administration (NHTSA), *Takata Recall Spotlight. https://www.nhtsa.gov/equipment/takata-recall-spotlight.*

[11] Id.; National Highway Traffic Safety Administration (NHTSA), *The State of Takata Recalls, https://www.nhtsa.gov/recall-spotlight/state-takata-recalls.*

[12] National Highway Traffic Safety Administration (NHTSA), *Takata ''Alpha'' Airbags Pose Increased Risk, https://www.nhtsa.gov/recalls/takata-alpha-air-bags-pose-increased-risk.*

[13] National Highway Traffic Safety Administration (NHTSA), *Coordinated Remedy Order,* November 3, 2015, Docket No. NHTSA–2015–0055. *https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/nhtsa-coordinated remedyorder-takata.pdf.*

[14] Ibid, paragraph 32.

[15] National Highway Traffic Safety Administration (NHTSA), *Expert Report of Harold R. Blomquist, Ph.D.,* May 4, 2016. *https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/expert_report-hrblomquist.pdf.*

[16] National Highway Traffic Safety Administration (NHTSA), *New Takata recall involves Nissan, Ford, and Mazda vehicles, https://www.nhtsa.gov/recall-spotlight/new-takata-recall-involves-nissan-ford-and-mazda-vehicles.*

[17] Takata Safety Data Sheet (SDS)—Pyrotechnic Automotive Safety Devices, January 2015.

[18] Testing information was submitted as confidential business information (CBI). The summary of results in this preamble does not contain CBI.

would be expected when inflators are exposed to temperatures generated by this type of fire. In some cases, they were propelled from their initial locations of rupture, throwing fragments beyond the initial location of the inflator.

C. Damage Incidents Related to Airbag Inflator Recycling

While non-Takata airbag inflators do not present the same shrapnel-producing defect as recalled Takata airbag inflators, these airbag inflators can still present an explosive risk when processed or recycled, as demonstrated by recent incidents at two facilities. In February 2015, an explosion and fire occurred at one airbag manufacturing and recycling facility as two workers handled airbag inflators that had been processed in an incinerator prior to recycling the metal.[19] In that incident, one worker was hospitalized with head injuries and burns. In March 2018, a large explosion at a different airbag recycling facility in the dedicated airbag recycling area killed one worker and seriously injured another.[20] This explosion is suspected to have been caused by the ignition of aluminum dust, which was created in the process of shredding airbag inflators. These incidents demonstrate the characteristically hazardous nature of waste airbag inflators and their component materials and the potential risk they pose to human health during processing.

D. Impact of Takata Bankruptcy and the Amended Preservation Order on Management of Takata Inflators

2015 Preservation Order

A Preservation Order issued by DOT and signed by Takata in February 2015 required all recalled airbag inflators be preserved intact, except for those utilized for testing purposes. Takata was required to take all reasonable and appropriate steps designed to prevent the partial or full destruction, alteration, deletion, shredding, incineration or loss of recalled or returned inflators, ruptured inflators and any other inflators under the recalls. The recalled Takata inflators were organized into categories of inflators that must be preserved. Ruptured inflators from field events were required to be preserved in a locked, secured, climate-controlled area, except for testing, inspection or analysis purposes. Recalled or returned inflators were also to be kept in a locked, secured and climate-controlled area.

EPA June Memorandum

In the June 23, 2017 memorandum, EPA clarified that the recalled Takata airbag inflators are not subject to RCRA Subtitle C regulatory requirements while they are being held under the 2015 DOT Preservation Order because EPA does not consider materials being stored pending judicial proceedings or investigations to be ''discarded.'' This interpretation is consistent with previous interpretations EPA has taken on similar materials, such as seized fireworks held as evidence and materials from aircraft accidents subject to investigation, where such items would otherwise be considered hazardous waste.[21] [22] Additionally, EPA clarified that Takata recalled airbag inflators would be considered ''used'' (*i.e.,* spent materials), and therefore a solid waste, once the preservation requirements are lifted. When the recalled Takata airbag inflators are discarded as a solid waste, EPA believes that they meet both the ignitability and reactivity hazardous waste characteristics.[23]

Impact of Takata Bankruptcy on Recall Procedures

Takata's U.S. subsidiary, TK Holdings Inc., filed for Chapter 11 bankruptcy on June 25, 2017, and received U.S. court approval for its plan on February 21, 2018.[24] Takata's manufacturing assets were sold to Key Safety Systems, another automobile safety system manufacturer, and the money from the sale was used to settle debts and legal claims. A small portion of the company emerged from bankruptcy and has a section dedicated to facilitating the replacement of recalled airbag inflators.[25] Takata's plan sets aside funds designated for the removal, handling and eventual disposal of recalled airbag inflators received before the effective date of the bankruptcy, April 10, 2018, and states that Takata will continue to provide replacement airbag inflators until the recall process is finished, expected in 2020.[26] Takata will also continue to receive recalled airbag inflators for storage prior to testing or eventual disposal after April 10, 2018, although it is not required to do so. EPA's understanding is that Takata will charge the automobile manufacturers to cover the costs associated with storage and eventual disposal of these inflators received after April 10, 2018. These costs include the overhead expenses associated with Takata managing the collection, storage, and disposal of airbag inflators, including wages and benefits for their workers that are involved in handling and coordinating the movement of the inflators. Prior to the bankruptcy effective date, Takata accepted and managed these inflators from the affected vehicle manufacturers free of charge.

2018 Amended Preservation Order

The April 12, 2018 Amendment to the February 25, 2015 Preservation Order and Testing Control Plan, issued by the U.S. DOT's NHTSA, requires Takata to preserve certain airbag inflators that are the subject of an ongoing defect investigation by NHTSA and the subject of private litigation.[27] The Amendment also requires Takata to implement a control plan for the inspection, testing, or analysis of those inflators.

The original 2015 Preservation Order required Takata to preserve indefinitely all affected airbag inflators, while the 2018 Amendment enables Takata to reduce the number of preserved airbag inflators by requesting the release of certain inflators from the Preservation Order allowing them to be disposed in compliance with all applicable regulations, including RCRA. The Amended Order also requires Takata to account for returned foreign and other ammonium-nitrate containing inflators. The Amendment applies to Takata airbag inflators removed from vehicles as a result of recalls affecting the 19 vehicle manufacturers.

The terms of the Amendment require Takata to track all airbag inflators in its possession by unique serial number and set aside at least 5% of inflators,

[19] U.S. EPA, *Autoliv Promontory Facility (20 June 2017),* July 24, 2018.

[20] Tennessee Occupational Safety and Health Administration, *Redacted Report: Lighting Resources LLC Explosion on March 14, 2018,* August 16, 2018.

[21] U.S. EPA, *Explosives Presenting an Immediate Safety Threat and Explosives Stored During Analysis,* August 11, 1988. RCRA Online 11363.

[22] U.S. EPA, *Management of Aircraft Remains from Catastrophic Loss Events,* January 6, 2014. RCRA Online 14881.

[23] Ignitable waste code D001 (40 CFR 261.21(a)(4)). Reactive waste code D003 (40 CFR 261.23(a)(6)).

[24] Prime Clerk, *Takata TK Holdings Inc Bankruptcy Case Information, https://restructuring.primeclerk.com/takata/Home-Index.*

[25] To avoid confusion, the entities responsible for managing the Takata airbag inflator recalls, including Takata's post-bankruptcy successor company TK Global, will collectively be referred to as ''Takata'' in this preamble.

[26] U.S. Bankruptcy Court—District of Delaware, *Fifth Amended Joint Chapter 11 Plan of Reorganization of TK Holdings Inc. and its Affiliated Debtors,* filed February 20, 2018.

[27] National Highway Traffic Safety Administration (NHTSA), *Amendment to the February 25, 2015 Preservation Order and Testing Order Control Plan,* April 12, 2018, EA15–001 (formerly PE14–016). *https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/preservation_order_amendment_public_-_april_12_2018-tag.pdf.*

proportionate to the overall number of inflators received from each State and of each type of inflator, for future analysis. The Amendment allows Takata to submit Disposal Designations to NHTSA, identifying a specific quantity of inflators to be released from preservation and disposed. The designated inflators are considered released from the Preservation Order fifteen business days after NHTSA's confirmation of receipt of the Disposal Designation.

Although the affected vehicle manufacturers may choose to contract with Takata's post-bankruptcy reorganized entity to transport and store recalled airbag inflators, they are not required to do so by the Preservation Order or Amendment. If a vehicle manufacturer chooses to contract with the Takata entity, the Takata entity must preserve those airbag inflators under the terms of the Preservation Order, and therefore those airbag inflators are not solid wastes per EPA's June 23, 2017 memorandum as described above. However, a vehicle manufacturer may choose not to contract with the Takata entity for a variety of reasons, including increased cost, increased liability, and slower disposal, in which case those airbag inflators would not be covered by the Preservation Order or Amendment, and would be considered discarded when removed from the vehicle.

V. Rationale for Conditional Exemption for Collection of Airbag Waste

In its 2015 Coordinated Remedy Order pertaining to the Takata airbag recalls, DOT found that it was imperative to accelerate the rate of the recalls because ''[e]ach airbag inflator with the capacity to rupture, as the recalled Takata inflators do, presents an unreasonable risk of serious injury or death. . .Since the propensity for rupture increases with the age of the inflator, and increases even more when the vehicle has been exposed to consistent long-term HAH [high absolute humidity] conditions, the risk for injurious or lethal rupture increases with each passing day.'' [28]

Since the original order was issued by DOT, the affected vehicle manufacturers have been working steadily to remove the recalled Takata airbag inflators from vehicles. As discussed earlier, because of DOT's Preservation Order, the recalled airbag inflators have not been regulated as hazardous waste and have instead been safely collected, transported as hazardous materials and stored under the Preservation Order.

With the amendment to DOT's Preservation Order and with Takata's restructuring due to bankruptcy, vehicle manufacturers may now dispose of recalled inflators that are not covered by the amended Preservation Order directly, rather than sending them to the Takata warehouses for long-term storage. This approach is preferable from a public health and environmental protection perspective both because it reduces the volume of inflators in long-term storage and because it is more efficient in freeing up resources spent on handling and storage that can be spent directly on the recalls themselves.

However, because this subset of recalled inflators is not subject to the DOT Preservation Order, they would be regulated as hazardous waste. As a result, many automobile dealers and other entities who continue to replace recalled airbag inflators at the current rate of repair would become subject to additional hazardous waste generator requirements in 40 CFR part 262, which would impose additional regulatory obligations on the dealers' and salvage vendors' management of the inflators.

Most automobile dealers and salvage vendors are currently in the category of ''Very Small Quantity Generators'' of hazardous waste. By managing hazardous airbag waste, the dealers and salvage vendors would likely generate sufficient amounts of hazardous waste (on a monthly basis) to become subject to increased regulations associated with higher generator categories for which dealers and salvage vendors typically have not had experience, familiarity, or expertise. Imposing these increased generator obligations on dealers and salvage vendors would result in a much less efficient, effective and environmentally protective approach to the urgent, time-critical recall effort. Through our conversations with DOT, the automobile manufacturers, automotive salvage vendors, and other affected stakeholders, EPA has learned that imposing full generator requirements on automobile dealers and salvage vendors who lack the expertise and experience in managing hazardous waste might result in the slowdown, rather than the necessary acceleration, of the recall effort, resulting in greater harm to human health and the environment.[29] The automobile manufacturers are worried that, because of their lack of familiarity and expertise with full RCRA hazardous waste generator regulations and the additional costs related to the management of hazardous waste in these higher generator categories, if the dealers were to become fully regulated small or large quantity generators due to handling recalled airbag waste, they may slow down or stop removing recalled airbag inflators altogether. In addition, some stakeholders have expressed their concern of a lack of hazardous waste transportation capacity, especially in more sparsely populated rural areas of the country. As hazardous waste generators, dealers would be required to use certified hazardous waste transporters, which are less numerous and more expensive than standard hazardous material transporters used to transport recalled inflators under the DOT preservation order. Thus, placing full hazardous waste generator requirements on dealers or salvage yards would not be the most efficient or environmentally protective approach for the above reasons. In contrast, as explained in the following section, an airbag waste collection facility under the control of a vehicle manufacturer or their authorized representative or under the control of an authorized party administering a remedy program in response to the recalls or a designated facility as defined in 40 CFR 260.10, has greater expertise and familiarity in properly managing hazardous waste.

A related but separate issue involves airbag modules and airbag inflators scavenged from scrapped automobiles. One vendor company has been involved in the collection of Takata airbag modules from the approximately 6,000 salvage yards in the United States. The company was approached by one automobile manufacturer after they discovered a number of injuries were caused by recalled Takata airbag inflators recovered from salvage yards and installed in other vehicles. The salvage vendor worked with the automobile manufacturer, DOT, and the independent monitor to put together a program to retrieve airbag modules containing recalled airbag inflators before the inflators can be removed and placed in another vehicle because at that point, they are virtually untraceable. The vendor collects the airbag and brings them to a central location where they undergo a validation step to determine whether they are definitively recalled airbag inflators. This validation includes using visual aids and scanning all VIN and serial numbers. The vendor also supplies specifically designed packaging and handles the

[28] National Highway Traffic Safety Administration (NHTSA), *Coordinated Remedy Order,* November 3, 2015, Docket No. NHTSA–2015–0055. *https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/nhtsa-coordinated remedyorder-takata.pdf.*

[29] EPA 2018. *Compilation of Stakeholder Meeting Summaries Regarding RCRA Regulation of Airbag Waste.*

transportation for the airbag modules. Once a pallet of validated airbag modules is collected (approximately 100–110 pieces), the pallet is sent for disposal and a certificate of destruction is provided. The airbag modules are transported in compliance with DOT hazardous materials regulations. According to this vendor, if the airbag modules must be handled as RCRA hazardous waste when removed from a vehicle in the salvage yard, the salvage yards would likely stop removing them.

Due to the potential for the replacement of defective Takata airbag inflators to slow down with the application of full RCRA generator requirements, EPA has determined that modified RCRA requirements are appropriate for automobile dealers, salvage yards, and other entities that are removing the recalled airbag inflators and facilitating the recalls.

As discussed earlier, any potential delay to the recalls presents an immediate public health threat, increasing the chances of death or serious injury due to a defective airbag deploying in a vehicle. Moreover, the system for managing the recalled airbag modules and inflators under the DOT Preservation Order over the last three years has provided for protection of human health and the environment during collection and transport of the airbag modules and inflators. Under the recalls, each individual recalled inflator is tracked by vehicle identification number, and subject to DOT packaging and transportation regulations. Vehicle manufacturers work with their dealers to make sure that the recalled inflators are quickly moved offsite and not over-accumulated, and have a strong incentive from a liability perspective to continue to do so in the future.

The conditions for the exemption promulgated by this rule mirror how recalled airbag modules and airbag inflators have been managed under the DOT Preservation Order during the past three years, except that instead of going to long-term storage under the Preservation Order, the collected airbag waste will be sent for safe disposal at a RCRA facility designated to receive hazardous waste per 40 CFR 260.10. Thus, exempting the collection of airbag waste from RCRA requirements, provided certain conditions are met, will result in an increase in protection of public health by facilitating the recalls, allowing the current airbag waste collection system to continue to safely collect the recalled inflators, and sending them directly to appropriate disposal facilities rather than to long-term storage facilities under the Preservation Order.

As previously explained in other rulemakings, EPA has authority under RCRA to issue conditional exclusions from the hazardous waste regulations. EPA has previously interpreted RCRA section 3001(a) to authorize the issuance of ''conditional exemptions'' from the requirements of RCRA Subtitle C, where it determines that ''a waste might pose a hazard only under limited management scenarios, and other regulatory programs already address such scenarios.'' 62 FR at 6636 (February 12, 1997); 66 FR at 27222–27223 (May 16, 2001). The final rule takes a similar approach to those earlier rules.

Section 3001(a) requires that EPA decide whether a waste ''should be subject to'' the requirements of RCRA Subtitle C. Hence, RCRA section 3001 authorizes EPA to determine when subtitle C regulation is appropriate. EPA has consistently interpreted section 3001 of RCRA to give it broad flexibility in developing criteria for hazardous wastes to enter or exit the Subtitle C regulatory system.

RCRA section 1004(5) further supports EPA's interpretation. This interpretation has also been upheld upon judicial review. See, *e.g., Military Toxics Project* v. *EPA,* 146 F. 3d 948 (DC Cir. 1998) (upholding conditional exemption for storage of military munitions, based on EPA determination that such wastes are subject to binding standards that meet or exceed RCRA standards, in addition to an institutional oversight process.) EPA has interpreted the statutory definition of hazardous waste in RCRA section 1004(5)(B) as incorporating the idea that a waste that is otherwise hazardous does not require regulation under RCRA so long as it is properly managed.

EPA has most recently provided a full discussion of EPA's authority for conditional exclusion from RCRA Subtitle C requirements in the preamble in its final rule entitled Hazardous Waste Management System: Conditional Exclusion for Carbon Dioxide (CO2) Streams in Geologic Sequestration Activities, 79 FR 350, 353–354 (January 3, 2014). Consistent with that rule, and other rules involving conditional exemptions, EPA has determined in this rule, as discussed above, that exempting the collection of airbag waste from RCRA requirements, provided certain conditions are met, will result in an increase in protection of public health by facilitating the recalls and allowing the current airbag waste collection system to continue to safely collect the recalled inflators. It is important to note, however, that this conditional exemption only applies to the storage and transport of airbag waste during collection. The final disposition of the hazardous airbag waste continues to be regulated under applicable RCRA Subtitle C hazardous waste regulations.

EPA has received requests from stakeholders to unconditionally exempt airbag modules and inflators from RCRA hazardous waste regulations.[30] However, EPA has determined, based on the nature of the waste and the damage cases that have occurred at airbag recycling facilities, an exemption for the final disposition of airbag waste would not be protective of human health and the environment. While the collection of intact airbag modules and inflators by vehicle manufacturers or their authorized representatives according to DOT requirements can be done safely without imposing RCRA requirements beyond the conditions of the exemption discussed in this preamble, processing the airbag inflator, which requires treatment of the ignitable and reactive propellant inside the inflator, is another matter. As discussed earlier, there have been at least two explosions at airbag recycling facilities, including one that resulted in a fatality, and in the case of the recalled Takata airbag inflators, the degraded nature of the propellant makes the potential for explosive reactions even worse. The protections provided by a RCRA Subtitle C hazardous waste permitted facility, including personnel training, inspections, contingency planning and emergency response, and an informed community through public participation address the risk of explosion from the end-of-life management of the collected airbag waste.

EPA solicits comment on the conditional exemption for airbag waste, including the applicability of the exemption and the specific requirements of this conditional exemption as explained in this preamble. EPA will consider these comments in determining whether any additional revisions to the regulation of airbag waste are necessary in the future.

VI. Summary of Requirements of the Conditional Exemption for the Collection of Airbag Waste

A. Applicability of Conditional Exemption

The new airbag waste conditional exemption found at 40 CFR 261.4(j) applies to all airbag waste (*i.e.,* airbag modules and airbag inflators) collected from auto dealers or other airbag waste handlers for the purpose of safe

[30] EPA 2018. *Compilation of Stakeholder Meeting Summaries Regarding RCRA Regulation of Airbag Waste.*

disposal. Entities that generate airbag waste under the conditional exemption are referred to as ''airbag waste handlers'' and can include automobile dealers, independent repair facilities, collision centers, and salvage and scrap yards.

The vast majority of items affected by the conditional exemption will be Takata airbag waste. As of August 2018, an estimated 50 million defective airbag inflators were under recall in approximately 37 million U.S. vehicles, with the potential for more recalls to be issued in the future.

However, EPA has determined that the conditional exemption should also apply to the collection of non-Takata airbag waste for the purpose of disposal, provided that the conditions of the exemption are met. Managing all airbag waste under the same protective requirements will avoid confusion, increase efficiency and will help prevent non-Takata airbag waste from being diverted into the municipal waste stream. Because non-Takata airbag waste is expected to be a much smaller volume waste than the recalled Takata airbag waste, in many cases automobile dealers that generate hazardous waste would be below the Very Small Quantity Generator threshold of 100 kilograms/month, which under the federal RCRA requirements in 40 CFR 262.14 would allow the non-Takata airbag waste to be disposed of in the municipal wastestream. Including these materials under the airbag waste conditional exemption is more protective of human health and the environment because it would encourage their disposal at hazardous waste management facilities. To make it clear that VSQGs have the option of managing their airbag waste under the airbag waste conditional exemption and sending their airbag waste to an airbag waste collection facility or a designated facility subject to the requirements of 40 CFR part 261.4(j), EPA is including a conforming change to the VSQG regulations at 40 CFR 262.14(a)(xi). (Note that the airbag waste conditional exemption does not prevent the airbag modules or airbag inflators from being managed under other applicable exemptions as explained in the July 2018 memo referenced in section IV.A. in this preamble) In addition, EPA also requests comment on expanding the applicability of the airbag waste exemption to include other similar propellent-actuated devices and their components. It would be helpful if commenters include detailed information on these additional wastestreams, including descriptions of the wastestreams, volumes generated, risks posed and current management practices.

B. Limits on Accumulation Times and Quantities at Airbag Waste Handlers

Based on information provided by automobile manufacturers, automobile dealers limit the quantity of recalled airbag modules and inflators stored onsite. According to one automobile manufacturer, guidance provided by Takata requires that dealers ship out the recalled airbag inflators that have been removed from vehicles every two weeks, or when the quantity reaches 200 inflators (*i.e.,* a small truckload).[31]

Limiting the quantity and accumulation times at airbag waste handlers for airbag waste prevents over-accumulation and limits the potential hazards posed by the inflators in case of a fire. Under the airbag waste exemption finalized in this action, airbag waste handlers are allowed to accumulate up to 250 airbag modules or airbag inflators for up to 180 days, whichever comes first. Limiting the quantity of airbag modules and airbag inflators accumulated onsite to 250 (*i.e.,* a little over one small truckload) allows the dealer and other airbag waste handlers to prepare one truckload for shipping while continuing to accumulate airbag waste for future shipments. The 180-day timeframe is based on the small quantity generator limits in 40 CFR 262.16, and addresses the future situation when the Takata recalls near completion, resulting in a slower turn-around in recalled inflators accumulated at the dealer. At that point it may take much longer to reach the 250-item limit, and the 180-day time limit ensures storage does not extend indefinitely, and that the airbag waste is safely disposed and not abandoned.

C. Packaging, Labeling and Transportation Requirements for Airbag Waste Handlers

During accumulation under the airbag waste exemption, airbag waste must be packaged in a container designed to address the risk posed by the airbag waste. Such a container would help reduce the potential for the airbag waste to react in case of a fire, and also reduce the projectile hazard if the defective Takata airbag inflators were to deploy. In most cases, this container would be the same container that the replacement airbag part was shipped in to the airbag handler, or, in the case of salvage yards, the container provided by the salvage recovery vendor. However, any container that meets DOT requirements for transporting the airbag items would meet the terms of the conditional exemption. Each container must be labeled ''Airbag Waste—Do Not Reuse.''

Airbag waste must be shipped directly to either (1) a designated facility as defined in 40 CFR 260.10, or (2) an airbag waste collection facility in the United States under the control of a vehicle manufacturer or their authorized representative, or under the control of an authorized party administering a remedy program in response to a recall under the National Highway Traffic Safety Administration. Airbag waste collection facilities may include part supply centers/parts distribution centers or any other facility authorized by vehicle manufacturers to collect their airbag waste and hold it for more than 10 days. (Airbag waste held at a transfer facility for less than 10 days is considered to be in transport and only subject to the DOT transportation regulations). Because the airbag waste is not subject to hazardous waste generator requirements under 40 CFR part 262 while at the airbag waste handler, the designated facility or the airbag waste collection facility that accepts the airbag waste from the airbag waste handler is considered the hazardous waste generator for the purposes of 40 CFR part 262 as the person whose act first causes a hazardous waste to become subject to the generator regulations.

D. Tracking and Recordkeeping Requirements for Airbag Waste Handlers

As a condition for exemption from RCRA hazardous waste requirements, airbag waste handlers must maintain at the facility and make available upon inspection certain records that document off-site shipments of airbag waste for a period of three years to help verify the airbag waste went to an appropriate destination. Specifically, for each shipment of airbag waste, the handler must maintain documentation of the date of each shipment, the name of each transporter, the type and quantity of airbag waste (*i.e.,* airbag modules or airbag inflators) shipped, and the name and address of the destination facility or airbag waste collection facility. This recordkeeping requirement may be fulfilled by ordinary business records, such as bills of lading, including electronic records. In addition, airbag waste handlers are required to maintain confirmations of receipt from the designated facility or airbag waste collection facility in order to verify that the airbag waste reached its intended destination and was not diverted. These receipts must be

[31] EPA 2018. *Compilation of Stakeholder Meeting Summaries Regarding RCRA Regulation of Airbag Waste,* Appendix 1.

maintained at the airbag waste handler for a period of three years. Specifically, the airbag waste handlers must maintain documentation of receipt that includes the name and address of the designated facility or airbag waste collection facility, the type and quantity of airbag waste (*i.e.,* airbag modules or airbag inflators) received, and the date which it was received. The Agency is not requiring a specific template or format for confirmations of receipt and anticipates that routine business records (*e.g.,* financial records, bills of lading, copies of DOT shipping papers, electronic confirmations of receipt, etc.) could contain the appropriate information sufficient for meeting this requirement. Note that these recordkeeping requirements will be implemented under an emergency Information Collection Request (ICR). Based on the public comments received on this rule, EPA will publish a separate revised ICR. See Section VIII.C in this preamble.

E. Prohibition on Reuse of Defective Airbag Modules and Airbag Inflators

While used airbag modules and used airbag inflators are not solid waste when reused for their intended purpose, in the case of airbag modules and airbag inflators that are subject to a recall under the National Highway Traffic Safety Administration, such reuse is not allowed under RCRA. Reuse of recalled Takata inflators is particularly dangerous due to the shrapnel producing defect that can cause death or serious injury when the airbag is deployed, even when the vehicle accident would otherwise be considered minor. As noted in a report by the Takata Independent Monitor, salvaged Takata inflators may pose an even greater risk than other defective Takata inflators due to possible exposure to high heat and humidity for an extended time in the scrap vehicles. In one case, a vehicle that was repaired with a salvaged Takata airbag inflator was involved in a minor accident. The resulting shrapnel from deployment of the defective resulted in serious injury to the driver. The family owning the car had no reasonable way of knowing that it contained a defective inflator.[32] Any person who reuses a defective inflator or causes it to be reused may therefore be placing another person in imminent danger of death or serious injury. Such a reuse would not meet the definition of legitimate recycling in 40 CFR 260.43 and would be considered sham recycling under 40 CFR 261.2(g). Specifically, because the defective airbag modules and airbag inflators cannot serve as an effective substitute for a commercial product, and do not otherwise provide a useful contribution per 40 CFR 260.43(a)(1), their reuse is considered to be sham recycling and prohibited under the hazardous waste regulations.

[32] National Highway Traffic Safety Administration (NHTSA), *The State of Takata Airbag Recalls—Report of the Independent Monitor,* November 15, 2017. *https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/the_state_of_the_takata_airbag_recalls-report_of_the_independent_monitor_112217_v3_tag.pdf.*

VII. State Authorization

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize a qualified state to administer and enforce a hazardous waste program within the state in lieu of the federal program, and to issue and enforce permits in the state. A state may receive authorization by following the approval process described in 40 CFR 271.21 (see 40 CFR part 271 for the overall standards and requirements for authorization). EPA continues to have independent authority to bring enforcement actions under RCRA sections 3007, 3008, 3013, and 7003. An authorized state also continues to have independent authority to bring enforcement actions under state law.

After a state receives initial authorization, new federal requirements and prohibitions promulgated under RCRA authority existing prior to the 1984 Hazardous and Solid Waste Amendments (HSWA) do not apply in that state until the state adopts and receives authorization for equivalent state requirements. In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), new federal requirements and prohibitions promulgated under HSWA provisions take effect in authorized states at the same time that they take effect in unauthorized states. As such, EPA carries out the HSWA requirements and prohibitions in authorized states, including the issuance of new permits implementing those requirements, until EPA authorizes the state to do so.

Authorized states are required to modify their programs only when EPA enacts federal requirements that are more stringent or broader in scope than existing federal requirements. Under RCRA section 3009, states may impose standards that are more stringent or broader in scope than those in the federal program (see also 40 CFR 271.1(i)). Therefore, authorized states are not required to adopt new federal regulations that are considered less stringent than previous federal regulations or that narrow the scope of the RCRA program. Previously authorized hazardous waste regulations would continue to apply in those states that do not adopt ''deregulatory'' rules.

B. Effect on State Authorization of Interim Final Rule

The regulations finalized in this interim final rule are not promulgated under the authority of HSWA. Thus, the standards will be applicable on the effective date only in those states that do not have final authorization of their base RCRA programs. Moreover, authorized states are required to modify their programs only when EPA promulgates federal regulations that are more stringent or broader in scope than the authorized state regulations. For those changes that are less stringent, states are not required to modify their program. Pursuant to section 3009 of RCRA, states may impose more stringent regulations than the federal program. This rule eliminates specific hazardous waste requirements that would otherwise apply to airbag waste (airbag modules and airbag inflators) managed under the conditional exemption, and therefore, these changes are less stringent than the federal program and authorized states are not required to adopt them. However, if a state were, through implementation of state waiver authorities or other state laws, to allow compliance with the provisions of the conditional exemption in advance of adoption or authorization, EPA would not generally consider such implementation a concern for purposes of enforcement or state authorization. Of course, the state could not implement the requirements in a way that was less stringent than the federal requirements in this rule.

VIII. Statutory and Executive Order (E.O.) Reviews

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

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. This rule has been determined significant because it raises novel legal or policy issues arising out of a legal mandate, the President's priorities or the principles set forth in the Executive Order. Any changes made in response to OMB recommendations have been documented in the docket. The EPA prepared an economic analysis of the potential costs and benefits associated with this action. This analysis, ''Economic Assessment of the Safe Management of Recalled Airbags Rule'',

is available in the docket. This analysis estimates the impacts of the rule relative to two separate baseline scenarios. The first baseline scenario assumes that all aspects of the Preservation Order established between Takata and the Department of Transportation in February 2015 and amended in April 2018 will remain in effect until the completion of the recall process. The alternative baseline scenario assumes the removal of the Preservation Order provisions that allow dealerships to disregard the volume of recalled airbag inflators when determining their hazardous waste generator status (*e.g.,* LQG) under RCRA. For each baseline and for the rule, EPA created a monthly schedule in order to estimate the number of airbag inflators shipped, accumulated, and disposed of by affected entities. EPA then assigned unit costs for storage, transport, management, and disposal of airbag inflators for each scenario to estimate the cost savings associated with this regulation. The cost impacts of the rule were then calculated as the difference between post-rule costs and costs under each baseline scenario. In summary, this regulatory action is expected to result in a total cost savings between $7.6 million and $56.9. million for the duration of the Takata recalls, resulting in an estimated annual cost savings of $1.7 million to $13.0 million per year (discounted at 7%).

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is considered an Executive Order 13771 deregulatory action. Details on the estimated cost savings of this final rule can be found in EPA's analysis of the potential costs and benefits associated with this action.

C. Paperwork Reduction Act (PRA)

The information collection activities in this rule have been granted emergency approval by the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR) that has been approved by OMB was assigned EPA ICR number 2589.02 and OMB Control Number 2050–0221. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

The collection of information is necessary in order to ensure that the hazardous waste airbag modules and airbag inflators exempted under this rule are safely disposed of and that defective airbag modules and airbag inflators are not reinserted into vehicles where they would pose an unreasonable risk of death or serious injury. Information collection activities include requiring affected entities maintain copies of shipping records and confirmations of receipt for three years.

In addition to the emergency ICR which will implement the requirements for up to six months, EPA is also developing an ICR based on comments received on this rulemaking. Towards this goal, pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) 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. EPA will consider the comments received and amend the ICR as appropriate.

Respondents/affected entities: The respondents will primarily be composed of automobile dealerships. These dealerships fall under NAICS code 441: Motor Vehicle and Parts Dealers.

Respondent's obligation to respond: The recordkeeping requirements for the interim final rule consist of maintaining at the airbag handler for no less than three years records of (1) all off-site shipments and (2) confirmations of receipt of airbag waste. The recordkeeping requirements may be fulfilled by ordinary business records, such as bills of lading, and are intended to allow the Agency to verify that the airbag waste reaches its intended destination and is not diverted back into vehicles. The statutory authority to require the recordkeeping activities derives from sections 2002, 3001, 3002, 3003, 3004, 3006, 3010, and 3017 of the Solid Waste Disposal Act of 1965, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA).

Estimated number of respondents: EPA estimates that there will be 15,256 respondents per year.

Frequency of response: EPA estimates that average facility will make 3 relevant shipments per year over a 5-year period. The facilities must retain documentation for each shipment.

Total estimated burden: 4,200 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $130,791 (per year), includes $0 annualized capital or operation & maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

D. Regulatory Flexibility Act

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute. The APA exempts from notice and comment requirements rules for which an Agency finds ''for good cause'' that notice and an opportunity to comment are ''impracticable, unnecessary, or contrary to the public interest.'' The Agency is invoking this exemption to address exigent public health issues associated with the Takata airbag recalls.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175. This action does not have substantial direct effects on one or more Indian tribes, on the relationship

between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

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

Section 5–502 of Executive Order 13045 provides that in emergency situations, or where the Agency is required by law to act more quickly than normal review procedures allow, the Agency shall comply with the Executive Order to the extent practicable. This action is being issued under a good cause exemption of notice and comment rulemaking under the APA to address an emergency situation associated with defective airbag inflators and risks to public health. The rule will remove potential regulatory impediments associated with the Takata airbag recalls. The recalls address explosion risks associated with faulty airbag deployment which could cause (and have caused) serious harm to passengers in vehicles, including children.

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This rulemaking simply removes potential regulatory impediments associated with the Takata airbag recalls; therefore, by itself, this rulemaking will not have any effect on the supply, distribution or use of energy.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because the rule increases protection of human health and the environment by removing potential regulatory impediments associated with the Takata airbag recalls while ensuring safe management and disposal of airbag waste. The recalls address explosion risks associated with faulty airbag deployment which could cause (and have caused) serious harm to passengers, including passengers from minority and low-income communities.

M. Congressional Review Act

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and comment rulemaking procedures are impracticable, unnecessary or contrary to the public interest (5 U.S.C. 808(2)). The EPA has made a good cause finding for this rule as discussed in Section I.B. of this preamble, including the basis for that finding.

List of Subjects

40 CFR Part 260

Environmental protection, Administrative practice and procedure, Definitions, Hazardous waste.

40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Solid waste.

40 CFR Part 262

Environmental protection, Hazardous waste, Generator Standards.

Dated: November 13, 2018.

Andrew Wheeler,

Acting Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

■ 1. The authority citation for part 260 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921–6927, 6930, 6935, 6937, 6938, 6939 and 6974.

Subpart B—Definitions

■ 2. Section 260.10 is amended by adding in alphabetical order definitions for ''Airbag waste'', ''Airbag waste collection facility'', and ''Airbag waste handler'' to read as follows:

§ 260.10 Definitions

* * * * *

Airbag waste means any hazardous waste airbag modules or hazardous waste airbag inflators.

Airbag waste collection facility means any facility that receives airbag waste from airbag handlers subject to regulation under § 261.4(j) of this chapter, and accumulates the waste for more than ten days.

Airbag waste handler means any person, by site, who generates airbag waste that is subject to regulation under this chapter.

* * * * *

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

■ 3. The authority citation for Part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y) and 6938.

Subpart A—General

■ 4. Section 261.4 is amended by adding reserved paragraph (i) and adding paragraph (j) to read as follows:

§ 261.4 Exclusions.

* * * * *

(j) *Airbag waste.* (1) Airbag waste at the airbag waste handler or during transport to an airbag waste collection facility or designated facility is not subject to regulation under parts 262 through 268, part 270, or part 124 of this chapter, and is not subject to the notification requirements of section 3010 of RCRA provided that:

(i) The airbag waste is accumulated in a quantity of no more than 250 airbag modules or airbag inflators, for no longer than 180 days;

(ii) The airbag waste is packaged in a container designed to address the risk posed by the airbag waste and labeled ''Airbag Waste–Do Not Reuse'';

(iii) The airbag waste is sent directly to either:

(A) An airbag waste collection facility in the United States under the control of a vehicle manufacturer or their authorized representative, or under the control of an authorized party administering a remedy program in response to a recall under the National Highway Traffic Safety Administration, or

(B) A designated facility as defined in 40 CFR 260.10;

(iv) The transport of the airbag waste complies with all applicable U.S. Department of Transportation regulations in 49 CFR part 171 through 180 during transit;

(v) The airbag waste handler maintains at the handler facility for no less than three (3) years records of all off-site shipments of airbag waste and all confirmations of receipt from the receiving facility. For each shipment, these records must, at a minimum, contain the name of the transporter and date of the shipment; name and address of receiving facility; and the type and quantity of airbag waste (*i.e.,* airbag modules or airbag inflators) in the shipment. Confirmations of receipt must include the name and address of the

receiving facility; the type and quantity of the airbag waste (*i.e.,* airbag modules and airbag inflators) received; and the date which it was received. Shipping records and confirmations of receipt must be made available for inspection and may be satisfied by routine business records (*e.g.,* electronic or paper financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt).

(2) Once the airbag waste arrives at an airbag waste collection facility or designated facility, it becomes subject to all applicable hazardous waste regulations, and the facility receiving airbag waste is considered the hazardous waste generator for the purposes of the hazardous waste regulations and must comply with the requirements of 40 CFR part 262.

(3) Reuse in vehicles of defective airbag modules or defective airbag inflators subject to a recall under the National Highway Traffic Safety Administration is considered sham recycling and prohibited under 40 CFR 261.2(g).

PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

■ 5. The authority citation for part 262 continues to read as follows:

Authority: 42 U.S.C. 6906, 6912, 6922–6925, 6937, 6938 and 6939g.

Subpart A—General

■ 6. Section 262.14 is amended by revising paragraphs (a) introductory text and (a)(5) to read as follows:

§ 262.14 Conditions for exemption for a very small quantity generator.

(a) Provided that the very small quantity generator meets all the conditions for exemption listed in this section, hazardous waste generated by the very small quantity generator is not subject to the requirements of parts 124, 262 (except §§ 262.10 through 262.14) through 268, and 270 of this chapter, and the notification requirements of section 3010 of RCRA and the very small quantity generator may accumulate hazardous waste on site without complying with such requirements. The conditions for exemption are as follows:

* * * * *

(5) A very small quantity generator that accumulates hazardous waste in amounts less than or equal to the limits in paragraphs (a)(3) and (4) of this section must either treat or dispose of its hazardous waste in an on-site facility or ensure delivery to an off-site treatment, storage, or disposal facility, either of which, if located in the U.S., is:

(i) Permitted under part 270 of this chapter;

(ii) In interim status under parts 265 and 270 of this chapter;

(iii) Authorized to manage hazardous waste by a state with a hazardous waste management program approved under part 271 of this chapter;

(iv) Permitted, licensed, or registered by a state to manage municipal solid waste and, if managed in a municipal solid waste landfill is subject to part 258 of this chapter;

(v) Permitted, licensed, or registered by a state to manage non-municipal non-hazardous waste and, if managed in a non-municipal non-hazardous waste disposal unit, is subject to the requirements in §§ 257.5 through 257.30 of this chapter;

(vi) A facility which:

(A) Beneficially uses or reuses, or legitimately recycles or reclaims its waste; or

(B) Treats its waste prior to beneficial use or reuse, or legitimate recycling or reclamation;

(vii) For universal waste managed under part 273 of this chapter, a universal waste handler or destination facility subject to the requirements of part 273 of this chapter;

(viii) A large quantity generator under the control of the same person as the very small quantity generator, provided the following conditions are met:

(A) The very small quantity generator and the large quantity generator are under the control of the same person as defined in § 260.10 of this chapter. ''Control,'' for the purposes of this section, means the power to direct the policies of the generator, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate generator facilities on behalf of a different person as defined in § 260.10 of this chapter shall not be deemed to ''control'' such generators.

(B) The very small quantity generator marks its container(s) of hazardous waste with:

(*1*) The words ''Hazardous Waste''; and

(*2*) An indication of the hazards of the contents (examples include, but are not limited to, the applicable hazardous waste characteristic(s) (*i.e.,* ignitable, corrosive, reactive, toxic); hazard communication consistent with the Department of Transportation requirements at 49 CFR part 172 subpart E (labeling) or subpart F (placarding); a hazard statement or pictogram consistent with the Occupational Safety and Health Administration Hazard Communication Standard at 29 CFR 1910.1200; or a chemical hazard label consistent with the National Fire Protection Association code 704);

(ix)–(x) [Reserved]

(xi) For airbag waste, an airbag waste collection facility or a designated facility subject to the requirements of § 261.4(j) of this chapter.

* * * * *

[FR Doc. 2018–25892 Filed 11–29–18; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 10

RIN 0906–AB19

340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties Regulation

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Final rule; effective date change.

SUMMARY: The Health Resources and Services Administration (HRSA) administers section 340B of the Public Health Service Act (PHSA), which is referred to as the ''340B Drug Pricing Program'' or the ''340B Program.'' HHS published a final rule on January 5, 2017, that set forth the calculation of the 340B ceiling price and application of civil monetary penalties. On June 5, 2018, HHS published a final rule that delayed the effective date of the 340B ceiling price and civil monetary rule until July 1, 2019, to consider alternative and supplemental regulatory provisions and to allow for sufficient time for additional rulemaking. On November 2, 2018, HHS issued a proposed rule to solicit comments to change the effective date from July 1, 2019, to January 1, 2019, and to cease any further delay of the rule. HHS proposed this action because it determined that the January 5, 2017, final rule has been subject to extensive public comment, and had been delayed several times. HHS has considered the full range of comments on the substantive issues in the January 5, 2017, final rule. After consideration of the comments received on the effective date of the proposed rule, HHS is changing the effective date of the January 5, 2017, final rule, to January 1, 2019.

DATES: The effective date of the final rule published in the **Federal Register** on January 5, 2017, at 82 FR 1210, and delayed March 6, 2017 at 82 FR 12508, March 20, 2017 at 82 FR 14332, May 19, 2017 at 82 FR 22893, September 29,

2017 at 82 FR 45511, and June 5, 2018 at 83 FR 25944, is changed to January 1, 2019.

FOR FURTHER INFORMATION CONTACT: CAPT Krista Pedley, Director, Office of Pharmacy Affairs, Healthcare Systems Bureau, HRSA, 5600 Fishers Lane, Mail Stop 08W05A, Rockville, MD 20857, or by telephone at 301–594–4353.

SUPPLEMENTARY INFORMATION:

I. Background

HHS published a notice of proposed rulemaking (NPRM) in June 2015 to implement civil monetary penalties (CMPs) for manufacturers who knowingly and intentionally charge a covered entity more than the ceiling price for a covered outpatient drug; to provide clarity regarding the requirement that manufacturers calculate the 340B ceiling price on a quarterly basis and how the ceiling price is to be calculated; and to establish the requirement that a manufacturer charge a $.01 (penny pricing policy) for drugs when the ceiling price calculation equals zero (80 FR 34583, June 17, 2015). The public comment period closed on August 17, 2015, and HRSA received 35 comments.

After review of the initial comments, HHS reopened the comment period (81 FR 22960, April 19, 2016) to invite additional comments on the following areas of the NPRM: 340B ceiling price calculations that result in a ceiling price that equals zero (penny pricing); the methodology that manufacturers use when estimating the ceiling price for a new covered outpatient drug; and the definition of the ''knowing and intentional'' standard to be applied when assessing a CMP for manufacturers that overcharge a covered entity. The comment period closed May 19, 2016, and HHS received 72 comments.

On January 5, 2017, HHS published a final rule in the **Federal Register** (82 FR 1210, January 5, 2017). Comments from both the NPRM and the reopening notification were considered in the development of the final rule. The provisions of that rule were to be effective March 6, 2017; however, through a series of rules, HHS delayed the effective date of the January 5, 2017, final rule until July 1, 2019 (83 FR 25943, June 5, 2018). On November 2, 2018, HHS issued a proposed rule (83 FR 55135) to cease any further delay of the January 5, 2017, final rule and to change the effective date from July 1, 2019, to January 1, 2019. HHS received a number of comments both supporting and opposing the delay. After consideration of the comments received, HHS has decided to change the effective date of the January 5, 2017, final rule to January 1, 2019. The substantive provisions included in the January 5, 2017, final rule were subject to extensive public comment, and have been delayed several times. HHS has considered the full range of comments on the substantive issues in the January 5, 2017, final rule.

In previous rulemaking, delaying the effective date of the January 5, 2017, final rule, HHS stated that it ''is developing new comprehensive policies to address the rising costs of prescription drugs. These policies will address drug pricing in government programs, such as Medicare Parts B & D, Medicaid, and the 340B Program. Due to the development of these comprehensive policies, we are delaying the effective date for the January 5, 2017, final rule to July 1, 2019.'' (83 FR 25944)

However, as explained in the proposed rule, HHS has determined that the finalization of the 340B ceiling price and civil monetary penalty rule will not interfere with HHS's development of these comprehensive policies. Accordingly, HHS no longer believes a delay in the effective date is necessary and is changing the effective date of the rule from July 1, 2019, to January 1, 2019. The implementation date and the effective date will be the same.

II. Analysis and Responses to Public Comments

In the NPRM, HHS solicited comments to change the effective date from July 1, 2019, to January 1, 2019, and cease any further delay of the rule. HHS received approximately 160 comments, which contained a number of issues from covered entities, manufacturers, and groups representing these stakeholders. In this final rule, HHS will only respond to comments related to whether HHS should change the effective date of the January 5, 2017, final rule to January 1, 2019. HHS did not consider and does not address comments that raised issues beyond the narrow scope of the NPRM, including comments related to broader policy matters. HHS has summarized the relevant comments received and provided its responses below.

Comment: Some commenters urge HHS not to change the effective date to January 1, 2019, and to further delay the rule to refocus the 340B Program on its mission, and issue new reforms. Commenters also express concern that the new ceiling price system has not yet been released, substantive guidance on the system has not been issued, and stakeholders will not have had an opportunity to gain experience in the system before the enforcement mechanism for the system becomes effective. These commenters recommend that HHS delay implementation until it rolls out the new ceiling price system in a thoughtful manner. Finally, the commenters state that first issuing substantive guidance on the new pricing system would be more consistent with fundamental fairness in a civil penalty enforcement context, inasmuch as program stakeholders should understand their substantive obligations and the timeframes for compliance prior to any enforcement activity.

Response: HHS does not believe that the issuance of additional guidance is needed in order to implement this final rule. Current policies under the 340B Program already provide stakeholders with sufficient guidance regarding programmatic compliance. More specifically, the January 5, 2017, final rule contains information related to the calculation of the 340B ceiling price and the imposition of CMPs against manufacturers who knowingly and intentionally overcharge a covered entity. In addition, the development of the 340B ceiling price reporting system has proceeded under a separate information collection request (ICR) process that is operational in nature and has not been contingent upon the specific provisions contained in the January 5, 2017, final rule. The ICR was submitted and approved by OMB on September 28, 2015, after a formal notice and comment process (80 FR 22207, April 21, 2015, OMB No. 0915–0327). HHS plans to release the 340B ceiling pricing reporting system shortly and HHS will communicate further information through its website. HRSA will also ensure all impacted stakeholders receive education and training to prepare to utilize the 340B ceiling price reporting system.

Comment: Commenters disagree with HHS that changing the effective date of the rule is necessary. Commenters also disagree that HHS has meaningfully responded to comments or considered the full range of comments on the substantive issues in the January 5, 2017, final rule, despite the rule being delayed several times. Commenters urge HHS to fully reconsider substantive comments on the January 5, 2017, final rule as the rule contains several policies that are inconsistent with the 340B statute and imposes unnecessary costs and needless administrative burdens on manufacturers.

Response: HHS has decided to change the effective date of the final rule to January 1, 2019, as the rule has been

subject to extensive public comment. HHS believes that it has had adequate time to consider comments on the substantive issues in the January 5, 2017, final rule. The rule is consistent with the 340B statute. HHS has the statutory authority under section 340B(d)(1)(B)(i)(I) of the PHSA to develop and publish through appropriate policy or regulatory issuance, the precisely defined standards and methodology for the calculation of 340B ceiling prices. HHS has undertaken the effort to issue the January 5, 2017, final rule to comply with this statutory provision. Section 340(d)(1)(B)(vi) of the PHSA also provides for the imposition of sanctions in the form of civil monetary penalties against manufacturers that knowingly and intentionally charge a covered entity a price for a 340B drug that exceeds the 340B ceiling price. HHS believes that CMPs provide a critical enforcement mechanism for HHS if manufacturers do not comply with statutory pricing obligations under the 340B Program.

Comment: Some commenters express concern that HHS has not provided an adequate rationale for its change of view on the need for additional rulemaking and HHS has not released information related to the ''comprehensive policies'' that it has suggested it intends to promulgate. The commenters explain that HHS made a decision to change course and put the Final Rule into effect before it has fully analyzed and explained to the public its conclusions on key issues it identified as requiring further consideration. The commenters contend that this contradicts the deliberative rulemaking principles at the heart of the Administrative Procedures Act.

Response: The effective date of the final rule, for which comments were collected multiple times, has now been delayed for almost two years. It has now been more than eight years since Congress instructed HHS to issue regulations concerning CMPs. The issues that HHS was examining are well documented in the January 5, 2017, final rule. Furthermore, HHS does not believe that a January 1, 2019, effective date will undermine the comprehensive policies under consideration within the Department to address rising drug prices. Given the significant delays, HHS feels that it would be more efficient for the rule to go into effect and assess the need for further rulemaking and guidance after the rule is in effect.

Comment: Some commenters express concern that HHS has not fully considered any new comprehensive policies that will curb the rising cost of drug prices and the 340B Program's impact on those rising prices. The commenters state that in previous rulemaking, HHS has stated that it would be counterproductive to effectuate the final rule prior to a more deliberative process of considering additional or alternative drug reform measures as HHS is in the process of developing new comprehensive policies to address the rising cost of prescription drugs, not limited to the 340B Program. These comments also explain that there is no basis for HHS to suddenly move up the effective date by six months and there is no material development that rationally justifies HHS's change of view on the need for additional rulemaking. They urge HHS to further delay until additional rulemaking is completed, as opposed to specifying a date certain.

Response: HHS disagrees with the commenters. HHS has issued several policies related to lowering prescription drug prices, particularly in the Medicare Program. HHS also notes that as previously discussed in other rulemaking related to this issue, HHS continues to explore other policy documents related to drug pricing in government programs, including the 340B Program.

In addition, commenters have not demonstrated that the finalization of the January 5, 2017, final rule would interfere with HHS's development of these comprehensive policies. As such, HHS does not believe that any further delay is necessary and is changing the effective date of the final rule from July 1, 2019, to January 1, 2019.

The effective date of the final rule has been delayed for nearly two years, which has provided affected entities more than enough time to prepare for its requirements.

Comment: Several commenters urge HHS to specify that the January 5, 2017, final rule's effective date is at least two quarters after the final rule's publication in the **Federal Register**. These commenters raise that in the January 5, 2017, final rule, HHS explicitly noted that the implementation date would be April 1, 2017, the beginning of the next quarter thereby providing a full quarter for implementation. They believe that HHS should follow the same logic here and anticipate publication of a final rule around January 1, 2019, with implementation coinciding with the beginning of the second quarter of 2019, April 1, 2019. They contend that many companies have not completed operational and other process changes because manufacturers fully expected that HHS would revisit the rule and address the rule's significant infirmities. These commenters raise that HHS previously indicated that it would delay the January 5, 2017, final rule to July 1, 2019, and an abrupt change such as this, with fewer than 60 days to implement, makes it difficult for companies—particularly smaller manufacturers—to upgrade their operational systems in time to ensure compliance with the rule. These commenters explain that there is no precedent where the established effective date of a rule imposing substantial compliance burdens on regulated parties was accelerated. Finally, these commenters state that reducing the effective date by six months will negatively affect their ability to come into compliance, which could be compounded by the implementation of the CMP provisions.

Response: Based on the review of the comments received, HHS has determined that the January 5, 2017, final rule will be effective January 1, 2019. The implementation date and the effective date will be the same. Unlike the previous rule, which was effective in the middle of a quarter, this rule is effective at the beginning of a quarter. HHS does not agree that a further delay is necessary for implementation. Manufacturers that offer 340B ceiling prices as of the quarter beginning January 1, 2019, must comply with the requirements of the January 5, 2017, final rule. HHS believes that since the January 5, 2017, final rule was issued, stakeholders have had sufficient time to adjust systems and update their policies and procedures.

Comment: Some commenters urge HHS to publish the ceiling price data on a secure website shortly after January 1, 2019, because the website is essential for effective enforcement of the 340B Program. These commenters explain that entities have no way of detecting overcharges and are at the mercy of manufacturers.

Response: While the ceiling price reporting system is not directly governed by this rule, HHS agrees that covered entities will be able to utilize the system to detect overcharges. As previously stated, the 340B ceiling pricing reporting system is forthcoming, and HHS will convey further updates through its website. HRSA will ensure all impacted stakeholders receive education and training on how to utilize the system.

Comment: Many commenters supported changing the effective date to January 1, 2019, and stated that any other delay would be unreasonable and would continue to reward manufacturers that are flouting ceiling price requirements. The commenters urge HHS to promptly enforce the final rule in order to bring drug companies

into compliance and to ensure that 340B providers are able to ''stretch scarce federal resources as far as possible, reaching more eligible patients and providing more comprehensive services'' as Congress intended. The commenters state that the rule is entirely consistent with HHS's stated goal of addressing the issue of the rising costs of prescription drugs. These commenters also explain that CMPs are an important deterrent to manufacturers who knowingly overcharge entities and initiatives to strengthen manufacturer transparency should be supported.

Response: For reasons stated above, HHS agrees with the commenters that any other delay is unreasonable and will change the effective date of the January 5, 2017, final rule, to January 1, 2019.

III. Regulatory Impact Analysis

HHS has examined the effects of this final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 8, 2011), the Regulatory Flexibility Act (September 19, 1980, Pub. L. 96–354), the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132 on Federalism (August 4, 1999).

Executive Orders 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866, emphasizing the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year), and a ''significant'' regulatory action is subject to review by the Office of Management and Budget (OMB).

HHS does not believe that this final rule to change the effective date of the January 5, 2017, final rule from July 1, 2019, to January 1, 2019, will have an economic impact of $100 million or more in any 1 year, and is therefore not designated as an ''economically significant'' final rule under section 3(f)(1) of Executive Order 12866. The 340B Program as a whole creates significant savings for entities purchasing drugs through the program, with total purchases estimated to be $19 billion in CY 2017. This final rule to implement the January 5, 2017, final rule would codify current policies regarding calculation of the 340B ceiling price and manufacturer civil monetary penalties. HHS does not anticipate that the imposition of civil monetary penalties would result in significant economic impact.

When the 2017 Rule was finalized, it was described as not economically significant. Therefore, changing the effective date of the 2017 Rule is also not likely to have an economically significant impact.

Specifically, the RIA for the 2017 Rule stated that, ''[. . .]manufacturers are required to ensure they do not overcharge covered entities, and a civil monetary penalty could result from overcharging if it met the standards in this final rule. HHS envisions using these penalties in rare situations. Since the Program's inception, issues related to overcharges have been resolved between a manufacturer and a covered entity and any issues have generally been due to technical errors in the calculation. For the penalties to be used as defined in the statute and in this [2017] rule, the manufacturer overcharge would have to be the result of a knowing and intentional act. Based on anecdotal information received from covered entities, HHS anticipates that this would occur very rarely if at all.'' Since the civil penalties envisioned in the 2017 Rule were expected to be rare, changing the effective date of these civil penalties is unlikely to have an economically significant impact.

Executive Order 13771 (January 30, 2017) requires that the costs associated with significant new regulations ''to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.'' This rule is not subject to the requirements of Executive Order 13771 because this rule results in no more than *de minimis* costs.

The Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) and the Small Business Regulatory Enforcement and Fairness Act of 1996, which amended the RFA, require HHS to analyze options for regulatory relief of small businesses. If a rule has a significant economic effect on a substantial number of small entities, the Secretary must specifically consider the economic effect of the rule on small entities and analyze regulatory options that could lessen the impact of the rule. HHS will use an RFA threshold of at least a three percent impact on at least five percent of small entities.

The final rule would affect drug manufacturers (North American Industry Classification System code 325412: Pharmaceutical Preparation Manufacturing). The small business size standard for drug manufacturers is 750 employees. Approximately 600 drug manufacturers participate in the Program. While it is possible to estimate the impact of the final rule on the industry as a whole, the data necessary to project changes for specific manufacturers or groups of manufacturers were not available, as HRSA does not collect the information necessary to assess the size of an individual manufacturer that participates in the 340B Program. For purposes of the RFA, HHS considers all health care providers to be small entities either by virtue of meeting the Small Business Administration (SBA) size standard for a small business, or for being a nonprofit organization that is not dominant in its market. The current SBA size standard for health care providers ranges from annual receipts of $7 million to $35.5 million. As of January 1, 2017, over 12,000 covered entities participate in the 340B Program, which represent safety-net healthcare providers across the country. HHS has determined, and the Secretary certifies that this final rule will not have a significant impact on the operations of a substantial number of small manufacturers; therefore, we are not preparing an analysis of impact for the purposes of this RFA. HHS estimates

that the economic impact on small entities and small manufacturers will be minimal and less than 3 percent.

Unfunded Mandates Reform Act

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year.'' In 2018, that threshold is approximately $150 million. HHS does not expect this rule to exceed the threshold.

Executive Order 13132—Federalism

HHS has reviewed this final rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' This rule would not ''have substantial direct effects on the States, or on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' The proposal to rescind the June 5, 2018, final rule and make the January 5, 2017, final rule effective as of January 1, 2019, would not adversely affect the following family elements: Family safety, family stability, marital commitment; parental rights in the education, nurture, and supervision of their children; family functioning, disposable income or poverty; or the behavior and personal responsibility of youth, as determined under Section 654(c) of the Treasury and General Government Appropriations Act of 1999.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that OMB approve all collections of information by a Federal agency from the public before they can be implemented. This final rule is projected to have no impact on current reporting and recordkeeping burden for manufacturers under the 340B Program. Changes finalized in this rule would result in no new reporting burdens.

Dated: November 27, 2018.

George Sigounas,

Administrator, Health Resources and Services Administration.

Approved: November 28, 2018.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2018–26223 Filed 11–29–18; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 416 and 419

[CMS–1695–CN]

RIN 0938–AT30

Medicare Program: Changes to Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Correction

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

ACTION: Final rule; correction.

SUMMARY: This document corrects an error that appeared in the final rule with comment period published in the **Federal Register** on November 21, 2018, entitled ''Medicare Program: Changes to Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs.'' Specifically, this document corrects the public comment period end date. The corrected date is January 2, 2019.

DATES:

Effective date: This correction is effective November 29, 2018.

Comment period: To be assured consideration, comments on the payment classifications assigned to the interim APC assignments and/or status indicators of new or replacement Level II HCPCS codes in FR Doc. 2018–24243 of November 21, 2018 (83 FR 58818), must be received at one of the addresses provided in the **ADDRESSES** section no later than 5 p.m. EST on January 2, 2019.

FOR FURTHER INFORMATION CONTACT: Marjorie Baldo, (410) 786–4617.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 2018–24243 of November 21, 2018 (83 FR 58818), entitled ''Medicare Program: Changes to Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs'' (hereinafter referred to as the CY 2019 OPPS/ASC final rule with comment period), there was an error that is identified and corrected in the Correction of Errors section below.

II. Summary of Errors

On page 58818, we made an error in the **DATES** section under the heading ''Comment period.'' We inadvertently stated that comments on the payment classifications assigned to the interim Medicare Ambulatory Payment Classification (APC) assignments and/or status indicators of new or replacement Level II Healthcare Common Procedure Coding System (HCPCS) codes in the final rule with comment period must be received no later than 5 p.m. EST on December 3, 2018. The corrected date is January 2, 2019, 60 days from the date of filing for public inspection.

III. Waiver of Proposed Rulemaking

Under 5 U.S.C. 553(b) of the Administrative Procedure Act (APA), the agency is required to publish a notice of the proposed rule in the **Federal Register** before the provisions of a rule take effect. Similarly, section 1871(b)(1) of the Act requires the Secretary to provide for notice of the proposed rule in the **Federal Register** and provide a period of not less than 60 days for public comment. In addition, section 553(d) of the APA and section 1871(e)(1)(B)(i) mandate a 30-day delay in effective date after issuance or publication of a rule. Sections 553(b)(B) and 553(d)(3) of the APA provide for exceptions from the notice and comment and delay in effective date of the APA requirements; in cases in which these exceptions apply, sections 1871(b)(2)(C) and 1871(e)(1)(B)(ii) of the Act provide exceptions from the notice and 60-day comment period and delay in effective date requirements of the Act as well. Section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act authorize an agency to dispense with normal rulemaking requirements for good cause if the agency makes a finding that the notice and comment process is impracticable, unnecessary, or contrary to the public interest. In addition, both section 553(d)(3) of the APA and section 1871(e)(1)(B)(ii) of the Act allow the agency to avoid the 30-day delay in effective date where such delay is contrary to the public interest and an agency includes a statement of support.

We believe that this correcting document does not constitute a rulemaking that would be subject to these requirements. This correcting

document corrects a technical error in the preamble to the CY 2019 OPPS/ASC final rule with comment period but does not make substantive changes to the policies or payment methodologies that were adopted in the final rule. Rather, it is intended to ensure that the public has 60 days to comment on the payment classifications assigned to the interim APC assignments and/or status indicators of new or replacement Level II HCPCS codes in the CY 2019 OPPS/ASC final rule with comment period, which is the duration of the typical comment period on these topics.

In addition, even if this were a rulemaking to which the notice and comment procedures and delayed effective date requirements applied, we find that there is good cause to waive such requirements. Undertaking further notice and comment procedures to incorporate the correction in this document into the final rule or delaying the effective date would be contrary to the public interest because it is in the public's interest to have adequate time to comment on the payment classifications assigned to the interim APC assignments and/or status indicators of new or replacement Level II HCPCS codes included in the CY 2019 OPPS/ASC final rule with comment period.

Furthermore, such procedures would be unnecessary, as we are not altering our payment methodologies or policies, but rather, we are simply correcting the incorrect comment period end date. This correcting document is intended solely to ensure that the comment period end date included in the CY 2019 OPPS/ASC final rule with comment period is correct for those items on which the public can submit public comments. For these reasons, we believe we have good cause to waive the notice and comment and effective date requirements.

IV. Correction of Errors

In FR Doc. 2018–24243 of November 21, 2018 (83 FR 58818), make the following corrections:

1. On page 58818, in the second column, in the **DATES** section, under the heading ''Comment Period,'' correct ''December 3, 2018'' to read ''January 2, 2019''.

Dated: November 26, 2018.

Ann C. Agnew,

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

[FR Doc. 2018–26079 Filed 11–29–18; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 151211999–6343–02]

RIN 0648–XG607

Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Georges Bank Cod Trip Limit Adjustment for the Common Pool Fishery

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

ACTION: Temporary rule; inseason adjustment.

SUMMARY: This action adjusts the possession and trip limits of Georges Bank cod for Northeast multispecies common pool vessels for the remainder of the 2018 fishing year, in order to ensure that the common pool fishery is able to harvest, but not exceed, its annual quota for the stock. These changes are intended to provide the common pool fishery with additional fishing opportunities.

DATES: These possession and trip limit adjustment are effective November 29, 2018, through April 30, 2019.

FOR FURTHER INFORMATION CONTACT: Spencer Talmage, Fishery Management Specialist, 978–281–9232.

SUPPLEMENTARY INFORMATION:

Possession and Trip Limit Increase for Georges Bank Cod

The regulations at § 648.86(o) authorize the Regional Administrator to adjust the possession and trip limits for common pool vessels in order to help avoid the overharvest or underharvest of the common pool quotas.

Based on information reported through October 13, 2018, the common pool fishery has caught 5,797 lb (2.6 mt) of Georges Bank (GB) cod, or approximately 11 percent of its 53,374 lb (24.2 mt) annual quota. At the current rate of fishing, the common pool fishery is not projected to fully harvest its annual quota for the stock by the end of the 2018 fishing year. A moderate increase in the possession and trip limits for the stock will provide additional opportunities with little risk of exceeding the common pool quota of the stock.

Effective November 29, 2018, the possession and trip limit of GB cod is increased, as summarized in Table 1. Common pool groundfish vessels that have declared their trip through the vessel monitoring system (VMS) or interactive voice response system, and crossed the VMS demarcation line prior to November 29, 2018, may land at the new possession and trip limits for that trip.

TABLE 1—CURRENT AND NEW POSSESSION AND TRIP LIMITS FOR GB COD

Permit type	Current possession/trip limits	New possession/trip limits
Day-At-Sea (DAS) ..	100 lb (45.4 kg) per DAS, up to 200 lb (90.7 kg) per trip (Outside of the Eastern U.S./Canada Area). 100 lb (45.4 kg) per DAS, up to 500 lb (226.8 kg) per trip (Inside the Eastern U.S./Canada Area).	250 lb (113.4 kg) per DAS, up to 500 lb (226.8 kg) per trip.
Handgear A	100 lb (45.4 kg) per trip	250 lb (113.4 kg) per trip.
Handgear B	25 lb (11.3 kg) per trip	unchanged.
Small Vessel Category*.	100 lb (45.4 kg) per trip	250 lb (113.4 kg) per trip.

*The Small Vessel Category trip limit of 300 lb of cod, yellowtail flounder, and haddock combined remains in place.

Reduction of the GB Cod Trip Limit in the Closed Area II Haddock Special Access Program

The projection supporting the increase of the common pool possession and trip limits for GB cod is based on the assumption that the common pool fleet fishes primarily within the Western U.S./Canada area, outside of any Special Access Programs (SAPs), as it has done for several years. As described in 50 CFR 648.85(b), SAPs are established to authorize specific fisheries to allow increased yield of certain target stocks without undermining the achievement of the goals of the Northeast Multispecies Fishery Management Plan. The Closed Area II Haddock SAP (CA2 SAP) has a limit of 1,000 lb (453.6 kg) per trip of GB cod, which is double the GB cod trip limit for common pool vessels not participating in the SAPs.

Under a worst-case scenario projection, the common pool fleet could take up to 12 trips within the CA2 SAP at 1,000 lb (453.6 kg) per trip. In this scenario, the common pool could potentially land the entire common pool Eastern GB cod sub-ACL of 11,500 lb (5.2 mt), and could substantially contribute to exceeding the entire common pool GB cod sub-ACL.

In order to avoid this worst case scenario that would contribute to the common pool exceeding its quotas, effective November 29, 2018, the trip limit of GB cod for common pool vessels participating in the CA2 SAP is set to 500 lb (226.8 kg) per trip. In addition, this change may help avoid confusion and facilitate enforcement by making the CA2 SAP GB cod trip limit consistent with other common pool limits for the stock.

Common pool groundfish vessels participating in the affected SAPs that have declared their trip through the vessel monitoring system (VMS) or interactive voice response system, and crossed the VMS demarcation line prior to November 29, 2018, are not subject new possession and trip limits for that trip.

Weekly quota monitoring reports for the common pool fishery can be found on our website at: *http://www.greateratlantic.fisheries.noaa.gov/ro/fso/MultiMonReports.htm.* We will continue to monitor common pool catch through vessel trip reports, dealer-reported landings, VMS catch reports, and other available information and, if necessary, we will make additional adjustments to common pool management measures.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA, finds good cause pursuant to 5 U.S.C. 553(b)(B) and 5 U.S.C. 553(d)(3) to waive prior notice and the opportunity for public comment and the 30-day delayed effectiveness period because it would be impracticable and contrary to the public interest.

The catch data used as the basis for this action only recently became available. The available analysis indicates that the increased possession and trip limit adjustments for GB cod will help the fishery achieve the optimum yield (OY) for this stock. Any delay in this action would limit the benefits to common pool vessels that this action is intended to provide.

The decrease in the CA2 SAP trip limit reduces the low likelihood of overages should vessels participate in the CA2 SAP. An overage of the common pool quota for this stock would undermine conservation objectives and trigger the implementation of accountability measures that could reduce available catch in the next fishing year, which would have negative economic impacts on the common pool fishery.

The time necessary to provide for prior notice and comment, and a 30-day delay in effectiveness, would keep NMFS from implementing the necessary possession and trip limit changes in a timely manner, which could prevent the fishery from achieving the OY and cause negative economic impacts to the common pool fishery.

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

Dated: November 26, 2018.

Karen H. Abrams,

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

[FR Doc. 2018–26072 Filed 11–29–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 171023999–8440–02]

RIN 0648–XG581

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; 2018 Tribal Fishery Allocations for Pacific Whiting; Reapportionment Between Tribal and Non-tribal Sectors

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

ACTION: Temporary rule; reapportionment of tribal Pacific whiting allocation.

SUMMARY: This document announces the reapportionment of 40,000 metric tons of Pacific whiting from the tribal allocation to the non-tribal commercial fishery sectors via automatic action on September 24, 2018. This reapportionment is to allow full utilization of the Pacific whiting resource.

DATES: The reapportionment of Pacific whiting was applicable from 12 noon local time, September 24, 2018 through December 31, 2018. Comments will be accepted through December 17, 2018.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2017–0160 by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal at *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0160.* Click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Barry A. Thom, Regional Administrator, West Coast Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115–0070, Attn: Miako Ushio.

Instructions: Comments sent by any other method to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain

anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Miako Ushio (West Coast Region, NMFS), phone: 206–526–4644 or email: *miako.ushio@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Electronic Access

This document is accessible online at the Office of the Federal Register's website at *http://www.gpo.gov/fdsys/search/home.action.* Background information and documents are available at NMFS' West Coast Region website at *www.westcoast.fisheries.noaa.gov/fisheries/management/whiting/pacific_whiting.html*

Background

Pacific Whiting

Pacific whiting (*Merluccius productus*) is a very productive species with highly variable recruitment (the biomass of fish that mature and enter the fishery each year) and a relatively short life span when compared to other groundfish species. Pacific whiting has the largest annual allowable harvest levels (by volume) of the more than 90 groundfish species managed under the Pacific Coast Groundfish Fishery Management Plan (FMP), which governs the groundfish fishery off Washington, Oregon, and California. The coastwide Pacific whiting stock is managed jointly by the United States and Canada, and mature Pacific whiting are commonly available to vessels operating in U.S. waters from April through December. Background on the stock assessment, and the establishment of the 2018 Total Allowable Catch (TAC), for Pacific whiting was provided in the final rule for the 2018 Pacific whiting harvest specifications, published May 15, 2018 (83 FR 22401). Pacific whiting is allocated to the Pacific Coast treaty tribes (tribal fishery) and to three non-tribal commercial sectors: The catcher/processor cooperative (C/P Coop), the mothership cooperative (MS Coop), and the Shorebased Individual Fishery Quota (IFQ) Program.

This document announces the reapportionment of 40,000 metric tons (mt) of Pacific whiting from the tribal allocation to the non-tribal commercial sectors on September 24, 2018. Regulations at 50 CFR 660.131(h) contain provisions that allow the Regional Administrator to reapportion Pacific whiting from the tribal allocation, specified at 50 CFR 660.50, that will not be harvested by the end of the fishing year to other sectors.

Pacific Whiting Reapportionment

For 2018, the Pacific Coast treaty tribes were allocated 77,251 mt of Pacific whiting. The best available information on September 24, 2018, indicated that less than 5,000 mt of the 2018 allocation had been harvested, and at least 40,000 mt of the tribal allocation would not be harvested by December 31, 2018. To allow for increased utilization of the resource, on September 24, 2018, NMFS reapportioned 40,000 mt from the Tribal sector to the Shorebased IFQ Program, C/P Coop, and MS Coop in proportion to each sector's original allocation. Reapportioning this amount is expected to allow for greater attainment of the TAC while not limiting tribal harvest opportunities for the remainder of the year. NMFS provided notice of the reapportionment on September 24, 2018, via emails sent directly to fishing businesses and individuals, and postings on the NMFS West Coast Region website. Reapportionment was effective the same day as the notice.

The amounts of Pacific whiting available for 2018 before and after the reapportionment are described in the table below.

Sector	Initial 2018 allocation (mt)	Final 2018 allocation (mt)
Tribal	77,251	37,251
C/P Coop	123,312	136,912
MS Coop	87,044	96,644
Shorebased IFQ Program	152,326.5	169,127

Classification

NOAA's Assistant Administrator for Fisheries (AA) finds that good cause exists for this notification to be issued without affording prior notice and opportunity for public comment pursuant to 5 U.S.C. 553(b)(B), because such notification would be impracticable and contrary to the public interest. As previously noted, NMFS provided actual notice of the reapportionment to fishery participants at the time of the action. Prior notice and opportunity for public comment on this reapportionment was impracticable because NMFS had insufficient time to provide prior notice between the time the information about the progress of the fishery needed to make this determination became available and the time at which fishery modifications had to be implemented in order to allow fishers access to the available fish during the remainder of the fishing season. For the same reasons, the AA also finds good cause to waive the 30-day delay in effectiveness for these actions, required under 5 U.S.C. 553(d)(3).

These actions are authorized by §§ 660.55 (i), 660.60(d) and 660.131(h) and are exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.* and 16 U.S.C. 7001 *et seq.*

Dated: November 27, 2018.

Karen H. Abrams,

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

[FR Doc. 2018–26043 Filed 11–29–18; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 83, No. 231
Friday, November 30, 2018

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

RIN Number 3038–AE79

Post-Trade Name Give-Up on Swap Execution Facilities

AGENCY: Commodity Futures Trading Commission.

ACTION: Request for comment.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is requesting public comment regarding the practice of ''post-trade name give-up'' on swap execution facilities.

DATES: Comments must be received on or before January 29, 2019.

ADDRESSES: You may submit comments, identified by ''Post-Trade Name Give-Up on Swap Execution Facilities'' and RIN number 3038–AE79, by any of the following methods:

- *The agency's website: http://comments.cftc.gov.* Follow the instructions for submitting comments.
- *Mail:* Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Same as Mail, above.

All comments must be submitted in English or, if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act,[1] a petition for confidential treatment of the exempt information may be submitted according to the procedures established in Commission Regulation 145.9.[2]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of this request for comment will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Aleko Stamoulis, Special Counsel, (202) 418–5714, *astamoulis@cftc.gov*; or Nhan Nguyen, Special Counsel, (202) 418–5932, *nnguyen@cftc.gov,* Division of Market Oversight, Commodity Futures Trading Commission, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

Historically, swaps traded in over-the-counter (''OTC'') markets rather than on regulated exchanges. Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'')[3] amended the Commodity Exchange Act (''CEA'' or ''Act'')[4] to establish a new regulatory framework for swaps. This new framework included, among other reforms, the registration and regulation of swap execution facilities (''SEFs'')[5] and the mandatory clearing of certain swaps by derivatives clearing organizations (''DCOs'').[6] SEFs and DCOs have since become a significant part of swaps trading infrastructure and have helped to transition a large portion of swaps trading from unregulated, uncleared OTC markets to regulated trading venues and central clearing.

Many swaps are traded on SEFs through trading methods and protocols that are electronic, voice-based, or a hybrid of both; and that provide for anonymous trade execution, trade execution on a name-disclosed basis, or a combination thereof. This variety of trading methods and protocols has developed because of the broad and diverse range of products traded in the swaps market that trade mostly episodically rather than on a continuous basis. The decision by a market participant to use one execution method or another depends on considerations such as the type of swap, transaction size, complexity, the swap's liquidity at a given time, the number of potential liquidity providers, and the associated desire to minimize potential information leakage and front-running risks.

''Post-trade name give-up'' is a long-standing market practice in many swaps markets and originated as a necessary practice in OTC markets for uncleared swaps. Post-trade name give-up refers to the practice of disclosing the identity of each swap counterparty to the other after a trade has been matched anonymously. In the case of uncleared swaps, post-trade name give-up enables a market participant to perform a credit-check on its counterparty prior to finalizing a trade. Due to the bilateral counterparty relationship that exists in an uncleared swap agreement, post-trade name give-up is also necessary in order to keep track of credit exposure and payment obligations with respect to individual counterparties.

For trades that are cleared, however, the rationale for post-trade name give-up is less clear cut. That is because a DCO enables each party to substitute the credit of the DCO for the credit of the parties, thereby eliminating individual credit risk and counterparty exposure. Swaps that are intended to be cleared are subject to pre-execution credit checks and straight-through processing requirements, effectively eliminating counterparty risk and, presumably, the need for market participants to know the identities of counterparties to anonymously matched trades.

Post-trade name give-up continues today in some swaps markets, including with respect to swaps that are anonymously executed and cleared.

[1] 5 U.S.C. 552.

[2] 17 CFR 145.9. Commission regulations referred to herein are found at 17 CFR chapter I.

[3] Public Law 111–203, 124 Stat. 1376 (2010).

[4] 7 U.S.C. 1 *et seq.*

[5] *See* CEA section 5h, as enacted by section 733 of the Dodd-Frank Act; 7 U.S.C. 7b–3. *See also* Core Principles and Other Requirements for SEFs, 78 FR 33476 (June 4, 2013).

[6] *See* Section 2(h)(1)(A) of the CEA, as enacted by section 723 of the Dodd-Frank Act; 7 U.S.C. 2(h)(1)(A). In 2012, the Commission issued final rules to implement the clearing requirement determination under section 723 of the Dodd-Frank Act. The final rules required certain classes of credit default swaps and interest rate swaps to be cleared by DCOs registered with the Commission. Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284 (Dec. 13, 2012).

Such disclosure may be made by a SEF as part of its trading protocols, or through middleware used for trade processing and routing trades to DCOs. For example, when a swap is matched using a voice-based execution method, a SEF employee may verbally disclose to a party the name of the other party to the trade. For swaps executed electronically on an anonymous order book, disclosure of counterparty names can occur through an electronic notification provided by the SEF after the trade is matched. Post-trade name give-up can also occur through third-party middleware and associated trade processing and affirmation services that provide counterparties with various trade details captured from SEF trading systems, including the identity of the party on the other side of a trade.[7]

As the swaps market increasingly becomes a cleared market, the Commission believes that it is reasonable to ask whether the post-trade name give-up practice continues to serve a valid industry purpose in facilitating swaps trading. A variety of views exist on both sides of this issue, depending on one's position in the market. Some industry participants have criticized the continued practice of post-trade name give-up in cleared swaps markets. During a meeting of the Commission's Market Risk Advisory Committee held in April 2015, several participants in a panel on SEFs identified post-trade name give-up as a concern with respect to SEF trading.[8] Post-trade name give-up is said to deter buy-side participation on some SEFs due to the prospect of information leakage, whereby disclosing the identity of a market participant could potentially expose the participant's trading intentions, strategies, positions, or other sensitive information to competitors or dealers.[9] Some industry participants have also alleged that post-trade name give-up serves as a policing mechanism used by swaps dealers to retaliate against non-dealer firms that attempt to trade on interdealer markets.[10] Such interdealer markets provide for competitive execution of large-sized trades at wholesale prices. Buy-side participants that have interest in trading on interdealer markets and otherwise meet participation criteria to join these platforms are said to be deterred because of post-trade name give-up.[11] Based on these concerns, critics of post-trade name give-up have argued that the practice is anticompetitive, hinders liquidity, and lacks credible justification in cleared swaps markets where participants are not exposed to counterparty credit risk.[12]

Other industry participants have claimed that post-trade name give-up is an important tool used to mitigate liquidity risk or the risk that traders will game the market.[13] Some participants argue that as bank market-making capital becomes further constrained by regulations,[14] liquidity providers need to more precisely allocate their bank capital among their customer base in coordination with their overall bank cross-marketing strategies. Without the information provided by post-trade name give-up, the ability to make such allocations would become more difficult. As a result, liquidity providers would be less willing to provide liquidity to the market, especially in times of crisis, and charge higher prices to customers.[15] This outcome arguably would hurt all market participants.

Another reported concern is that buy-side clients may undercut prices from dealers, for example, by posting aggressive bids or offers on an interdealer order book and then soliciting dealers through a request-for-quote (''RFQ'') on a dealer-to-client platform, hoping to motivate dealers to provide more favorable quotes based on prices posted in the order book.[16] Post-trade name give-up is said to mitigate these concerns because it can help to identify a client that is attempting to game the market.

II. Request for Comment

The Commission requests comment from the public relating to the practice of post-trade name give-up on SEF markets where trades are anonymously executed and intended to be cleared. The Commission encourages all comments, including relevant background information, actual market examples, best practice principles, expectations for possible impacts on market structure and market liquidity, and estimates of any asserted costs and expenses. The Commission also encourages substantiating data, statistics, and any other information that supports any such comments. In particular, the Commission requests comment on the following questions:

Question 1: What utility or benefits (*e.g.,* commercial, operational, legal, or other) does post-trade name give-up provide in SEF markets where trades are anonymously executed and cleared? Is post-trade name give-up a necessary or appropriate means to achieve such benefits?

Question 2: Does post-trade name give-up result in any restraint of trade, or impose any anticompetitive burden on swaps trading or clearing?

Question 3: Should the Commission intervene to prohibit or otherwise set limitations with respect to post-trade name give-up? If so, what regulatory limitations should be set and how should they be set in a manner that is consistent with the CEA? What would be the potential costs and/or benefits of doing so? What might be the potential impacts on liquidity, pricing, and trading behavior? Would a prohibition cause dealers to remove liquidity from the market or charge higher prices? Would new liquidity makers fully and consistently act in the market to make up any shortfall in liquidity?

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[7] Trade affirmation refers to a process that occurs after a trade is executed whereby counterparties verify and affirm the details of the trade before submitting it for settlement. Third-party trade processing and affirmation services commonly used for SEF trades include MarkitWire and ICE Link. The Commission has provided that SEFs may use such services to route trades to DCOs if the routing complies with § 37.702(b). *See* Core Principles and Other Requirements for SEFs, 78 FR 33476, 33535 (June 4, 2013).

[8] *See* Transcript of CFTC Market Risk Advisory Committee Meeting (April 2, 2015) (''MRAC Transcript'') at 133 *et seq., available at https://www.cftc.gov/About/CFTCCommittees/MarketRiskAdvisoryCommittee/mrac_meetings.html.*

[9] *See* MRAC Transcript at 142–144, 164. *See also* Managed Funds Association Position Paper: Why Eliminating Post-Trade Name Disclosure Will Improve the Swaps Market (Mar. 31, 2015) (''MFA Position Paper''), p. 4–5. The Commission notes that other factors, such as the current lack of certain trading features, *e.g.,* the ability to calculate volume-weighted average pricing on an order book may have also deterred buy-side participation on certain SEFs.

[10] *See* In re: Interest Rate Swaps Antitrust Litigation, 261 F.Supp.3d 430, 458–59 (S.D.N.Y. 2017) (''The compulsory disclosure of swap counterparties, plaintiffs claim, serves as a policing mechanism, allowing the Dealers to retaliate against entities that attempt to trade on all-to-all platforms.'').

[11] The argument is that swap dealers threaten to shun platforms in the interdealer markets that attempt to execute trades between dealers and non-dealers.

[12] *See* MRAC Transcript at 169–71; MFA Position Paper at 4–5, 8.

[13] *See, e.g.,* Tom Osborn, *How to game a Sef: Banks fear arrival of arbitrageurs,* Risk.net (Mar. 19, 2014).

[14] Such post-financial crisis regulatory reforms include the Volcker Rule, Basel III Accords, capital charges and other bank capital-based restrictions. *See* Anthony J. Perrotta, Jr., *An E-Trading UST Market 'Flash Crash'? Not So Fast,* TABB Group, Nov. 24, 2014, *http://tabbforum.com/opinions/an-e-trading-treasury-market-'flash-crash'-not-so-fast* (discussing regulatory capital constraints and declining market liquidity).

[15] Peter Madigan, *CFTC to Test Role of Anonymity in Sef Order Book Flop, Risk.net*, Nov. 21, 2014, *available at http://www.risk.net/risk-magazine/feature/2382497/cftc-to-test-role-of-anonymity-in-sef-order-book-flop.* Short of exiting the market entirely, some swaps dealers might become more selective in providing liquidity (holding back in times of market stress and volatility, for example) out of concern that they may not be able to adequately hedge their risk in interdealer markets.

[16] *See id.*

Question 4: Should post-trade name give-up be subject to customer choice or SEF choice given the flexible execution methods in the Commission's recent SEF notice of proposed rulemaking?

Issued in Washington, DC, on November 6, 2018, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix to Post-Trade Name Give-Up on Swap Execution Facilities—Commission Voting Summary

On this matter, Chairman Giancarlo and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

[FR Doc. 2018–24643 Filed 11–29–18; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 36

Loan Guaranty: Revisions to VA-Guaranteed or Insured Cash-Out Home Loans

AGENCY: Department of Veterans Affairs.

ACTION: Advanced notice of rulemaking.

SUMMARY: The Department of Veterans Affairs (VA) is issuing this document in compliance with the Economic Growth, Regulatory Relief, and Consumer Protection Act (the Act). The Act requires VA to amend its regulation on VA-guaranteed or insured cash-out refinance loans and to publish the amended regulation within a shortened time frame. If VA determines that urgent or compelling circumstances make compliance with the advance public notice and comment requirements of the Administrative Procedure Act impracticable or contrary to public interest and publishes notice of that determination in the **Federal Register**, the Act permits VA to amend the regulation through an interim final rule or final rule. VA has determined that urgent and compelling circumstances do exist and is, therefore, issuing this **Federal Register** document announcing VA's intent to promulgate an interim final rule implementing the Act.

DATES: November 30, 2018.

ADDRESSES: Loan Policy & Valuation, Loan Guaranty Service (26), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420.

FOR FURTHER INFORMATION CONTACT: Greg Nelms, Assistant Director for Loan Policy & Valuation, Loan Guaranty Service (26), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 632–8862. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On May 24, 2018, the President signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act (the Act), Public Law 115–174, 132 Stat. 1296. Section 309 of the Act, codified at 38 U.S.C. 3709, provides new statutory criteria for determining when, in general, VA may guarantee a refinance loan. The Act also requires, among other things, VA to promulgate regulations, within 180 days after the date of the enactment of the Act, for cash-out refinance loans, specifically those where the principal of the new loan to be VA-guaranteed or insured is larger than the payoff amount of the loan being refinanced. Public Law 115–174, 132 Stat. 1296.

Section 309(a)(2) of the Act permits VA to waive the requirements of the Administrative Procedure Act (APA), 5 U.S.C. 551 through 559, if the Secretary determines that urgent or compelling circumstances make compliance with such requirements impracticable or contrary to public interest. Public Law 115–174, 132 Stat. 1348–1349.

VA believes there are several urgent and compelling circumstances that make advance notice and comment on this rule contrary to the public interest. First, VA is concerned about lenders who seem to continue to exploit legislative and regulatory gaps related to seasoning, recoupment, and net tangible benefit standards, despite anti-predatory lending actions that VA and Congress have already taken. VA's regulatory impact analysis for this rule indicates that perhaps more than 50 percent of cash-out refinances remain vulnerable to predatory terms and conditions until this rule goes into effect. VA believes that VA must immediately seal these gaps to fulfill its obligation to veterans, prudent lenders, and those who invest in securities that include VA-guaranteed loans.

VA is also gravely concerned about constraints in the availability of program liquidity if VA does not act quickly to address early pre-payment speeds for VA-guaranteed cash-out refinance loans. In large part, cashflows derived from investors in mortgage-backed securities (MBS) furnished by the Government National Mortgage Association (Ginnie Mae) provide liquidity for lenders that originate VA-guaranteed refinance loans. When pricing MBS, investors rely on pre-payment models to estimate the level of pre-payments and any resultant potential losses of revenue expected to occur in a set period, given possible changes in interest rates. These pre-payment models tend to drive, at least in significant part, the valuation of Ginnie Mae MBS. Ginnie Mae, buyers of VA-guaranteed loans, and other industry stakeholders have expressed serious concerns that early pre-payments of VA-guaranteed loans are devaluing these investments. See ''Slowing Down VA Refi Churn Proving More Difficult Than Expected'', National Mortgage News (November 12, 2018), *https://www.nationalmortgagenews.com/news/slowing-down-va-refi-churn-proving-more-difficult-than-expected.* If such stakeholders view MBS investments that include VA-guaranteed refinance loans as less desirable, even prudent lenders could be deprived of the cashflows, *i.e.* liquidity, necessary to make new VA-guaranteed loans to veterans.

In a hearing before the House Veterans' Affairs Committee's Subcommittee on Economic Opportunity, the Government National Mortgage Association (Ginnie Mae) issued warnings to Congress regarding the ripple effects that risky refinancing practices had on the valuing of VA-guaranteed loans, as well as Ginnie Mae pools at-large. See *Hearing on Home Loan Churning Practices and How Veteran Homebuyers are Being Affected Before the Subcomm. on Econ. Opportunity of the House Comm. on Veterans' Affairs,* 115 Cong. (2018). Thus, VA believes that, unless VA promulgates rules quickly, a loss of investor optimism in the VA product could further restrict veterans from being able to utilize their earned VA benefits.

Exacerbating the issue is the lending industry's varied interpretation of the Act, which has led to lender uncertainty in how to implement a responsible cash-out refinance program. VA believes this uncertainty has caused prudent lenders to employ a high degree of caution, (*e.g.* refraining from providing veterans with crucial refinance loans that are not predatory or risky). Absent swift implementation of clear regulatory standards, cautious lenders are less likely to make cash-out refinance loans, which means that veterans do not enjoy the widest range of competitive, responsible credit options that can, when used properly, result in placing the veteran in a better financial position than the veteran's current circumstances afford. Unfortunately, such caution has the potential to compound the risk of predatory lending, as irresponsible

lenders have more opportunity to prey upon veterans by stepping into areas where prudent lenders may have stopped competing.

At the same time, VA is concerned that certain lenders are exploiting cash-out refinancing as a loophole to the responsible refinancing Congress envisioned when enacting section 309 of the Act. VA recognizes there are certain advantages to a veteran who wants to obtain a cash-out refinance, and VA has no intention of unduly curtailing veterans' access to the equity they have earned in their homes. Nevertheless, some lenders are pressuring veterans to increase artificially their home loan amounts when refinancing, without regard to the long-term costs to the veteran and without adequately advising the veteran of the veteran's loss of home equity. In doing so, veterans are placed at a higher financial risk, and the lender avoids compliance with the more stringent requirements Congress mandated for less risky refinance loans. Essentially, the lender revives the period of subprime lending under a new name.

VA does not plan to dispense with the notice and comment requirements altogether. Section 309(a)(2)(A)(ii) and (iii) of the Act requires VA, 10 days before publication of the final rule, to submit a notice of the waiver to the House and Senate Committees on Veterans' Affairs and publish the notice in the **Federal Register**. Public Law 115–174, 132 Stat. 1296. VA is complying with these requirements. Section 309(a)(2)(B) further requires VA to seek public notice and comment on this regulation if the regulation will be in effect for a period exceeding one year. Public Law 115–174, 132 Stat. 1296. VA anticipates the regulation will be in effect past the one-year mark. Therefore, VA is seeking public comment on the interim final rule once it is published in the **Federal Register**.

Signing Authority

The Secretary of Veterans Affairs 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. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on November 19, 2018, for publication.

Dated: November 19, 2018.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2018–26021 Filed 11–29–18; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2018–0195; FRL–9987–37–OAR]

RIN 2060–AU00

Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: In this action, the EPA proposes to amend the 2015 New Source Performance Standards (NSPS) for new residential hydronic heaters and new forced-air furnaces by adding a two-year ''sell-through'' period for all affected new hydronic heaters and forced-air furnaces that are manufactured or imported before the May 2020 compliance date to be sold at retail through May 2022. This will allow retailers additional time, after the May 2020 effective date of the ''Step 2'' standards, for the sale of ''Step 1'' compliant hydronic heaters and forced-air furnaces remaining in inventory. The EPA is also taking comment on whether a sell-through period for all affected new residential wood heaters is appropriate following the May 2020 compliance date and, if so, how long a sell-through period is needed and why. In addition, this action is taking comment on whether the current minimum pellet fuel requirements should be retained and, if so, whether they should be revised.

DATES:

Comments. Comments must be received on or before January 14, 2019. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before December 31, 2018.

Public Hearing. The EPA will hold a public hearing on December 17, 2018, in Washington, DC. Please refer to the **FOR FURTHER INFORMATION CONTACT** section for information on registering for the hearing and the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearing.

ADDRESSES: *Comments.* Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2018–0195, at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. See **SUPPLEMENTARY INFORMATION** for details about how the EPA treats submitted comments. *Regulations.gov* is our preferred method of receiving comments. However, the following other submission methods are also accepted:

- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2018–0195 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2018–0195.
- *Mail:* To ship or send mail via the United States Postal Service, use the following address: U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2018–0195, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand/Courier Delivery:* Use the following Docket Center address if you are using express mail, commercial delivery, hand delivery, or courier: EPA Docket Center, EPA WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. Delivery verification signatures will be available only during regular business hours.

Public Hearing. The hearing will be held at EPA Headquarters, EPA WJC East Building, Room 1117A&B, 1201 Constitution Avenue NW, Washington, DC 20004. The hearing will convene at 8:00 a.m. local time and conclude at 6:00 p.m. local time. The EPA will end the hearing two hours after the last registered speaker has concluded their comments but no later than 6:00 p.m. local time. Two 15-minute breaks and a lunch break will be scheduled as time will allow depending on the number of registered speakers.

Because this hearing is being held at a U.S. government facility, individuals planning to attend the hearing should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. Please note that the REAL ID Act, passed by Congress in 2005, established new requirements for entering federal facilities. For purposes of the REAL ID Act, the EPA will accept government-issued IDs, including driver's licenses from the District of Columbia and all

states and territories except from American Samoa. If your identification is issued by American Samoa, you must present an additional form of identification to enter the federal building where the public hearing will be held. Acceptable alternative forms of identification include: federal employee badges, passports, enhanced driver's licenses, and military identification cards. For additional information for the status of your state regarding REAL ID, go to: *https://www.dhs.gov/real-id-frequently-asked-questions.* Any objects brought into the building need to fit through the security screening system, such as a purse, laptop bag, or small backpack. Demonstrations will not be allowed on federal property for security reasons.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Ms. Amanda Aldridge, Outreach and Information Division, Mail Code: C304–05, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5268; fax number: (919) 541–0072; and email address: *aldridge.amanda@epa.gov.* For information about the applicability of the NSPS to a particular entity, contact Dr. Rafael Sanchez, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, EPA WJC South Building (Mail Code 2227A), 1200 Pennsylvania Avenue NW, Washington DC 20460; telephone number: (202) 564–7028; and email address: *sanchez.rafael@epa.gov.*

Public Hearing. The EPA will begin pre-registering speakers for the hearing upon publication of this document in the **Federal Register**. To register to speak at the hearing, please use the online registration form available at *https://www.epa.gov/residential-wood-heaters,* or contact Regina Chappell at (919) 541–3650 to register to speak at the hearing. The last day to pre-register to speak at the hearing will be December 13, 2018. On December 13, 2018, the EPA will post at *https://www.epa.gov/residential-wood-heaters* a general agenda for the hearing that will list pre-registered speakers in approximate order. The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing to run either ahead of schedule or behind schedule. Additionally, requests to speak will be taken the day of the hearing at the hearing registration desk. The EPA will make every effort to accommodate all speakers who arrive and register, although preferences on speaking times may not be able to be fulfilled.

SUPPLEMENTARY INFORMATION: *Public Hearing.* Each commenter will have 5 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) or in hard copy form.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing. Commenters should notify Regina Chappell if there are special needs related to providing comments at the hearings. Verbatim transcripts of the hearings and written statements will be included in the docket for this rulemaking.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/residential-wood-heaters.* While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact Regina Chappell at (919) 541–3650 or *chappell.regina@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

The EPA will not provide audiovisual equipment for presentations. Any media presentations should be submitted to the public docket at *https://www.regulations.gov/,* identified by Docket ID No. EPA–HQ–OAR–2018–0195. The EPA must receive comments on the proposed action no later than January 14, 2019.

If you require the service of a translator or special accommodations such as audio description, please pre-register for the hearing and describe your needs by December 13, 2018. We may not be able to arrange accommodations without advanced notice.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2018–0195. All documents in the docket are listed in the *Regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *Regulations.gov* or in hard copy at the EPA Docket Center, Room 3334, EPA WJC West Building, 1301 Constitution Avenue NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2018–0195. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *https://www.regulations.gov* or email. This type of information should be submitted by mail as discussed below.

The EPA may publish any comment received to its public docket. 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, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets.*

The *https://www.regulations.gov* website is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not

be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/dockets.*

Submitting CBI. Do not submit information containing CBI to the EPA through *http://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 digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI for inclusion in the public docket. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2018–0195.

Preamble Acronyms and Abbreviations. The Agency uses multiple acronyms and terms in this preamble. While this may not be an exhaustive list, to ease the reading of this preamble and for reference purposes, the following terms and acronyms are defined here:

BSER Best System of Emissions Reduction
CAA Clean Air Act
CBI Confidential Business Information
CFR Code of Federal Regulations
CO Carbon Monoxide
EAV Equivalent Annual Value
EPA U.S. Environmental Protection Agency
EJ Environmental Justice
FR Federal Register
HAP Hazardous Air Pollutant(s)
HPBA Hearth, Patio and Barbecue Association
NAICS North American Industry Classification System
NO_X Nitrogen Oxides
NSPS New Source Performance Standards
NTTAA National Technology Transfer and Advancement Act of 1995
OAQPS Office of Air Quality Planning and Standards (U.S. EPA)
OECA Office of Enforcement and Compliance Assurance (U.S. EPA)
OMB Office of Management and Budget
PM Particulate Matter
$PM_{2.5}$ Particulate Matter with an aerodynamic diameter of 2.5 micrometers or less (''fine particles'')
PV Present Value
R&D Research and Development
RIA Regulatory Impact Analysis
RTC Response to Comments
tpy tons per year
U.S. United States
U.S.C. United States Code
UMRA Unfunded Mandates Reform Act
VOC Volatile Organic Compound
Wood heaters Refers to all appliances covered in 40 CFR part 60, subpart AAA—woodstoves & pellet stoves

Organization of this Document. The information presented in this preamble is organized as follows:

I. General Information

A. Executive Summary

On March 16, 2015 (80 FR 13672), the Environmental Protection Agency (EPA) finalized the NSPS for new residential wood heaters, new residential hydronic heaters, and new forced-air furnaces. For this action, the term wood heaters refers to all appliances covered in 40 CFR part 60, subpart AAA, and the terms hydronic heaters and forced-air furnaces refer to appliances covered in 40 CFR part 60, subpart QQQQ. Also, for this action, the term wood heating devices refers to all units regulated by the 2015 NSPS (40 CFR part 60, subparts AAA and QQQQ).

In this action, the EPA proposes to amend 40 CFR part 60, subpart QQQQ of the 2015 NSPS by adding a two year ''sell-through'' period for retailers to sell new hydronic heaters and forced-air furnaces that are manufactured or imported before the May 2020 compliance date and are compliant with the ''Step 1'' standards. This will allow retailers additional time after the May 2020 effective date of the ''Step 2'' standard, to sell ''Step 1'' compliant hydronic heaters and forced-air furnaces remaining in inventory. The EPA is also taking comment on whether a sell-through period for retailers to sell new residential wood heaters (40 CFR part 60, subpart AAA) is appropriate following the May 2020 compliance date and, if so, how long a sell-through period is needed and why. In addition, this action is taking comment on whether the current minimum pellet fuel requirements should be retained or revised. In the 2015 Final Rule Preamble (at 80 FR at 13682/2), the EPA stated: ''For pellet-fueled appliances, operation according to the owner's manual includes operation only with pellet fuels that are specified in the owner's manual.''

The Agency estimated the cost and benefits of the proposed rule by developing a memorandum (supplemental RIA) [1] to supplement the Regulatory Impact Analysis prepared for the 2015 Final Rule. This memorandum acknowledges uncertainty driven by consumer, manufacturer, and retailer response to this proposed ''sell-through'' period and evaluates three scenarios. Section VII.A of this preamble summarizes the information in that supplemental RIA. Given the nature of this rule, costs are presented

[1] U.S. EPA. Memorandum: Supplemental Regulatory Impact Analysis (RIA)—Estimated Cost Savings and Forgone Benefits Associated with the Proposed Rule, ''Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces.''

here as the forgone benefits of forgone emission reductions. We estimate the average annual cost savings to be $0.01 billion. We estimate the average annual forgone benefits to be $0.10 billion to $0.23 billion at a 3 percent discount rate and $0.09 billion to $0.21 billion at a 7 percent discount rate. The Agency represents the benefits as cost savings, which the Agency estimates as the increase in revenues to manufacturers and retailers of affected hydronic heaters and forced air furnaces. Estimated costs and benefits reflect the average annual impacts for the 2019 to 2022 timeframe, which are the implementation years analyzed in the supplemental RIA. All estimates in the supplemental RIA reflect the primary scenario analyzed for this proposal (which estimates the number of affected wood heaters available during the sell-through period with no change in wood heater production as estimated in the 2015 NSPS). Results are also provided in the supplemental RIA for wood heaters covered by 40 CFR part 60, subpart AAA, which are wood heating devices not included in the proposed 2-year sell-through extension but for which comments are requested to determine if they should be.

B. Does this action apply to me?

Table 1 of this preamble lists categories and entities that are the subject of this proposal. Table 1 is not intended to be exhaustive, but rather provides a guide for readers regarding the entities likely to be affected by this proposed action. These standards, and any changes considered in this rulemaking, are directly applicable to sources as a federal program. Other federal, state, local and tribal government entities are not directly affected by this action.

TABLE 1—SOURCE CATEGORIES AFFECTED BY THIS ACTION

Category	NAICS Code [1]	Examples of regulated entities
Residential Wood Heating	333414	Manufacturers, owners, and operators of wood heaters, pellet heaters/stoves, and hydronic heaters.
	333415	Manufacturers, owners, and operators of forced-air furnaces.
Testing Laboratories	541380	Testers of wood heaters, pellet heaters/stoves, and hydronic heaters.
Retailers	423730	Warm air heating and air-conditioning equipment and supplies merchant wholesalers.

[1] North American Industry Classification System.

C. How do I obtain a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this action is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at *https://www.epa.gov/residential-wood-heaters/final-new-source-performance-standards-residential-wood-heaters.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal at this same website.

II. Background

A. Statutory Background

Section 111 of the Clean Air Act (CAA) requires the EPA Administrator to list categories of stationary sources that, in his or her judgment, cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. The EPA must then issue ''standards of performance'' for new sources in such source categories. The EPA has the authority to define the source categories, determine the pollutants for which standards should be developed, and identify within each source category the facilities for which standards of performance would be established.

CAA section 111(a)(1) defines ''a standard of performance'' as ''a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirement) the Administrator determines has been adequately demonstrated.'' This definition makes clear that the standard of performance must be based on controls that constitute ''the best system of emission reduction (BSER).'' The standard that the EPA develops, based on the BSER, is commonly a numerical emission limit, expressed as a performance level. As provided in CAA 111(b)(5), the EPA does not prescribe a specific technology that must be used to comply with a standard of performance. Rather, sources generally can select any measure or combination of measures that will achieve the emission level of the standard.

The Residential Wood Heaters source category is different from most NSPS source categories in that it is for mass-produced residential consumer products. Thus, important elements in determining BSER include the costs and environmental impacts on consumers of delaying production while wood heating devices with those systems are designed, tested, field evaluated and certified.

Section 111(b)(1)(B) of the CAA requires that the standards be effective upon promulgation of the NSPS. Given this statutory requirement, as discussed more fully in the **Federal Register** notice for the 2015 NSPS rulemaking (80 FR 13672), the EPA adopted the stepped (phased) approach for residential wood heaters, hydronic heaters and forced-air furnaces to provide sufficient implementation time for manufacturers and retailers to comply with Step 2 limits.

B. Regulatory Background

Residential wood heaters were originally listed under CAA section 111(b) in February 18, 1987 (see 52 FR 5065). The NSPS for wood heaters (40 CFR part 60, subpart AAA) was proposed on February 18, 1987 (see 52 FR 4994) and promulgated on February 26, 1988 (see 53 FR 5859) (1988 Wood Heater NSPS). The NSPS was amended in 1998 to address an issue related to certification testing (see 63 FR 64869).

On February 3, 2014, the EPA proposed revisions to the NSPS (See 79 FR 6330) and promulgated revisions on March 16, 2015 (See 80 FR 13672). The final 2015 NSPS updated the 1988 Wood Heater NSPS emission limits, eliminated exemptions over a broad suite of residential wood combustion devices, and updated test methods and the certification process. The 2015 NSPS also added a new subpart (40 CFR part 60, subpart QQQQ) that covers new wood burning residential hydronic heaters and new forced-air furnaces. It also directs owners of pellet or wood chip heaters to burn only the fuel

specified in the owner's manual and that meet certain minimum requirements.

As a part of the 2015 rulemaking, the EPA identified the percentage of wood heaters estimated to be meeting the Step 2 standards prior to promulgation of the 2015 NSPS as 70 percent of pellet stoves and 26 percent of wood stoves. Similarly, 18 percent of hydronic heaters were meeting the Step 2 standards prior to promulgation of the 2015 NSPS, while the limited dataset for forced-air furnaces showed no models meeting the Step 2 standards prior to promulgation of the 2015 NSPS. As of March 20, 2018, there were a total of 78 models (44 pellet models and 34 crib/cord wood) that met the Step 2 standard for wood heaters (as required under 40 CFR 60.532(b) or 60.532(c)), nine models that met the Step 2 standard for hydronic heaters (as required under 40 CFR 60.5474(a)(2) or (b)(3)) and one model that met the Step 2 standard for forced-air furnaces (as required under 40 CFR 60.5474(a)(6)). The inventory of certified models as of March 2018 is provided in the document titled: ''List of EPA certified Wood Heating Devices March 2018,'' which is available in the docket and at the website *https://www.epa.gov/compliance/wood-heater-compliance-monitoring-program.*

In promulgating the 2015 NSPS, the EPA took a ''stepped compliance approach'' in which certain ''Step 1'' standards became effective in May 2015 and more stringent ''Step 2'' standards would become effective five years later, in May 2020.

A major component of demonstrating compliance with either Step 1 or Step 2 is a certification test, using an EPA approved test method, for a given wood heating device. Among other requirements, the emissions from the certification test cannot exceed the emission limit for the standard for which it is certifying (either Step 1 or Step 2). It is worth noting that, because these certification test methods were developed outside of the 2015 NSPS, certification test methods have their own requirements independent of the 2015 NSPS, such as fuel requirements.

The 2015 NSPS included a sell-through provision which allowed seven and a half months for retailers to sell current wood heater and hydronic heater non-compliant inventory (Step 1 sell-through). No sell-through provision was provided for forced-air furnaces because small forced-air furnaces did not have to comply with a numerical emission standard until May 2016, and large forced-air furnaces did not have to comply with a numerical emission standard until May 2017 (see 80 FR 13682 and 13685). While manufacturers could no longer make units that were not certified for the Step 1 standard (after the May 2015 Step 1 effective date), the Step 1 sell-through allowed retailers several months to sell their existing inventory that was not Step 1 compliant. The 2015 NSPS provided no such sell-through provision for the more stringent Step 2 standards that are currently scheduled to become effective in May 2020. The Step 1 and Step 2 standards are discussed further below.

III. Proposed Action

In promulgating the 2015 NSPS, the EPA took a stepped compliance approach to implementing the emission limits for the rule. The Step 1 standard was intended to codify emission limits that were already being met. For wood heaters, (40 CFR part 60, subpart AAA), the Step 1 limit was based on the Washington State standard that had been in effect since 1995 and had been met by most wood heater manufacturers. For hydronic heaters, the Step 1 emission limit was based on the 2010 Phase 2 Voluntary Hydronic Heater Program. Step 1 for forced-air furnaces was what the EPA concluded would be immediately achievable based on a limited dataset.

The Step 1 standard went into effect in May 2015, and Step 2 becomes effective in May 2020 (see discussion at 80 FR 13676–13677). For the Step 1 standards, the EPA provided a ''sell-through'' period of seven and a half months, until December 2015, to allow retailers additional time after the effective date of the rule to sell the non-compliant wood heaters and hydronic heaters remaining in inventory (see 80 FR 13685). Specifically, the 2015 NSPS allowed non-compliant wood heaters and hydronic heaters manufactured before May 15, 2015, to be imported and/or sold at retail through December 31, 2015 (see 40 CFR 60.532(a) and 60.5474(a)(1)).[2] For the Step 2 standards, the EPA did not provide a sell-through period following the May 2020 compliance date. The EPA concluded at the time that the 5-year period leading up to the May 2020 Step 2 compliance date would provide manufacturers with sufficient lead time to develop, test, and certify Step 2-compliant wood heating devices. Meanwhile, in the time before the Step 2-certified models were available for sale, both manufacturers and retailers would be able to continue making and selling Step 1-certified wood heating devices (see 80 FR 13676). The EPA provided further explanation in the 2015 Response to Comments (RTC) document (Docket ID EPA–HQ–OAR–2009–0734). On page 99 of the RTC, the EPA noted that the 5-year period from 2015 to 2020 ''matches the window of time many manufacturers noted they would need to conduct research and development (R&D) and bring a new model to market,'' and on page 231 of the RTC, the EPA concluded that Step 2 standards provide ''appropriate lead times for manufacturers to redesign their model lines to accommodate the improved technology across multiple model lines and test, field evaluate, and certify new model lines.''

Recently, the EPA has learned from manufacturers and retailers that a substantial number of retailers are already reducing or even ending their purchases of Step 1-certified wood heating devices from the manufacturers because they are concerned that they will not be able to sell these devices before the May 2020 Step 2 compliance date and will be left with unsaleable inventory.[3] Additionally, some

[2] The EPA did not provide any sell-through period for forced-air furnaces, because the EPA determined that the requirements that became effective for these heaters in May 2015 (to revise the owner manuals, and training and marketing materials) could be accomplished without disrupting sales and creating undue burden on manufacturers or retailers. See 80 FR 13682 and 13685.

[3] The following statements from various groups or individuals demonstrate these concerns:

Hearth, Patio & Barbecue Association (HPBA): *As time goes on and we get closer to the May 2020 effective date, retailers will reduce their purchase orders of Step 1 products. We are already seeing this happen today—a full two years before the effective date of Step 2. If orders are decreased or cut off, this implies that manufacturing is also being cut off or decreased.* (May 31, 2018, response to request for information from the EPA.)

Frank Moore (President & Owner, Hardy Manufacturing): *Like manufacturers, retailers are making business decisions right now based on the Step 2 2020 requirements. It can sometimes take up to five years for a retailer to sell a hearth product from the time they purchase it from a manufacturer. With that in mind, many retailers aren't purchasing products from manufacturers that don't already meet the 2020 requirements. Even though it is still 2017, in practice the effective date is already having an impact.* (September 13, 2017, testimony before the House Committee on Energy & Commerce Subcommittee on the Environment in support of H.R. 453 (the Relief from New Source Performance Standards Act)).

Mark Freeman (Owner, Kuma Stoves): *SELL THROUGH—This is the most immediate need. I can't tell you how important this is to provide sell-through relief for manufacturers of AAA appliances as well as for the QQQQ manufacturers. Already we are seeing Early-buy orders for the 2018 season being affected from our dealers who are worried about having stock that they won't be able to sell by May 2020. We need this as it is hurting my business and our industry.* (May 1, 2018, email to the EPA.)

Chris Neufeld (Vice President, Blaze King): *The 2015 New Source Performance Standards failed to provide a sell through date. The magnitude of this omission in the 2015 NSPS is growing and growing*

manufacturers have indicated that they will need until May 2020 to develop, test, and certify wood heating devices to meet the 2020 Step 2 standards. As a result, manufacturers may face revenue losses as retailers are not willing to buy the Step 1-certified models and the Step 2-certified models have not yet been developed, tested, and certified. Further, as May 2020 approaches, the EPA expects that retailers will become increasingly reluctant to purchase non-Step 2-compliant wood heating devices which they will not be able to sell after May 2020, resulting in stranded capital. The EPA also acknowledges that the price differential between the Step 2 models and Step 1 models may dampen demand for these heaters and could result in consumers declining to purchase new heaters altogether (although the supplemental RIA does not examine this consumer response in detail).

To address this situation, the EPA is proposing to amend the 2015 NSPS, 40 CFR part 60, subpart QQQQ requirements to create a two-year sell-through period for retailers after the Step 2 compliance date that is similar to the Step 1 sell-through period. The EPA is proposing an amendment that will allow Step 1-compliant hydronic heaters and forced-air furnaces manufactured or imported before May 15, 2020, to be sold at retail through May 15, 2022. The EPA is not proposing any changes to its BSER determination and is not proposing any changes to the 5-year compliance period for Step 2 or the associated May 2020 compliance date. As stated in the March 16, 2015, notice of final rulemaking, the EPA concluded that:

- A final hydronic heater Step 2 emission level of 0.10 lb/mmBtu within 5 years as BSER is a reasonable balance of environmental impacts and costs; and
- a final forced-air furnace Step 2 emission level of 0.15 lb/mmBtu within 5 years as BSER is a reasonable balance of environmental impacts and costs.

While the EPA is soliciting comment on the compliance date for the Step 2 emission limits in a separate **Federal Register** notice, this notice of proposed rulemaking maintains the Agency's 2015 BSER determination, while at the same time seeking to ensure that the full 5-year compliance period is available so that consumers, manufacturers, and retailers are not adversely affected.

In this action, the EPA is seeking comment on this two-year sell-through period for retailers after the Step 2 compliance date, including the reasonableness of the Agency's determination that there is a need for a Step 2 sell-through period and, if providing a sell-through period is reasonable, what length of sell-through period is appropriate and why. The EPA is particularly interested in soliciting comments for the following topics regarding compliant hydronic heaters and forced-air furnaces and the sell-through period:

(1) The Agency solicits comment on whether retailers are currently declining to purchase Step 1-compliant hydronic heaters and forced-air furnaces and how widespread is this reduction in purchases. The EPA also solicits comment as to whether this will become a more significant issue as the May 2020 compliance date approaches and, if so, when is it likely that retailers will no longer be willing to buy Step 1-compliant hydronic heaters and forced-air furnaces at all. The EPA solicits comment on the cost or other impacts that retailers could have on manufacturers who are small businesses if they decline to purchase Step 1-compliant hydronic heaters and forced-air furnaces.

(2) The Agency is soliciting comment as to what is the typical period of time between (a) when a retailer purchases a hydronic heater or forced-air furnace, and (b) when the device is sold to a consumer. In particular, the Agency is soliciting comment on these periods of time for small businesses.

(3) The Agency is soliciting comment on the EPA's proposal that a sell-through period for retailers to sell Step 1-compliant hydronic heaters and forced-air furnaces is a reasonable way to address concerns about retailers' reluctance to purchase Step 1-compliant hydronic heaters and forced-air furnaces and/or manufacturers' inability to sell such heaters and furnaces before Step 2-certified models are available. In particular, the EPA is soliciting comment on the sell-through as a reasonable way to address concerns about retailers of devices and products from small businesses.

(4) The Agency is soliciting comments regarding, if a sell-through period for the May 2020 compliance date were to be promulgated, what period of time after May 2020 would be sufficient for retailers to sell their inventory of Step 1-compliant hydronic heaters and forced-air furnaces. The EPA is proposing a two-year period but is also taking comment on whether either a shorter or a longer sell-through period may be more reasonable and, if so, why a sell-through period other than two years is appropriate. For small businesses in particular, the Agency is soliciting comment on a two-year period and whether that amount of time is reasonable.

(5) The EPA is also soliciting comment on whether the Agency's proposal to provide the same two-year Step 2 sell-through period for both hydronic heaters and forced-air furnaces is reasonable, or whether a sell-through period of some different length may be more appropriate for each of these types of wood heating devices. The EPA is also soliciting comment on whether it may be more appropriate not to provide a sell-through period at all for either hydronic heaters or forced-air furnaces.

(6) The Agency is soliciting information on the number of Step 1 forced-air furnaces and hydronic heaters that are currently in production and the number that are being designed for Step 2 compliance that have not yet received their EPA certification for Step 2 compliance. The EPA requests information on the number of Step 2 pellet and cord/crib wood forced-air furnaces and hydronic heaters that are currently certified to meet Step 2. The EPA is soliciting comment on how far in advance of the current May 2020 Step 2 compliance date manufacturers will need to submit their EPA certification applications to not only meet the standards, but also to manufacture, market, and distribute their products without disruption to their business.

(7) The Agency seeks comment on whether and what type of small business relief may be appropriate in place of the extended sell-through period that would accomplish the same goal.

(8) The Agency seeks comment on the effects on the consumer as a result of a sell-through period.

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quickly. Here is what we have learned from my visits to nearly 60 retail locations in the past 3 months:

1. Retailers are hesitant to order products that are set to expire on May 15th, 2020.

2. Compounding their concerns, by some estimates, there are 100,000 or more wood and pellet heaters in showrooms across the country that must be sold by May 15th, 2020. Based on these estimates, this could represent an entire year of industry sales. This does not include inventory held by distributors.

3. Dealers expressed real concern that excessive discounting will result and in turn cause their small businesses to become vastly less profitable resulting in layoffs or closure.

4. Retailers are hesitant to schedule summer and fall participation is fairs, home shows and other costly public events, which will reduce profitability.

As a manufacturer, one that has acted in good faith, this could hurt our company to an insurmountable degree. Even though our company and others may demonstrate compliance in advance of May 15, 2020, the very real threat is retailers stop ordering our products in an effort to sell off all the products with the expiration date of May 15, 2020. This matter is very time sensitive. A decision to provide an extension needs to be communicated soon and effectively so as to avoid a serious disruption to our business and that of retailers. (June 1, 2018, email to the EPA.)

Providing specific information and data to explain the basis of your comments on these topics discussed above (and on all matters that you address in your comments) will be helpful in the Agency's consideration of the issues presented by this proposed rule.[4]

IV. Request for Comments on Wood Heaters (40 CFR Part 60, Subpart AAA)

The EPA is also taking comment on whether the 2015 NSPS, 40 CFR part 60, subpart AAA, should also be revised to create a two-year sell-through period for retailers after the Step 2 compliance date for wood heaters similar to what is being proposed for 40 CFR part 60, subpart QQQQ appliances in section III of this preamble. The EPA is seeking comment on whether to allow Step 1-compliant 40 CFR part 60, subpart AAA wood heaters manufactured or imported before May 15, 2020, to be sold at retail through May 15, 2022. In this action, the EPA is seeking comment on a two-year sell-through period for retailers after the Step 2 compliance date, including comment on whether a Step 2 sell-through period for wood heaters is needed, and, if a sell-through period is added, what length of sell-through period is reasonable, and why.

The EPA is particularly interested in soliciting comments for the following topics regarding compliant wood heaters and the sell-through period:

(1) The Agency solicits comment on whether retailers are currently declining to purchase Step 1-compliant wood heaters and whether this reduction in purchases is widespread. In particular, the EPA solicits comment on whether there is a disproportionate change in purchases of crib/cord wood heaters (certification tests with either crib wood or cord wood) compared to pellet wood heaters due to the approaching May 2020 compliance date. The EPA also solicits comment as to whether this will become a more significant issue as the May 2020 compliance date approaches and, if so, when it is likely that retailers will no longer be willing to buy Step 1-compliant wood heaters. The EPA solicits comment on the cost or other impacts that retailers could have on manufacturers who are small businesses if they decline to purchase Step 1-compliant wood heaters.

(2) The Agency is soliciting comment as to what is the typical period of time between (a) when a retailer purchases a wood heater, and (b) when the device is sold to a consumer. In particular, the Agency is soliciting comment on these periods of time for small businesses.

(3) The Agency is soliciting comment as to whether a sell-through period for retailers to sell Step 1-compliant wood heaters is a reasonable way to address these concerns about retailers' reluctance to purchase Step 1-compliant wood heaters and/or manufacturers' inability to sell wood heaters before Step 2-certified models are available. In particular, the Agency is soliciting comment on the sell-through as a reasonable way to address concerns about retailers of devices and products from small businesses.

(4) The Agency is soliciting comments regarding if a sell-through period for the May 2020 compliance date were to be promulgated, what period of time after May 2020 would be sufficient for retailers to sell their inventory of Step 1-compliant wood heaters. The EPA is also taking comment on whether the sell-through period should be as short as one year or as long as three years (or more), and, if so, why such a sell-through period would be more appropriate than two years. For small businesses in particular, the Agency is soliciting comment on a two-year period and whether that amount of time is reasonable.

(5) The Agency is soliciting information on the number of Step 1 wood heater models that are currently in production and the number that are being designed for Step 2 compliance that have not yet received their EPA certification for Step 2 compliance. The EPA requests information on the number of Step 2 pellet and crib/cord wood heaters that are currently certified to meet Step 2. The EPA is soliciting comment on how far in advance of the current May 2020 Step 2 compliance date manufacturers will need to submit their EPA certification applications to not only meet the standards, but also to manufacture, market, and distribute their products without disruption to their business. The EPA solicits comment on any potential impact on consumers if the production of Step 2-compliant wood heaters is limited.

(6) The Agency seeks comment on whether and what type of small business relief may be appropriate in place of the extended sell-through period that would accomplish the same goal.

(7) The Agency seeks comment on the effects on the consumer as a result of a sell-through period.

Providing specific information and data to explain the basis of your comments on these topics discussed above (and on all matters that you address in your comments) will be helpful in the Agency's consideration of the issues presented by this proposed rule.

V. Request for Comments on Pellet Fuel Requirements

Certification tests for residential wood pellet heaters require pellet fuels be made of wood with certain minimum quality requirements to ensure consistent operation for every certification test. These requirements have the added benefit to manufacturers of minimizing emissions during certification testing.

The 2015 NSPS requires that pellets burned in a residential wood pellet heater meet the same minimum quality requirements to ensure consistent operations and comparable emissions. See Pellet Fuel Requirements stated in 40 CFR 60.532(e) and 60.5474(e). These requirements were intended to maintain a level of quality consistent with the requirements of a pellet heater certification test to ensure these pellets are similar to pellets used in certification testing. The EPA concluded at the time that this requirement provided some assurance that the wood pellet heater's performance in the home would be consistent with the laboratory certification test. A pellet manufacturer is not obligated to produce pellets that meet the pellet fuel requirements, but operators and manufacturers of residential pellet heaters in the United States are prohibited from using pellets that do not meet the pellet fuel requirements. However, the Agency has learned of issues regarding these requirements since publication of the 2015 rule. Therefore, the EPA is taking comment on whether the minimum quality pellet fuel requirements in the 2015 NSPS (40 CFR part 60, subparts AAA and QQQQ) should be retained and, if they are retained, whether they should be revised.

(1) The EPA is taking comment on whether 40 CFR part 60, subparts AAA and QQQQ should retain the minimum pellet fuel requirements, which are currently found at 40 CFR 60.532(e) and 60.5474(e). In support of the 2015 NSPS and in response to a remand of the record requested by the EPA, the EPA prepared a memorandum that set forth

[4] In an Advanced Notice of Proposed Rulemaking in another **Federal Register** document that the EPA plans to publish soon, the EPA intends to seek comment on several additional matters, including whether the May 2020 Step 2 compliance date should be extended. The EPA does not view this proposed action for a retailer sell-through period as a measure that would preclude an extension of the Step 2 compliance date. The EPA might both (1) finalize the proposed sell-through period, and (2) subsequently extend the 2020 compliance date. In short, the EPA views the proposed sell-through period and a possible extension of the 2020 compliance date as related, but not mutually exclusive. Whether the EPA does one or both (or neither) will be decided after the EPA considers comments and the other pertinent information.

the Agency's rationale for including pellet fuel requirements. See November 21, 2016, Memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, titled ''EPA's Response to Remand of the Record for Residential Wood Heaters New Source Performance Standards.'' [5] The EPA is requesting comment on the rationale presented in the above-mentioned memorandum and if the current minimum requirements should be retained in its current form at 40 CFR 60.532(e) and 60.5474(e).

(2) The EPA is taking comment on whether the minimum pellet fuel requirements in 40 CFR 60.532(e) and 60.5474(e) should be eliminated entirely.

(3) The EPA is taking comment on whether the pellet fuel requirements, if retained, should be revised. Such revisions could include adding new requirements or removing one or more of the current requirements or revising the requirements that are currently stated. For example, with respect to the maximum dimensions stated in 40 CFR 60.532(e)(2) and 60.5474(e)(2), the Agency is seeking comment on whether this criterion should be removed or replaced with larger or smaller dimensions. The EPA has reviewed the pellet requirements and solicits comment on whether the Agency should revise the current minimum pellet fuel requirements:

1. *Density:* Minimum of 38 lbs/ft^3.

2. *Dimensions:* Maximum length of 1.5″.

3. *Fines:* <1% (EPA referred to ''inorganic fines'' in the 2015 NSPS. Should this be modified to ''fines''?).

4. *Chlorides:* ≤300 ppm.

5. *Ash content:* ≤2%.

6. Contains no demolition or construction waste.

7. Total of each trace metal: 100 mg/kg. Clarify if this should be reported ''as received'' or ''dry basis''. The trace metals include mercury, cadmium, lead, arsenic, chromium, copper, nickel, and zinc.

8. None of the prohibited fuels in paragraph (f) of this section. The prohibited list does not prevent the use of unseasoned wood as an input material for manufacturing pellets.

The EPA is interested in receiving comments that both support the current requirements (and explain why they are necessary) and comments that advocate that the requirements be removed or revised.

[5] This memorandum was placed in the 2015 docket as Docket ID No. EPA–HQ–OAR–2009–0734–1805 and is in the docket for this proposed rule at EPA–HQ–OAR–2018–0195.

VI. Impacts of This Proposed Rule

A. What are the air impacts?

The air impacts associated with the requirements of this proposed rule are the forgone emission reductions of $PM_{2.5}$, HAPs, as well as other criteria pollutants and their precursors, including CO and VOC. VOCs are precursors to $PM_{2.5}$ and ozone. These forgone emission reductions are estimated using the baseline emissions reflected in the final 2015 NSPS as presented in the emissions estimation memorandum and the 2015 NSPS RIA.[6] The average annual forgone emission reductions for the primary scenario (Scenario 2), calculated over the timeframe of 2019–2022, is 257 tons of $PM_{2.5}$, 271 tons of VOC, and 1,444 tons of CO. More information on how these impacts are estimated can be found in the supplemental RIA.

B. What are the energy impacts?

These proposed actions are anticipated to have negligible impacts on energy costs or usage. To the extent that Step 1-compliant hydronic heaters and forced-air furnaces continue to be sold for an additional two years, it is difficult to determine the precise energy impacts that might result from this proposed action. Wood-fueled appliances compete with other biomass forms for residential heating as well as more traditional energy sources such as oil, electricity, and natural gas. There is also a lack of sufficient data to determine the potential for affected consumers to choose other types of fuels and their associated appliances, nor the potential impacts to affected manufacturers.

C. What are the cost savings?

The cost savings of the proposed action are the increase in revenues for manufacturers and retailers of hydronic heaters and forced-air furnaces affected by this rulemaking. The overall distribution of the avoided compliance costs as well as the distribution of forgone benefits is uncertain. The increase in revenues is calculated by estimating the reduction in unit costs from producing Step 1-compliant hydronic heaters and forced-air furnaces as compared to Step 2-compliant devices with estimates of sales taken from the 2015 NSPS RIA, using the estimates calculated for the final 2015 NSPS requirements as the baseline. The revenue estimate calculated is the average of the annual estimates calculated for the 2019–2022 timeframe and the primary scenario (Scenario 2). The estimate of additional average annual revenues to manufacturers is $0.01 billion (2016 dollars). Calculated as an EAV, the estimate is $0.01 billion (2016 dollars). More information on how these impacts are estimated can be found in the supplemental RIA of this proposed rule.

[6] Memo to Gil Wood, USEPA, from EC/R, Inc. Estimated Emissions from Wood Heaters. January 30, 2015. Available in Docket ID: Docket ID No. EPA–HQ–OAR–2009–0734. Regulatory Impact Analysis for Residential Wood Heaters NSPS, Final Report. EPA–452/R–15–001. February 2015. Available at Docket ID: EPA–HQ–OAR–2009–0734–177407344.

D. What are the economic and employment impacts?

The economic impacts of this proposal are the cost savings that are shown in section VI.C of this preamble. Impacts on employment are qualitatively examined in the supplemental RIA.

E. What are the forgone benefits of the proposed rule?

The overall distribution of the avoided compliance costs as well as the distribution of forgone benefits is uncertain. Although this proposed action may result in the delay of the emission reductions from the 2015 NSPS by up to two years, this proposed action to establish a sell-through period does not change the standards upon implementation. The proposed revisions in this action would defer emission reductions into the future, thus delaying the health benefits estimated in the Residential Wood Heaters 2015 NSPS RIA. Due to analytical limitations, it was not possible to conduct air quality modeling for this proposed rule. Instead, the Agency used a ''benefit-per-ton'' approach to estimate the forgone benefits. In brief, the EPA calculated benefit per-ton (BPT) values for this sector by: (1) Characterizing the photochemical modeled $PM_{2.5}$ air quality levels associated with this sector; (2) quantifying the number and economic value of adverse health impacts attributable to these $PM_{2.5}$ concentrations; (3) dividing these values by the sum of the emissions for the sector. The BPT reflects the average national benefits of reducing $PM_{2.5}$ and $PM_{2.5}$ precursors from the residential wood sector and cannot characterize the benefits occurring in discrete geographic locations such as non-attainment areas. For more detailed discussion of the benefit-per-ton approach, please refer to the benefits section in the supplemental RIA accompanying this proposed rulemaking.

As compared to the 2015 NSPS RIA, for the years 2019 to 2022, this proposed rule, if finalized, would result in less

emission reduction of $PM_{2.5}$, HAPs, as well as other criteria pollutants and their precursors, including CO and VOC, compared to the 2015 NSPS final rule. VOC are precursors to $PM_{2.5}$ and ozone. For this proposed rule, the Agency was only able to quantify the monetized forgone health benefits associated with forgone decreased exposure to directly emitted $PM_{2.5}$. The forgone benefits reflect the average of annual $PM_{2.5}$ forgone emission reductions occurring between 2019 and 2022 (inclusive). The Agency estimates the annual average monetized $PM_{2.5}$-related forgone health benefits of the residential wood heaters NSPS in the 2019–2022 timeframe to be $0.10 billion to $0.23 billion (2016 dollars) at a 3-percent discount rate and $0.09 billion to $0.21 billion (2016 dollars) at a 7-percent discount rate. The ends of the range are quantified using Hazard Ratios reported in the Krewski, et al. (2009) and Lepeule, et al. (2012) long-term epidemiological studies. Using alternate relationships between $PM_{2.5}$ and premature mortality supplied by experts, higher and lower estimates of forgone benefits are plausible; but, most of the expert-based estimates fall between these two estimates.[7] A summary of the forgone emissions and monetized forgone benefits estimates for this proposed rule at discount rates of 3 percent and 7 percent is provided in Table 2 of this preamble. All estimates reflect the primary scenario analyzed for this proposal (Scenario 2). Another metric that can be used to calculate such estimates, EAV, yields monetized forgone benefits estimates of $0.09 billion to $0.21 billion at a 3 percent discount rate and $0.07 billion to $0.16 billion at a 7 percent discount rate. More information on all of these calculations can be found in the supplemental RIA.

TABLE 2—SUMMARY OF ANNUAL AVERAGE MONETIZED $PM_{2.5}$-RELATED HEALTH FORGONE BENEFITS FOR NEW RESIDENTIAL WOOD HEATERS, NEW RESIDENTIAL HYDRONIC HEATERS AND FORCED-AIR FURNACES NSPS PROPOSAL IN 2019–2022 TIMEFRAME

[Billions of 2016 dollars][a] [b] [c] [d]

Pollutant	Estimated emission increases (tpy)	Total monetized forgone benefits (3% discount rate)	Total monetized forgone benefits (7% discount rate)
Directly emitted $PM_{2.5}$	257	$0.10 to $0.23	$0.09 to $0.21.
$PM_{2.5}$ Precursors:			
VOC	271		
CO	1,444		

[a] All estimates are for the 2019–2022 timeframe (inclusive) and are rounded to two significant figures. The total monetized forgone benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of $PM_{2.5}$ precursors, such as NO_X, and directly emitted $PM_{2.5}$. It is important to note that the monetized benefits do not include reduced health effects from exposure to HAP, direct exposure to nitrogen dioxide (NO_2), exposure to ozone, VOC, ecosystem effects, effects from black carbon or visibility impairment.

[b] Forgone PM benefits are shown as a range from Krewski, *et al.* (2009) to Lepeule, *et al.* (2012).

[c] These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effects estimates by particle type.

[d] All estimates reflect the primary scenario (or Scenario 2) for the proposal.

These forgone benefit estimates represent the annual average economic value of the health benefits that would have occurred in the years 2019, 2020, 2021 and 2022, were the proposed sell-through date not deferred from 2020 to 2022.

The Agency assumes that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effects estimates by particle type. Even though the Agency assumes that all fine particles have equivalent health effects, the benefit-per-ton estimates vary between precursors depending on the location and magnitude of their impact on $PM_{2.5}$ levels, which drive population exposure.

For this analysis, policy-specific air quality data are not available. Thus, the Agency is unable to estimate the percentage of forgone premature mortality associated with this specific proposed rule's forgone emission reductions at each $PM_{2.5}$ level. As a surrogate measure of mortality impacts, the Agency provides the percentage of the population exposed at each $PM_{2.5}$ level using the source apportionment modeling used to calculate the benefit-per-ton estimates for this sector. Using the Krewski, *et al.,* (2009) study, 93 percent of the population is exposed to annual mean $PM_{2.5}$ levels at or above the lowest measured level (LML) of 5.8 micrograms per cubic meter ($\mu g/m^3$). Using the Lepeule, *et al,* (2012) study, 67 percent of the population is exposed above the LML of 8 $\mu g/m^3$. Therefore, caution is warranted when interpreting the LML assessment for this proposed rule. The Agency refers the reader to the supplemental RIA prepared for this proposed rule for detailed discussion.

Every benefit analysis examining the potential effects of a change in environmental protection requirements is limited, to some extent, by data gaps, model capabilities (such as geographic coverage) and uncertainties in the underlying scientific and economic studies used to configure the benefit and cost models. A detailed discussion of these uncertainties is provided in the supplemental RIA. Despite these uncertainties, the benefit analysis for this action provides a reasonable indication of the expected forgone health benefits of the proposed rulemaking under a set of reasonable estimations.

The monetized forgone benefits estimates provided above do not include forgone benefits from a variety of additional benefit categories. Although the Agency does not have sufficient information or modeling available to provide monetized estimates for these forgone benefits, the Agency includes a qualitative assessment of these unquantified forgone benefits in the supplemental RIA for this proposed rule. For more information on the benefits analysis, refer to the supplemental RIA for this proposed rule, which is available in the docket at Docket ID No. EPA–HQ–OAR–2018–0195.

[7] Roman, *et al.,* 2008. ''Expert Judgment Assessment of the Mortality Impact of Changes in Ambient Fine Particulate Matter in the U.S.,'' Environ. Sci. Technol., 42, 7, 2268–2274.

VII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

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

This action is an economically significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket. The EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, Supplemental Regulatory Impact Analysis (RIA)—Estimated Cost Savings and Forgone Benefits Associated with the Proposed Rule, ''Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces'' is a memorandum that is available in the docket. It is also summarized in section I of this preamble.

Consistent with Executive Orders 12866 and 13563, ''Improving Regulation and Regulatory Review,'' the Agency has estimated the cost and benefits of the proposed rule. Given the nature of this rule, the Agency modified the discussion of net benefits (benefits − costs) to be more consistent with the relevant terminology of traditional net benefit analysis. The costs are presented here as the forgone benefits presented in section 5 of the supplemental RIA and section VI.E of this preamble. The Agency represents the benefits as the cost savings presented in section 2 of the supplemental RIA and section VI.C of this preamble, which the Agency estimates as the increase in revenues to manufacturers of affected wood heaters. The net benefits are the benefits (cost savings) minus the costs (forgone benefits). In this proposed rule, the estimated costs are greater than the benefits, leading to a negative net benefit (or net cost). The estimated annual average net benefit at a 3-percent discount rate is $0.09 billion to $0.22 billion, and $0.08 billion to $0.20 billion at a 7-percent discount rate in 2016 dollars, over the 2019 to 2022 timeframe. The net benefit estimate reflects an annual average of 257 tons of forgone $PM_{2.5}$ emission reductions per year, and a total annual average cost savings of $0.01 billion (2016 dollars). The forgone benefits also include forgone emission reductions of 271 tons of VOC reductions per year and 1,444 tons of CO reductions per year; forgone reduced exposure to HAP, including formaldehyde, benzene, and POM; forgone reduced climate effects due to forgone reduced black carbon emissions and GHG emissions; forgone reduced ecosystem effects; and forgone reduced visibility impairments. Table 3 summarizes the estimated costs and forgone benefits for the affected forced-air furnaces and hydronic heaters. The estimated costs and benefits reflect the average annual impacts for the 2019 to 2022 timeframe, which are the implementation years analyzed in the supplemental RIA for this proposed rule. All estimates reflect the primary scenario analyzed for this proposal (Scenario 2). Results for wood stoves, a category not included in the 2-year sell through proposed extension but for which comments are requested to determine if they should be, are also provided in the supplemental RIA.

TABLE 3—SUMMARY OF ANNUAL AVERAGE COST SAVINGS, MONETIZED FORGONE BENEFITS, AND MONETIZED NET FORGONE BENEFITS (BILLIONS OF 2016 DOLLARS) IN THE 2019–2022 TIMEFRAME FOR THE PROPOSED RULE [a] [b]

	3% Discount rate	7% Discount rate
Costs: Forgone Benefits [c]	($0.10) to ($0.23)	($0.09) to ($0.21).
Benefits: Cost Savings from Increased Manufacturers' and Retailers' Revenues	$0.01	
Net Benefits	($0.09) to ($0.22)	($0.08) to ($0.20).

[a] All estimates in this table are rounded to one decimal point, so numbers may not sum due to independent rounding. All estimates reflect the primary scenario (Scenario 2) as described in the supplemental RIA.

[b] All estimates are for the timeframe from 2019 to 2022 inclusive. All estimates reflect the primary scenario (Scenario 2) for this proposal. These results include units anticipated to come online and the lowest cost disposal assumption. These cost savings are presented in the supplemental RIA. The monetized forgone net benefits at a 3% interest rate are minimally different than those calculated at a 7% interest rate.

[c] The total monetized forgone benefits reflect the forgone human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of directly emitted $PM_{2.5}$. Monetized forgone benefits include many, but not all, health effects associated with $PM_{2.5}$ exposure. Forgone benefits are shown as a range from Krewski *et al.* (2009) to Lepeule *et al.* (2012). We do not report the total monetized forgone benefits by $PM_{2.5}$ species.

In addition, Table 4 reports the present values and equivalent annualized values of the net benefits discounted at 7 and 3 percent. EAV are the annualized present values, or the levelized flow of the present values (PV), over the three years affected by the proposal. The PV of the net benefits are negative $0.07 billion to negative $0.19 billion when using a 7 percent discount rate and negative $0.07 billion to negative $0.20 billion when using a 3 percent discount rate. The equivalent annualized values of the net benefits are negative $0.06 billion to negative $0.15 billion per year when using a 7 percent discount rate and negative $0.08 billion to negative $0.20 billion per year when using a 3 percent discount rate. The negative values indicate that EAV of the estimated benefits (cost savings) of the proposal are smaller than the EAV of estimated costs (forgone benefits). All these estimates are in 2016 dollars and are discounted to 2016.

TABLE 4—ESTIMATED PRESENT VALUES AND EQUIVALENT ANNUALIZED VALUES OF THE BENEFITS, COSTS, AND THE NET BENEFITS OF THE NEW RESIDENTIAL WOOD HEATERS, NEW RESIDENTIAL HYDRONIC HEATERS AND FORCED-AIR FURNACES NSPS PROPOSAL

[Billions of 2016]

	7% Discount rate		3% Discount rate	
	PV	EAV	PV	EAV
Benefits [1]	$0.025	$0.01	$0.029	$0.01.
Costs [2]	($0.09) to ($0.21)	($0.07) to ($0.16)	($0.10) to ($0.23)	($0.09) to ($0.21).
Net Benefits	($0.07) to ($0.19)	($0.06) to ($0.15)	($0.07) to ($0.20)	($0.08) to ($0.20).

[1] The EAV of benefits are the EAV of the cost savings.
[2] The EAV of costs are calculated from the PV of the forgone monetized benefits. Results are rounded to two significant figures. Totals may not sum due to rounding. Values in parentheses are negative.

For more information on the forgone benefits analysis, the cost analysis and the calculation of net benefits, please refer to the supplemental RIA prepared for this proposed rulemaking under Docket ID No. EPA–HQ–OAR–2018–0195.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is expected to be an Executive Order 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule's economic analysis. See section VI of this preamble.

C. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and assigned OMB Control number 2060–01 for 40 CFR part 60, subpart AAA and OMB Control number 2060–0693 for 40 CFR part 60, subpart QQQQ. This action is believed to result in no changes to the information collection requirements of the 2015 Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-air Furnaces rule, so that the information collection estimate of project cost and hour burden from the 2015 final rule have not been revised.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule. This proposed rule will not impose any new requirements on any entities because it does not impose any additional regulatory requirements relative to those specified in the 2015 NSPS. The Agency has, therefore, concluded that this action will have no net regulatory burden for all directly regulated small entities.

E. Unfunded Mandates Reform Act of 1995 (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175. This rule will not impose any requirements on tribal governments. Thus, Executive Order 13175 does not apply to this action. Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, the EPA will provide outreach through the National Tribal Air Association and will offer consultation to tribal officials.

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

This proposed action is subject to Executive Order 13045 because it is an economically significant regulatory action as defined by Executive Order 12866. As noted in the preamble to the 2015 NSPS, the EPA does not believe that the environmental health risks or safety risks addressed by the NSPS presents a disproportionate risk to children based on distributional assessments of effects from residential wood smoke emissions (see 80 FR 13700). Although this proposed action may result in the delay of the emission reductions of some hydronic heater and forced air furnace appliances in the 2015 NSPS by up to two years, this will not alter the EPA's prior findings that on a nationwide basis, cancer risks due to residential wood smoke emissions among disadvantaged population groups generally are lower than the risks for the general population due to residential wood smoke emissions. (One of the demographic variables examined by the EPA was that of people 18 years and younger.) Furthermore, the proposed action does not affect the level of public health and environmental protection already being provided by existing NAAQS and other mechanisms in the CAA. This proposed action does not affect applicable local, state, or federal permitting or air quality management programs that will continue to address areas with degraded air quality and maintain the air quality in areas meeting current standards. Areas that need to reduce criteria air pollution to meet the NAAQS will still need to rely on control strategies to reduce emissions. To the extent that states use other mechanisms in order to comply with the NAAQS, this action will not have a disproportionate adverse effect on children's health.

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This action allows affected wood

heating devices to sustain their current levels of operation. It does not promote the reduction in energy use nor does it increase the cost of energy production. Further information on the energy impacts can be found in section VI.B of this preamble.

J. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51

This rulemaking does not involve technical standards.

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

The EPA believes that this proposed action will not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations or indigenous peoples as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). As noted in the preamble to the 2015 NSPS, the EPA believes that the human health or environmental risk addressed by the NSPS will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations from residential wood smoke emissions (see 80 FR 13701). Although this proposed action may result in the delay of the emission reductions of some hydronic heater and forced air furnace appliances in the 2015 NSPS by up to two years, this will not alter the EPA's prior findings that on a nationwide basis, cancer risks due to residential wood smoke emissions among disadvantaged population groups generally are lower than the risks for the general population due to residential wood smoke emissions.

Furthermore, the overall distribution of the avoided compliance costs as well as the distribution of forgone benefits is uncertain. Although this proposed action may result in the delay of the emission reductions of some hydronic heater and forced air furnace appliances in the 2015 NSPS by up to two years, this proposed action to establish a sell-through period does not change the standards upon implementation.

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure.

Dated: November 21, 2018.

Andrew R. Wheeler,

Acting Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

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

Subpart QQQQ—[Amended]

■ 2. Section 60.5474 is amended by revising paragraphs (a)(2) and (a)(6) to read as follows.

§ 60.5474 What standards and requirements must I meet and by when?

(a) * * *

(2) On or after May 15, 2020, manufacture or sell at retail a residential hydronic heater unless it has been certified to meet the 2020 particulate matter emission limit in paragraph (b)(2) or (b)(3) of this section except that a residential hydronic heater certified to meet the 2015 particulate matter emission limit in paragraph (b)(1) of this section manufactured or imported on or before May 15, 2020, may be sold at retail on or before May 15, 2022.

* * * * *

(6) On or after May 15, 2020, manufacture or sell at retail a small or large residential forced-air furnace unless it has been certified to meet the 2020 particulate matter emission limit in paragraph (b)(6) of this section except that a small or large residential forced-air furnace certified to meet the applicable 2015 particulate matter emission limit in paragraph (b)(4) or (b)(5) of this section, respectively, manufactured or imported on or before May 15, 2020 may be sold at retail on or before May 15, 2022.

* * * * *

[FR Doc. 2018–26083 Filed 11–29–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2018–0196; FRL–9987–39–OAR]

RIN 2060–AU07

Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces

AGENCY: Environmental Protection Agency (EPA).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: In this action, the Environmental Protection Agency (EPA) is soliciting comment on several aspects of the 2015 Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces (2015 NSPS) in order to inform future rulemaking to improve these standards and related test methods. This action does not propose any changes to the 2015 NSPS, but does take comment on a number of aspects of the rule, including the compliance date for the Step 2 emission limits, Step 2 emission limits for forced-air furnaces, hydronic heaters and wood heaters, Step 2 emission limits based on weighted averages versus individual burn rates, transitioning to cord wood certification test methods, compliance audit testing, third-party review, electronic reporting tool, and warranty requirements.

DATES: *Comments.* Comments must be received on or before February 13, 2019. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before January 29, 2019.

ADDRESSES: *Comments.* Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2018–0196, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* See **SUPPLEMENTARY INFORMATION** for details about how the EPA treats submitted comments. *Regulations.gov* is our preferred method of receiving comments. However, the following other submission methods are also accepted:

- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2018–0196 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2018–0196.
- *Mail:* To ship or send mail via the United States Postal Service, use the following address: U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2018–0196, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand/Courier Delivery:* Use the following Docket Center address if you are using express mail, commercial delivery, hand delivery, or courier: EPA Docket Center, EPA WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. Delivery

verification signatures will be available only during regular business hours.

FOR FURTHER INFORMATION CONTACT: For questions about this action, contact Ms. Amanda Aldridge, Outreach and Information Division, Mail Code: C304–05, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5268; fax number: (919) 541–0072; and email address: *aldridge.amanda@epa.gov.* For information about the applicability of the new source performance standard (NSPS) to a particular entity, contact Dr. Rafael Sanchez, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, EPA WJC South Building (Mail Code 2227A), 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564–7028; and email address: *sanchez.rafael@epa.gov.*

SUPPLEMENTARY INFORMATION:

Docket. The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2018–0196. All documents in the docket are listed in the *Regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *Regulations.gov* or in hard copy at the EPA Docket Center, Room 3334, EPA WJC West Building, 1301 Constitution Avenue NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2018–0196. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. This type of information should be submitted by mail as discussed below.

The EPA may publish any comment received to its public docket. 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, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets.*

The *http://www.regulations.gov* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/dockets.*

Submitting CBI. Do not submit information containing CBI to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI for inclusion in the public docket. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2018–0196.

Preamble Acronyms and Abbreviations. The Agency uses multiple acronyms and terms in this preamble. While this may not be an exhaustive list, to ease the reading of this preamble and for reference purposes, the following terms and acronyms are defined here:

BSER Best System of Emission Reduction
CAA Clean Air Act
CBI Confidential Business Information
CFR Code of Federal Regulations
CO Carbon Monoxide
CSA Canadian Standards Association
EPA U.S. Environmental Protection Agency
ERT Electronic Reporting Tool
FR Federal Register
g/hr grams per hour
HPBA Hearth, Patio and Barbecue Association
ISO International Organization for Standardization
lb/mmBtu pound(s) per million british thermal units
NAICS North American Industry Classification System
NSPS New Source Performance Standards
OAQPS Office of Air Quality Planning and Standards (U.S. EPA)
OMB Office of Management and Budget
PFI Pellet Fuels Institute
PM Particulate Matter
$PM_{2.5}$ Particulate Matter with an aerodynamic diameter of 2.5 micrometers or less (''fine particles'')
R&D Research and Development
RTC Response to Comments
U.S. United States
U.S.C. United States Code

Organization of this Document. The information presented in this preamble is organized as follows:

I. General Information

A. Does this action apply to me?

Table 1 of this preamble lists categories and entities that are the subject of this notice. Table 1 is not intended to be exhaustive, but rather provides a guide for readers regarding the entities likely to be affected by this proposed action. The issues described in this notice, and any changes considered in future rulemakings, would be directly applicable to sources as a federal program. Other federal, state, local and tribal government entities are not directly affected by this action.

TABLE 1—SOURCE CATEGORIES AFFECTED BY THIS ACTION

Category	NAICS code [1]	Examples of regulated entities
Residential Wood Heating ...	333414	Manufacturers, owners, and operators of wood heaters, pellet heaters/stoves, and hydronic heaters.
	333415	Manufacturers, owners, and operators of forced-air furnaces.
Testing Laboratories	541380	Testers of wood heaters, pellet heaters/stoves, and hydronic heaters.
Retailers	423730	Warm air heating and air-conditioning equipment and supplies merchant wholesalers.

B. How do I obtain a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this action is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this action at *https://www.epa.gov/residential-wood-heaters/final-new-source-performance-standards-residential-wood-heaters.*

Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of this notice at this same website.

II. Background

A. Statutory Background

Section 111 of the CAA requires the EPA Administrator to list categories of stationary sources that, in his or her judgment, cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. The EPA must then issue ''standards of performance'' for new sources in such source categories. The EPA has the authority to define the source categories, determine the pollutants for which standards should be developed, and identify within each source category the facilities for which standards of performance would be established.

Section 111(a)(1) of the CAA defines ''a standard of performance'' as ''a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction (BSER) which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirement) the Administrator determines has been adequately demonstrated.'' This definition makes clear that the standard of performance must be based on measures that constitute BSER, while taking into account multiple statutory factors. The standard that the EPA develops, based on the BSER, is commonly a numerical emission limit, expressed as a performance level. As provided in CAA 111(b)(5), the EPA does not prescribe a specific technology that must be used to comply with a standard of performance. Rather, sources generally can select any measure or combination of measures that will achieve the emission level of the standard. Where certain statutory criteria are met, the EPA may promulgate design, equipment, work practice or operational standards instead of a numerical standard of performance. See CAA 111(h)(1) and (2).

The Residential Wood Heaters source category is different from most NSPS source categories in that it applies to mass-produced residential consumer products. Thus, an important consideration in determining the emission limit that is achievable through the application of the BSER here is the cost to both manufacturers and consumers as well as any potential environmental impact of delaying production while wood heating devices with those systems are designed, tested, field evaluated and certified.

Section 111(b)(1)(B) of the CAA requires that the standards be effective upon promulgation of the NSPS. Given this statutory requirement, as discussed more fully in the **Federal Register** notice for the 2015 NSPS rulemaking (80 FR 13672), the EPA adopted the stepped (phased) approach for residential wood heaters, hydronic heaters and forced-air furnaces to provide sufficient implementation time for manufacturers and retailers to comply with the Step 2 limits. That is, for the 2015 NSPS rulemaking, the EPA determined that certain emission limits phased in over time reflect the degree of emission limitation achievable through the application of BSER.

B. Regulatory Background

Residential wood heaters were originally listed under CAA section 111(b) in February 18, 1987 (see 52 FR 5065). The NSPS for wood heaters (40 CFR part 60, subpart AAA) was proposed on February 18, 1987 (see 52 FR 4994) and promulgated on February 26, 1988 (see 53 FR 5859) (1988 Wood Heater NSPS). The NSPS was amended in 1998 to address an issue related to certification testing (see 63 FR 64869).

On February 3, 2014, the EPA proposed revisions to the NSPS (see 79 FR 6330) and published notice of its final rule making revisions on March 16, 2015 (see 80 FR 13672). The final 2015 NSPS updated the 1988 Wood Heater NSPS emission limits, eliminated exemptions over a broad suite of residential wood combustion devices, and updated test methods and the certification process. The 2015 NSPS also added a new subpart (40 CFR part 60, subpart QQQQ) that covers new wood burning residential hydronic heaters and new forced-air furnaces.

For this action, the term ''wood heaters'' refers to all appliances covered in 40 CFR part 60, subpart AAA, and the terms ''hydronic heaters'' and ''forced-air furnaces'' refer to appliances covered in 40 CFR part 60, subpart QQQQ. Also, for this action, the term ''wood heating devices'' refers to all units, collectively, regulated by the 2015 NSPS (40 CFR part 60, subparts AAA and QQQQ).

In promulgating the 2015 NSPS, the EPA took a ''stepped compliance approach'' in which certain ''Step 1''

[1] North American Industry Classification System.

standards would become effective in May 2015, and more stringent ''Step 2'' standards would become effective five years later, in May 2020. Considering that over 90 percent of wood heating device manufacturers and retailers are small businesses, the Agency adopted this two-phased implementation approach to try to provide manufacturers adequate lead time to develop, test, field evaluate and certify technologies across their product lines to meet the Step 2 emission limits.

The Step 1 standard reflected demonstrated wood heater technologies at the time. For wood heaters, the Step 1 limit was based on the Washington State standard that had been in effect since 1995 and had been met by most wood heater manufacturers. For hydronic heaters, the Step 1 emission limit was based on the 2010 Phase 2 Voluntary Hydronic Heater Program. The Step 1 standard for forced-air furnaces was what the EPA concluded would be immediately achievable based on a limited dataset (see 80 FR 13693).

For the Step 1 standards, the EPA provided a ''sell-through'' period of seven and a half months, until December 2015, to allow retailers additional time after the effective date of the rule to sell the non-compliant wood heaters and hydronic heaters remaining in inventory (see 80 FR 13685). Specifically, the 2015 NSPS allowed non-compliant wood heaters and hydronic heaters manufactured before May 15, 2015, to be imported and/or sold at retail through December 31, 2015 (see 40 CFR 60.532(a) and 60.5474(a)(1)).[2] For the Step 2 standards, the EPA did not provide a sell-through period following the May 2020 compliance date. The EPA concluded at the time that the 5-year period leading up to the May 2020 Step 2 compliance date would provide manufacturers with sufficient lead time to develop, test and certify Step 2-compliant wood heating devices (see 80 FR 13676). However, in light of concerns raised by manufacturers, in a separate rulemaking action, the Agency is proposing a 2-year sell-through period for certain types of wood heating devices that are manufactured before the May 2020 compliance date to be imported and/or sold at retail.

[2] The EPA did not provide any sell-through period for forced-air furnaces because the EPA determined that the requirements that became effective for these heaters in May 2015 (to revise the owner manuals, and training and marketing materials) could be accomplished without disrupting sales and creating undue burden on manufacturers or retailers (see 80 FR 13682 and 13685).

A major component of demonstrating compliance with both the Step 1 and Step 2 standards is a certification test, using an EPA-specified test method, for a given wood heating device. Among other requirements, the emissions from the certification test cannot exceed the emission limit for the standard for which it is certifying (either Step 1 or Step 2). It is worth noting that, because these certification test methods were developed outside of the 2015 NSPS, they have their own requirements independent of the 2015 NSPS, such as fuel requirements.

Another important point is that the EPA-specified test methods may not reflect how a typical consumer uses the device. Some test methods require the use of crib wood,[3] which is air-dried dimensional lumber, rather than typical cord wood,[4] or firewood. Additionally, the EPA-specified test methods direct the certification laboratory to target specific burn rate categories for performance assessment purposes.

III. Request for Comment

The EPA has worked with a wide array of stakeholders, including but not limited to industry, states, and non-governmental organizations, in implementing the 2015 NSPS and received feedback from these stakeholders on how to improve the 2015 NSPS. Based on this feedback, the EPA is soliciting comments on the following 10 topics:

A. Test Methods—Transition to Cord Wood

As discussed at 80 FR 13678, 13684 and 13690 in the 2015 NSPS, the EPA contemplated requiring ''real world'' cord wood test methods for the Step 2 standards in the final rule. However, the Agency determined that it was premature to require a cord wood based-Step 2 emission limit (except for forced-air furnaces for which CSA B415.1–10 already specified cord wood as the test fuel) because no cord wood test method for wood heaters was available at that time. Rather, the EPA based the Step 2 emission limit on crib wood test data but included a voluntary alternative cord wood compliance option and emission limit to encourage manufacturers to certify with cord wood as soon as possible to provide consumers with better information for actual in-home-use performance. Recently, the EPA approved the use of ASTM 3053–17, finalized in November 2017, through the EPA's Broadly Applicable Test Methods approval process. Broadly applicable test methods Alt-125 and Alt-127 (*https://www.epa.gov/emc/broadly-applicable-approved-alternative-test-methods*) are now available for manufacturers wishing to use this voluntary cord wood compliance option.

As the 2015 NSPS did not include a new test method intended to provide ''real world'' data through cord wood compliance testing, the EPA has received many informal comments and taken part in several discussions concerning the differences between the existing compliance test methods and ''real world'' cord wood compliance testing. These discussions have led the EPA to review existing wood appliance test methods and conduct research into the data sets provided by those test methods. In doing so, the Agency recognizes a need to better understand what compliance test procedures are necessary in order to provide a cord wood emissions test data set that serves both the compliance test benchmark (pass/fail) and ''real world'' data collection to support other regulatory needs. Our review of existing test methods has focused on two distinct facets of the testing procedures: (1) Particulate collection and measurement during the testing; and (2) operation and fueling of an appliance during the testing. Each of these two pathways is currently represented in our compliance testing paradigms by a separate test methodology. For example, ASTM E2515–11 serves as the particulate collection and measurement test method for all existing NSPS compliance test requirements, but this test method is always used in conjunction with any one of several different operation and fueling protocols, such as the EPA Method 28R for crib wood fuel testing of a wood heater or the EPA Method 28WHH for crib wood fuel testing of a hydronic heater. There is inherent variability in each facet of the testing, and the overall variability of the testing result combines the variability inherent to each facet. The EPA recognizes that moving away from a crib wood fuel compliance testing paradigm to a cord wood fuel compliance paradigm involves the introduction of the additional variability inherent to cord wood fuel including the use of various species of cord wood fuel across different regions of the U.S. and in different countries where compliance testing may occur. In that light, a review of test method processes and procedures is appropriate with respect to handling this additional and unknown variability,

[3] Crib wood fuel is air dried, dimensional cut Douglas fir lumber, arranged in the firebox per the EPA Method 28R.

[4] Cord wood fuel is traditional firewood cut to nominal commercial sale length and air dried.

and the Agency is seeking public comment regarding the direction and extent to which the EPA should undertake such evaluations of existing test methods, including the scope of test method, appropriateness of testing procedures, validation of test methodology, and revision and/or developing new compliance test methods not currently associated with the existing NSPS standards. To inform comments, the Agency would point out that the EPA has an existing guideline covering Validation and Peer Review of test methods: (*https://www.epa.gov/sites/production/files/2016-02/documents/chemical_method_guide_revised_020316.pdf*). While the EPA Methods 5H and 5G (both particulate test methods) underwent a similar review prior to their publication in the 1988 NSPS (see: R. Gay and J. Shah, Technical Support Document For Residential Wood Combustion, EPA–450/4–85–012, U.S. Environmental Protection Agency, Research Triangle Park, NC, February 1986), those are the only wood burning appliance test methods upon which the EPA has collected such data and done such analysis. The EPA Method 5G is closely related to the current ASTM E2515–11, which is required for measuring particulate throughout the 40 CFR part 60, subparts AAA and QQQQ, and so some understanding of this method variability of ASTM E2515–11 exists through our understanding of the EPA Method 5G. Beyond particulate measurement, the EPA's Method 28, Method 28R, Method 28WHH, Method 28WHH–PTS and all other operation and fueling protocols required by 40 CFR part 60, subparts AAA and QQQQ have not been individually validated or assessed through such a process.

In addition to the lack of information surrounding the validation of these operating and fueling protocols, the Agency recognizes the need to understand the variability introduced to a compliance test protocol through the combustion of various fuel species. Beyond this, the Agency seeks comment on the need to develop a thorough understanding of appliance use and emissions from typical appliance operations such as startup, refueling (adding logs) and other common modes of operation more representative of actual in-home use than the ''high burn, mid burn, and low burn'' modes currently required by Method 28R and/or similar operating conditions required by the various operating and fueling protocols throughout 40 CFR part 60, subparts AAA and QQQQ. The Agency realizes that ''real-world'' data collection stems from an understanding of the actual in-home use of the appliance, and any compliance test paradigm relies on consistent application of appliance fueling and operation during performance tests and, while our existing compliance paradigms provide some testing consistency, the Agency would like information supporting their use or specific information as to more appropriate compliance operation and fueling protocol direction for this program.

The EPA seeks comment on whether existing operation and fueling protocols are suited to deliver an appropriate compliance test result and if existing operation and fueling protocols are suited to deliver ''real world'' emissions data where such data are a necessary output of this program. The EPA also seeks comment on the need to validate existing operation and fueling protocols and/or expend time and resources to develop new validated operation and fueling protocol methods in support of cord wood fuel compliance testing and providing such ''real world'' emissions data from those tests. Relatedly, the EPA also seeks comment with respect to developing new emission standards to correspond with new test methods, if new test method development is found to be necessary. Commenters should provide relevant information and data to support their comments.

B. Feasibility of the Step 2 Compliance Date of May 15, 2020

While some manufacturers have begun manufacturing Step 2-compliant units, the EPA has learned of issues with compliance with these emission limits by the May 15, 2020, deadline. In the 2015 NSPS, the EPA concluded that the 5-year period leading up to the May 2020 Step 2 compliance date would provide manufacturers with sufficient lead time to develop, test and certify Step 2-compliant wood heating devices (see 80 FR 13676).[5]

The Step 1 emission standards reflected demonstrated wood heater technologies at that time. Step 2 standards were deemed to be reasonable levels of emission control five years after promulgation. As a part of the 2015 rulemaking, the EPA identified the percentage of wood heaters estimated to be meeting the Step 2 standards prior to promulgation of the 2015 NSPS as 70 percent of pellet stoves and 26 percent of wood stoves. Similarly, 18 percent of hydronic heaters were meeting the Step 2 standards prior to promulgation of the 2015 NSPS, while the limited dataset for forced-air furnaces showed no models meeting the Step 2 standards prior to promulgation of the 2015 NSPS. As of March 20, 2018, there were a total of 78 (44 pellet and 34 crib/cord wood) models that when certified for the Step 1 and Step 2 standards reported emission levels that met the Step 2 standard for wood heaters (as required under 40 CFR 60.532(b) or 60.532(c)). In addition, there are nine models that met the Step 2 standard for hydronic heaters (as required under 40 CFR 60.5474(a)(2) or (b)(3)) and one model that met the Step 2 standard for forced-air furnaces (as required under 40 CFR 60.5474(a)(6)) based on the Step 2 certification process. The inventory of certified models as of March 2018 is provided in the document titled: ''List of EPA certified Wood Heating Devices March 2018,'' which is available in the docket and at the website *https://www.epa.gov/compliance/wood-heater-compliance-monitoring-program.* The EPA requests comment and information regarding the percentage of models referenced above that the agency projects are meeting standards for each type of equipment.

Recently, some manufacturers have indicated that they need more time to develop, test, and certify wood heating devices that meet the Step 2 standard and that the costs of Step 2 compliance are beyond what the industry can bear. As a result of this input, the EPA is soliciting comment on whether it is feasible/practicable for manufacturers to meet the Step 2 emission limits by May 15, 2020. Commenters should discuss whether the Step 2 compliance date is achievable or not and should provide relevant information and data to support their position. For example, commenters may wish to address the following questions:

1. Are there other factors that have changed or that the Agency did not consider when issuing the 2015 NSPS that have influenced whether some manufacturers are able to comply, and others are not? Why are some manufacturers able to comply with the Step 2 emission limits by May 2020 and others cannot comply by then?

2. For manufacturers expecting to achieve Step 2 emission limits by May 2020, what is the time and cost to bring

[5] The EPA provided further explanation in the 2015 Response to Comments (RTC) document (Docket ID EPA–HQ–OAR–2009–0734–1775). On page 99 of the RTC, the EPA noted that the 5-year period from 2015 to 2020 ''matches the window of time many manufacturers noted they would require to conduct research and development (R&D) and bring a new model to market,'' and on page 231 of the RTC, the EPA concluded that the Step 2 standards provide ''appropriate lead times for manufacturers to redesign their model lines to accommodate the improved technology across multiple model lines and test, field evaluate, and certify new model lines.''

the model to market and how does this compare to the EPA's 2015 NSPS estimates? Were there other timing considerations associated with new state level requirements that were issued in the intervening time between 2015 NSPS promulgation and the May 2020 deadline that may have changed the design timeline? Do manufacturers, considering the size of their businesses, typically sell different models to meet differing state standards or do manufacturers typically have just one model for the nation? Does the manufacturer's business model and distribution chain affect their ability to comply by the compliance deadline? If so, please provide specific information on how this occurs. What is the typical engineering design cycle for small businesses and did five years provide enough time?

3. For manufacturers that do not expect to achieve the Step 2 emission limits by May 2020, what factors are preventing your model(s) from meeting the emission limits? Are there other factors that have changed or that the Agency did not consider when issuing the 2015 NSPS that have had an effect on meeting the May 2020 emission limits? Are there features of wood heating devices that make meeting Step 2 standards more challenging or more expensive? Does a lack of desirable consumer features lead to delays in replacing older dirty stoves or promote switching to other fuels?

The EPA is also soliciting comment on how much the compliance date should be extended, if at all. Commenters should provide relevant information and data to support any request for an extension of the compliance date. For example, commenters may wish to address the following questions:

1. What new factors resulted in the need for time beyond the five years of the 2015 NSPS? The Agency seeks comment and information explaining how cost affects meeting the Step 2 emission limits by May 2020, including why cost projections have changed since the 2015 NSPS, along with relevant data on the cost of research and development, certification testing, and bringing a model to market. Are there other cost considerations such as material costs, warranty costs, installation costs, or maintenance costs that were unexpected or different from what the Agency estimated in the 2015 NSPS? Have there been any other unforeseen impacts on costs for manufacturers due to changes in consumer preferences or attitudes towards the devices and products that would be needed to comply with Step 2? For example, would any of the new designs needed to meet the May 2020 standards impact the size of the unit, how much it would cost consumers to operate it, or change the maintenance frequency or cost?

2. If more time is needed to meet the Step 2 emission limits, the EPA seeks comment on the time and resources devoted to research and development of a Step 2 model since 2014. Commenters should include information regarding time spent on emissions testing, and the number of runs/tests passed versus the number failed. Both manufacturer-produced test data and certified laboratory test data are of interest to the EPA. The Agency is also interested in receiving information regarding emission reduction efforts and any other information outlining attempts to develop a Step 2-compliant model.

3. If more time is needed to meet the Step 2 emission limits, then how much additional time is needed? For example, the Agency solicits comments and detailed information regarding the timetable for conducting research and development, additional testing, developing saleable products, marketing, and any other relevant information and data that supports a request for a delayed compliance date.

The EPA also solicits comment on the environmental consequences and public health effects, if any, of delaying compliance.

C. Step 2 Emission Limit for Forced-Air Furnaces

At the time of the 2015 NSPS, the EPA expected most forced-air furnace manufacturers to transfer technology and knowledge from wood heaters and hydronic heaters to design Step 2-compliant forced-air furnaces by the 2020 compliance date; however, the EPA is only aware of one manufacturer that has received EPA certification as being Step 2 compliant, see website: *https://www.epa.gov/compliance/wood-heater-compliance-monitoring-program.* Prior to the 2015 NSPS, some small forced-air furnace manufacturers had already transferred technology from wood heaters to forced-air furnaces to achieve good performance as discussed at 80 FR 13687. Several manufacturers, however, question whether it is feasible to transfer technology from hydronic heaters. These manufacturers point to the fact that space limitations may affect their ability to adequately insulate models that may be installed in close proximity to combustibles. The Agency requests comment on the installation of cord wood-fired indoor hydronic heaters without large volumes of thermal insulation around the firebox, and whether this approach is feasible and cost effective for forced-air furnaces. The EPA also seeks comment on whether technology transfer is necessary for forced-air furnaces to meet the Step 2 emission limit, and on the technological feasibility and costs of alternatives to thermal insulation around the firebox. The EPA solicits comment on the feasibility of the Step 2 limit for forced-air furnaces and what factors the Agency should consider concerning the feasibility and costs of transferring technologies from other wood heater devices to forced-air furnaces. Comments should include information and data supporting their perspective.

Also, since promulgating the 2015 NSPS, the EPA has received feedback from some manufacturers that complying with the Step 2 emission limit is cost prohibitive. Therefore, the EPA is soliciting comment on whether, regardless of technical feasibility concerns, it is economically feasible to comply with the Step 2 emission limit for forced-air furnaces. Commenters should explain the issues regarding costs and the feasibility/practicability for achieving the Step 2 emission limit and whether changing the Step 2 emission limit would alleviate these issues, along with data supporting the position. The EPA is also soliciting comment on the environmental and public health effects, if any, of modifying the Step 2 emission limit for forced-air furnaces.

As noted earlier, the EPA is also soliciting comment on the feasibility of the Step 2 compliance date of May 15, 2020. The EPA is soliciting comment on whether to extend the Step 2 compliance date for forced-air furnaces. Commenters should provide relevant information and data to support any request for a delayed compliance date. The EPA is also soliciting comment on the environmental and public health effects, if any, of potential extensions of the Step 2 compliance date for forced-air furnaces.

D. Step 2 Emission Limit for Hydronic Heaters

For the 2015 NSPS, the EPA set the Step 2 emission limits based on its determination of the BSER, which takes into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements (See 80 FR 13687). Since promulgation, however, the EPA has received comments from industry representatives that the cost of compliance with Step 2 emission limits for hydronic heaters is exceeding the EPA's original estimation. The EPA

estimated a yearly cost of $46 million (2013$), that would be incurred from 2015 to 2020, for implementation of the 2015 NSPS. Details of how costs of the 2015 NSPS were estimated can be found in Chapter 5 of the Regulatory Impact Analysis for that standard.[6] Furthermore, these comments have indicated that the excess costs have made complying with the Step 2 emission limit cost prohibitive. Are there other cost considerations such as material costs, warranty costs, installation costs, maintenance costs, or other costs that were unexpected or different from what the Agency estimated in the 2015 NSPS? Have there been any other unforeseen impacts on costs for manufacturers due to changes in consumer preferences or attitudes towards the devices and products that would be needed to comply with Step 2? Therefore, the EPA is soliciting comment on the feasibility of complying with the Step 2 emission limit for hydronic heaters. Commenters should explain the issues regarding the practicability of achieving the Step 2 emission limits, whether the EPA's estimated costs are being exceeded[7] or if there are other aspects of the costs that the Agency had not previously considered, and whether changing the Step 2 emission limit will alleviate these issues. Commenters should provide relevant information and data to support their positions. The EPA is also soliciting comment regarding the potential environmental and public health effects, if any, of modifying the Step 2 emission limits for hydronic heaters.

As of March 20, 2018, there are nine models that meet the Step 2 standard for hydronic heaters (as required under 40 CFR 60.5474(a)(2) and 60.5474(b)(2) or (b)(3)), and one model that meets the Step 2 standard for forced-air furnaces (as required under 40 CFR 60.5474(a)(6) and 60.5474(b)(6)) based on the Step 2 certification process. These models are listed in the document titled ''List of EPA certified Wood Heating Devices March 2018,'' which is in the docket at EPA–HQ–OAR–2018–0196. Also see link *https://www.epa.gov/compliance/wood-heater-compliance-monitoring-program.*

The EPA is requesting comment regarding these models and models that have not met the Step 2 standard for hydronic heaters and what they demonstrate about achieving the standard at a reasonable cost. Specifically, for manufacturers expecting to be unable to design a hydronic heater to meet the Step 2 standard, the EPA is interested in whether the Step 2 standard applicable to your device is achievable at a reasonable cost by the May 2020 Step 2 compliance date. The Agency is also interested in receiving information regarding efforts undertaken to design hydronic heaters to meet the applicable Step 2 standard, including cost, and if one or more models are expected to be ready for certification by the May 2020 Step 2 compliance date, when you expect to submit your application(s) for certification to the EPA.

As noted earlier, the EPA is also soliciting comment on the feasibility of the Step 2 compliance date of May 15, 2020. The EPA is soliciting comment on whether to extend the Step 2 compliance date for hydronic heaters. Commenters should provide relevant information and data to support any request for a delayed compliance date. The EPA is also soliciting comment on the environmental and public health effects, if any, of potential extensions of the Step 2 compliance date for hydronic heaters.

E. Step 2 Emission Limit Based on Weighted Averages Versus Individual Burn Rates for Hydronic Heaters and Forced-Air Furnaces

For hydronic heaters, the 2015 NSPS retained the proposed Step 1 emission cap of 18 grams per hour (g/hr) for all burn rates. For forced-air furnaces, the 2015 NSPS does not require an emission cap for any burn rates for Step 1. The Step 2 requirements for hydronic heaters did not retain the g/hr cap. Instead, to balance industry's concern with the g/hr cap with concerns about very large emissions at individual burn rates, the Step 2 emission standards for hydronic heaters and forced-air furnaces require the devices to meet the emission limits for crib wood and cord wood, at each individual burn rate (see 80 CFR 13684 and 13690).

The emission limits for hydronic heaters reflect the data available for the 2015 NSPS rulemaking, when 18 percent of hydronic heaters in the EPA's Voluntary Hydronic Heater Program already met the Step 2 standard. For forced-air furnaces, the EPA determined that research and development would be needed in order to meet the Step 2 limits.[8]

In the 2014 NSPS proposal, the EPA proposed a weighted average approach for compliance. But, because of the large emissions that could potentially result from individual burn rates, along with the proposed weighted average approach, the EPA also proposed a g/hr cap for the certification test. Comments received from industry representatives in 2014 suggested that the g/hr emission cap would be too difficult to meet. To accommodate these concerns, and after considering other public comments, the EPA finalized the emission standards without a g/hr cap but required the devices to meet the emission limit at each individual burn rate to prevent large emission discharges.

Based on concerns raised since promulgating the 2015 NSPS, the EPA is soliciting comment on determining compliance with weighted averages instead of individual burn rates. Commenters should describe the relevant issues pertaining to compliance with the Step 2 emission limit with individual burn rates versus a weighted average and also include data to support their position. Commenters should also discuss and support with data how a weighted average would impact emissions and compliance costs.

F. Step 2 Emission Limit for Wood Heaters

As of March 20, 2018, there were a total of 78 models that when certified for the Step 1 and Step 2 standards reported emission levels that meet the Step 2 standard for wood heaters (as required under 40 CFR 60.532(b) or 60.532(c)). These models are listed in the document titled ''List of EPA certified Wood Heating Devices March 2018,'' which is in the docket at EPA–HQ–OAR–2018–0196. Also see link *https://www.epa.gov/compliance/wood-heater-compliance-monitoring-program.*

The EPA is requesting comment on all aspects of the costs associated with the Step 2 standards for wood heaters compared to the costs estimated by the EPA in the 2015 NSPS and whether Step 2 is achievable at a reasonable cost. The EPA requests comment on the potential cost difference for consumers to operate different types of wood heaters and, in particular, the cost of operating a pellet wood heater compared to the cost of operating a cord/crib wood heater.

If you are a manufacturer that has been unable to design a wood heater to

[6] U.S. Environmental Protection Agency. Regulatory Impact Analysis (RIA) for the Residential Wood Heaters NSPS Revision. Final Report. EPA–452/R–15–001. Available on the internet at *https://www3.epa.gov/ttn/ecas/docs/ria/wood-heaters_ria_final-nsps-revision_2015-02.pdf.*

[7] Memo to Gil Wood, USEPA, from EC/R Inc. Estimated Residential Wood Heater Manufacturer Cost Impacts. January 30, 2015. Available in Docket ID No. EPA–HQ–OAR–2009–0734.

[8] Memo to Gil Wood, USEPA, from EC/R Inc. Estimated Residential Wood Heater Manufacturer Cost Impacts. January 30, 2015. Available in Docket ID No. EPA–HQ–OAR–2009–0734.

meet the Step 2 standard, the EPA is interested in whether you think the Step 2 standard applicable to your device is achievable at a mean capital cost per model of $162,300 (for wood stoves and pellet stoves, in 2016 dollars) by the May 2020 Step 2 compliance date and whether this cost is reasonable.[9] The EPA is requesting comment on the technical feasibility of achieving the Step 2 standards for 40 CFR part 60, subpart AAA wood heaters including both pellet and cord/crib wood heaters and whether the Agency should consider creating separate source categories for these different wood heaters types.[10] Since more pellet stoves meet Step 2 than crib/cord wood stoves, the EPA is interested in hearing from manufacturers and the public on the concept of different emission standards for pellet-fired and crib/cord wood-fired heating devices. The Agency is also interested in receiving information regarding the efforts you have undertaken to design a wood heater, both for pellet and crib/cord wood heaters, to meet the applicable Step 2 standard, including the cost of your efforts to do so. In addition, the EPA requests information on how many models of pellet and crib/cord wood heaters you expect will be and will not be ready for certification by the May 2020 Step 2 compliance date, and when you expect to submit your application(s) for certification to the EPA.

Additionally, the EPA has received informal comments from several parties regarding emissions testing variability and, along with those discussions, issues have been raised regarding the units or format of the Step 2 emission limit in 40 CFR 60, subpart AAA. One issue raised is that the existing emission limit in units of grams per hour (g/hr) increases variability in that the duration of the performance test directly impacts the g/hr result, thus incentivizing longer test periods. The EPA is soliciting comments on this form of the standard (g/hr) and whether it is appropriate for the purpose of defining the compliance limit and, if not, what form of a standard would be more appropriate and reasons supporting those positions. Other possible unit options for the emission limit could be g/kg or lb/mmBtu. Commenters are asked to provide relevant information and data (where available) to support their comments.

G. The EPA Compliance Audit Testing

The EPA seeks comment with respect to the EPA compliance audit test provisions in the current rules (2015 NSPS), found at 40 CFR 60.533(n) (80 FR 13708) for wood heaters and at 40 CFR 60.5475(n) (80 FR 13721) for hydronic heaters and forced-air furnaces. Specifically, the Agency is seeking comment on whether revisions to the current compliance audit test provisions are necessary to ensure compliance. First, the Agency is seeking comment on 40 CFR 60.533 (n)(2)(i) and 40 CFR 60.5475(n)(2)(i) regarding if it is appropriate for the EPA to select a lab to perform the audit test from any approved test laboratory, and whether the EPA should also consider using a federal laboratory. Alternatively, the EPA seeks comment on whether audit tests should be performed by the same lab that did the certification test for a given wood heater appliance. If the audit test should be done by the certifying lab, the EPA seeks comment on how to handle situations where the original certifying lab is out of business or unable to accommodate the audit test. Commenters should include any relevant information and data that support their views and comments.

Second, as some variability is inherent in emissions testing, the Agency is seeking comment (and information) on whether and, if so, to what degree, the EPA should consider this variability when assessing the result of an audit test to determine if a wood burning appliance successfully passed the test, or not. Please provide relevant information and data to support your comments.

Third, the Agency is seeking comment on establishing (as well as how best to manage the regulatory cost of), through NSPS regulation, a program using ASTM E691–99 ''Standard Practice for Conducting an Interlaboratory Study to Determine the Precision of a Test Method.'' The intent of such a program would be to develop and establish wood heating device audit test acceptability criteria, and to provide data useful to the EPA in both refining wood heating device test methodology development and in aiding the regulatory data collection with respect to wood heater, forced-air furnace, and hydronic heater emissions and standards setting processes. The EPA is also requesting comment on the cost or any concerns with specifying a specific certification lab and any discussion of the use of a federal versus a private lab. For the 2015 NSPS, the EPA estimated a cost of $63,564 for each compliance audit conducted for each hydronic heater and forced-air furnace over the period of 2015 to 2017, an estimate documented in the Supporting Statement for the standard.[11]

H. ISO-Accredited Third-Party Review

In the 2015 NSPS, the EPA included a new feature to improve the process by which manufacturers of wood heating devices apply for certification (see 80 FR 13684, and the ISO-accredited third-party review at 80 FR 13706 and 80 FR 13719). The ISO-accredited third-party review was included in the 2015 NSPS to streamline and speed up the review process.

The EPA is seeking comment on whether third-party review has streamlined the process for manufacturers to submit their certification applications and/or what issues and problems stakeholders have experienced with third-party review process. The EPA also solicits suggestions for improving the third-party review and reducing regulatory burden, including what specific rule changes would be appropriate, and why. Commenters should provide relevant information and data to support their comments and suggestions.

The current process allows the EPA-approved certifying lab to also act as the third-party reviewer for a given appliance. Some external stakeholders have raised concerns about allowing a lab to act as both the certifying test lab and third-party reviewer for a given certification test. The EPA solicits comments as to whether an EPA-approved lab should be allowed to act

[9] Estimate is based on the mean capital cost per model in Table 5–1, p. 5–5 of that RIA, escalated to 2016 dollars from the original 2013 dollar estimate of $156,000. Escalation uses the annual value of GDP implicit price deflator, which is 1.04127 higher in 2016 than 2013.

[10] In the 2015 final rule, the EPA noted that it was ''making a single determination of BSER for catalytic, noncatalytic, hybrid, cord wood and pellet heaters and furnaces in order to not restrict open market competition.'' Furthermore, as noted in the Response to Comment document: ''It is up to manufacturers to decide what combustion technology/wood fuel to use to meet the emission limits and up to consumers to decide what types of heaters they wish to purchase that are certified to meet those limits.'' Performance standards may drive competition in the marketplace; however, maintaining just one source category for these wood heaters may distort the marketplace and raise costs for both manufacturers and consumers if only a limited number of wood heaters or predominantly one type of wood heater can meet the Step 2 standards. Pellet wood heaters may be more readily able to meet more stringent standards due to the consistent fuel type and continual operating mode compared to crib/cord wood heaters that may require more costly redesigns to meet the Step 2 standards. In addition, the agency did not consider the lifetime operating costs in the 2015 NSPS as the difference in fuel costs between operating a crib/cord wood and pellet wood heater could be considerable over the lifetime of the wood heater if consumer choice is limited to just pellet stoves due to the Step 2 standards.

[11] U.S. Environmental Protection Agency. NSPS for New Residential Hydronic Heaters and Forced-Air Furnaces (40 CFR part 60, subpart QQQQ) (Final Rule). January 2015. Pp. 11–12.

as both the certifying lab and third-party reviewer. Commenters should address whether this is a problem and provide available data to support their position.

I. Electronic Reporting Tool (ERT)

The EPA seeks comment on establishing electronic reporting for submitting the non-confidential business information (CBI) certification application, including the compliance test data, rather than via hard copy, to relieve manufacturer burden and enhance efficiencies. One possibility is the EPA's Electronic Reporting Tool (ERT). The ERT is a Microsoft Access® application that generates electronic versions of source test reports. Information on the ERT can be found at *https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert.* The EPA believes that using the ERT will relieve the burden on manufacturers in the certification application process by standardizing the reporting format by having specific data elements reported, thereby helping to ensure completeness and accuracy of the data submitted. As a result, the electronically submitted application with complete and accurate data will enable an efficient and timely review. In addition, because the ERT performs the required method calculations, certification test report errors will be reduced and the burden of performing these calculations manually will be eliminated for the manufacturers as well as for the third-party certifiers and the EPA reviewers. If the ERT were used, it would generate a non-CBI test report (in pdf format) along with the ERT-generated Access database (accdb) file that could be submitted to the EPA for certification and once certified, posted to the manufacturer's website. This ERT-generated test report would include a list of attachments in the ERT file but not the attachments themselves. The attachments would be contained in the ERT accdb file and if posted to the manufacturer's website would be available to the public. Posting the pdf will also address the version control concerns of the ERT-generated database file. These two components could satisfy the reporting requirements in 80 FR 13713 and 13725. The EPA seeks comment on whether to include the option of using the ERT to create a non-CBI and a CBI test report and certification package (pdf and .accdb file) that satisfies the reporting requirements in 40 CFR 60.537(f) and 60.5479(f), which requires the manufacturer to submit the results of a certification test within 60 days of completing each performance test. If the EPA changes the current provisions, the Agency expects that the manufacturers would still be required to post the full non-CBI test report (pdf with all attachments or ERT generated pdf with the Access database (accdb) file) on the manufacturer's website and submit the CBI test report separately to the EPA. Manufacturers, who claim that some of the information being submitted is CBI (*e.g.,* design drawings), could also utilize the same non-CBI test report generated by the ERT and add the design drawings as an attachment to be submitted to the EPA as CBI in order to satisfy the requirements under 40 CFR 60.537(f) and 60.5479(f). Similarly, the non-CBI report with no CBI information attached could be posted to the manufacturer's website within 30 days of receiving a certification of compliance to satisfy 40 CFR 60.537(g) and 60.5479(g). Please provide as much detailed information as possible to support your comments regarding this approach.

J. Warranty Requirements for Certified Appliances

The 2015 NSPS requires owners or operators to operate wood heating devices consistent with the owner's manual (see 40 CFR 60.532(f)(13) and (g) and 60.5474(f)(13) and (g)). The 2015 NSPS also requires manufacturers to provide an owner's manual that clearly states that operation in a manner inconsistent with the manual, such as burning prohibited material or pellets that do not meet the minimum requirements of the 2015 Rule, would void the warranty (see 80 FR 13751, appendix I to Part 60). The cost of this requirement to provide an owner's manual is an average of $3,750 per hydronic heater or forced-air furnace model over the time period of 2015 to 2017, according to the Supporting Statement for the 2015 NSPS.[12] Although numerous states expressed their support for these requirements as a mechanism to help enforce the 2015 NSPS, some stakeholders have questioned whether the EPA has the statutory authority to impose these requirements. Stakeholders have also raised other issues regarding the warranty requirements. The EPA is, therefore, soliciting comments regarding retention, revision, or elimination of the warranty requirements. For example, the EPA would be interested in hearing whether such requirements are necessary for the safe and efficient operation of the wood heater devices. Commenters supporting retention of the requirements should address whether any changes are recommended to the warranty requirements along with data, as appropriate, and an explanation to support their position. Commenters supporting elimination of the requirements should provide an explanation to support their position.

[12] U.S. Environmental Protection Agency. NSPS for New Residential Hydronic Heaters and Forced-Air Furnaces (40 CFR part 60, subpart QQQQ). January 2015. pp. 11.

VII. Statutory and Executive Order Reviews

Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), this is a ''significant regulatory action.'' Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action. Because this action does not propose or impose any requirements, and instead seeks comments and suggestions for the Agency to consider in possibly developing a subsequent proposed rule, the various statutes and Executive Orders that normally apply to rulemaking do not apply in this case. Should the EPA subsequently determine to pursue a rulemaking, the EPA will address the statutes and Executive Orders as applicable to that rulemaking.

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure.

Dated: November 21, 2018.

Andrew R. Wheeler,

Acting Administrator.

[FR Doc. 2018–26082 Filed 11–29–18; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 181031994–8999–01]

RIN 0648–XG608

Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Fisheries of the Northeastern United States; Atlantic Herring Fishery; Adjustment to Atlantic Herring Specifications and Sub-Annual Catch Limits for 2019

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

ACTION: Proposed rule; request for comments.

SUMMARY: This action proposes an in-season adjustment to the Atlantic herring specifications and sub-annual catch limits for 2019. These adjustments are necessary to reduce 2018 herring catch limits that would otherwise remain in effect for 2019. This action is intended to prevent overfishing of the herring resource while minimizing negative social and economic impacts of reduced catch limits.

DATES: Public comments must be received by December 31, 2018.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2018–0131, by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2018-0131,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Michael Pentony, Regional Administrator, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, ''Comments on Adjustments to Atlantic Herring Specifications for 2019.''

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by us. 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).

Copies of this action, including the Supplemental Environmental Assessment and the Regulatory Impact Review/Initial Regulatory Flexibility Analysis (SEA/RIR/IRFA) prepared in support of this action, are available from Thomas A. Nies, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The supporting documents are also accessible via the internet at: *https://www.regulations.gov/.*

FOR FURTHER INFORMATION CONTACT: Carrie Nordeen, Fishery Policy Analyst, 978–281–9272.

SUPPLEMENTARY INFORMATION:

Background

We implemented 2016–2018 Atlantic herring specifications on November 1, 2016 (81 FR 75731), as recommended by the New England Fishery Management Council. The specifications included an overfishing limit (OFL) of 111,000 mt for 2018. The acceptable biological catch (ABC) for 2018 was also set at 111,000 mt. The ABC was based on the Council's interim control rule, set equal to the OFL with at least a 50-percent probability of preventing overfishing, and consistent with the Council's Scientific and Statistical Committee's (SSC) advice. The annual catch limit (ACL) for 2018 was 104,800 mt.

In June 2018, a new Northeast Regional Stock Assessment Workshop (SAW) for herring, reviewed by the Stock Assessment Review Committee (SARC), was completed. The assessment concluded that although herring was not overfished and overfishing was not occurring in 2017, poor recruitment would likely result in a substantial decline in herring biomass. The stock assessment estimated that recruitment had been at historic lows during the most recent 5 years (2013–2017). The assessment projected that biomass could increase, after reaching a low in 2019, if recruitment returns to average levels, but that herring catch would need to be reduced, starting in 2018, to prevent overfishing and lower the risk of the stock becoming overfished. The final assessment summary report is available on the Northeast Fisheries Science Center (NEFSC) website (*www.nefsc.noaa.gov/publications/*).

The Atlantic Herring Fishery Management Plan (FMP) allows us to make in-season adjustments to the herring specifications and sub-ACLs, after consultation with the Council, consistent with the Herring FMP's objectives and other FMP provisions. In August 2018, at the request of the Council, we used an in-season adjustment to reduce the 2018 ACL from 104,800 mt to 49,900 mt to reduce the risk of overfishing (83 FR 42450, August 22, 2018). This ensured at least a 50-percent probability of preventing overfishing in 2018. However, assessment projections indicated that catch would need to be further reduced in 2019 to prevent overfishing and lower the risk of the stock becoming overfished.

By regulation, herring catch limits for 2018, as modified by the 2018 in-season adjustment, will remain in effect until replaced. At its September 2018 meeting, the Council adopted a new ABC control rule for the herring fishery developed in Amendment 8 to the Herring FMP and recommended we use an in-season adjustment to reduce 2018 herring catch limits for 2019 while it develops new specifications starting in 2020. The Council was scheduled to begin developing the 2019–2021 herring specifications at its September meeting and take final action on the new specifications at its December 2018 meeting. The Council planned for us to implement the new specifications during 2019, based on the new ABC control rule it adopted in Amendment 8. However, because of the time required for the Council to prepare the necessary documentation and for us to review and approve the control rule in Amendment 8 and implement final approved measures, the new specifications would not have been effective early enough to prevent catch from exceeding the lower catch limits required to prevent overfishing in 2019.

Proposed Adjustments to Herring Specifications

We are proposing to adjust the current herring specifications and sub-ACLs for 2019, consistent with the Herring FMP's objectives of preventing overfishing while maximizing social and economic benefits. We will strive to publish the final rule as close as possible to the start of the new fishing year in January 2019. The 2019 specifications and sub-ACLs proposed in this action, as well as the Council's recommendations for 2019, are shown in Table 1.

TABLE 1—2019 ATLANTIC HERRING SPECIFICATION AND SUB-ACL ALTERNATIVES (mt)

	Alternative 1—no action	Alternative 2—council-recommended	Alternative 3—proposed action
Overfishing Limit	111,000	30,688	30,688
Acceptable Biological Catch	111,000	21,266	30,688
Management Uncertainty	6,200	6,200	6,200
Optimum Yield/ACL	49,900 *	15,065 *	24,488 *

TABLE 1—2019 ATLANTIC HERRING SPECIFICATION AND SUB-ACL ALTERNATIVES (mt)—Continued

	Alternative 1—no action	Alternative 2—council-recommended	Alternative 3—proposed action
Domestic Annual Harvest	104,800	15,065	24,488
Border Transfer	4,000	0	0
Domestic Annual Processing	100,800	15,065	24,488
U.S. At-Sea Processing	0	0	0
Area 1A Sub-ACL	27,743* (55.6%)	4,354* (28.9%)	7,077* (28.9%)
Area 1B Sub-ACL	2,639 (5.3%)	647 (4.3%)	1,053 (4.3%)
Area 2 Sub-ACL	8,200 (16.4%)	4,188 (27.8%)	6,808 (27.8%)
Area 3 Sub-ACL	11,318 (22.7%)	5,876 (39%)	9,550 (39%)
Fixed Gear Set-Aside	295	39	64
Research Set-Aside	3% of sub-ACLs	3% of sub-ACLs	3% of sub-ACLs

*If New Brunswick weir fishery catch through October 1 is less than 4,000 mt, then 1,000 mt will be subtracted from the management uncertainty buffer and added to the ACL and Area 1A Sub-ACL.

We consulted with the Council on potential 2019 specifications during the Council's September 2018 meeting. At that meeting, the Council recommended that we:

- Use the most recent assessment and projections to develop the 2019 specifications.
- Use the ABC control rule approved by the Council in Amendment 8.
- Maintain the sub-annual catch limits for herring management areas based on the proportions allocated in the 2016–2018 specifications package.
  - Area 1A: 28.9 percent.
  - Area 1B: 4.3 percent.
  - Area 2: 27.8 percent.
  - Area 3: 39 percent.
- Proportionally reduce the fixed gear set-aside allocation which is based on a small weir fishery west of Cutler, ME.
- Set the border transfer (which allows U.S. vessels to transfer herring to Canadian vessels to be processed as food) at 0 mt.

Based on the best available science, we are proposing to reduce the OFL for 2019 to 30,688 mt. The Herring FMP specifies that the OFL must be equal to catch resulting from applying the maximum fishing mortality threshold to a current or projected estimate of stock size. When the stock is not overfished and overfishing is not occurring, this is usually the fishing rate supporting maximum sustainable yield. Catch that exceeds this amount would result in overfishing. An OFL of 30,388 mt would ensure at least a 50-percent probability of preventing overfishing in 2019. This OFL is based on projections by the SAW/SARC, as updated by NOAA's NEFSC staff using 2018 catch, and was recommended by both the SSC and the Council.

The Herring FMP specifies that the ABC may be equal to or less than the OFL depending on scientific uncertainty concerning stock size estimates, variability around recruitment estimates, and consideration of ecosystem issues. For the 2019 ABC reduction, we are proposing to continue applying the interim control rule that was used to set ABC in recent specifications (2016–2018). Our proposed ABC would have a 50-percent probability of preventing overfishing in 2019 and would be set equal to the OFL. In contrast, the SSC and Council recommended reducing the ABC for 2019 based on the new control rule the Council adopted in Amendment 8 that accounts for herring's role in the ecosystem. Our proposed ABC is 30,688 mt and the SSC/Council recommended ABC is 21,266 mt.

Our proposed ABC prevents overfishing and accounts for scientific uncertainty in the short-term until we are able to consider the Council's recommendation for addressing scientific uncertainty in a long-term control rule in Amendment 8. The approach to continue using the interim control rule for 2019 is independent of and involves different considerations than our consideration of the Council's recommended control rule in Amendment 8. We expect the Council to submit Amendment 8 to us for review and approval in late 2018. Additionally, while the 2018 assessment showed that the probability of the stock becoming overfished has increased since the last stock assessment, our proposed ABC is intended to reduce the risk of the stock becoming overfished.

We are proposing to maintain the current management uncertainty buffer (6,200 mt), as recommended by the Council, so the resulting ACL would be 24,488 mt. This ACL is almost 10,000 mt higher than the ACL that would result from the Council-recommended ABC (15,065 mt). Allowing this additional harvest helps to achieve optimum yield (OY) by accounting for social, economic, and ecological factors, specifically the need to conserve herring biomass while mitigating severe economic hardship on the herring industry. Because the majority of herring catch is bait for the lobster fishery, we expect this additional harvest to help minimize the negative economic impacts associated with bait shortages and higher bait prices on the lobster fishery. The management uncertainty buffer, in conjunction with low fishery closure thresholds (95 percent of the ACL and 92 percent of a sub-ACL), has prevented herring catch from ever exceeding the ABC, which further minimizes the probability of overfishing.

We are proposing to maintain the sub-ACL allocations used in the recent specifications (2016–2018) for 2019. This means that 28.9 percent of the ACL would be allocated to Area 1A, 4.3 percent allocated to Area 1B, 27.8 percent allocated to Area 2, and 39 percent allocated to Area 3. These sub-ACL allocations were recommended by the Council for past specifications, as well as for 2019, because they do not substantially impact one stock component (inshore versus offshore) more than the other while maximizing opportunities for the fishery to achieve OY. Adjusting the sub-ACL allocations for the herring management area may have impacts beyond those we considered in this action. For that reason, we are seeking public comment on the proposed sub-ACL allocation versus other possible sub-ACL allocations that would be consistent with the Herring FMP's objectives.

Based on the Council's recommendations, we are also proposing to reduce border transfer to 0 mt and reduce the fixed gear set-aside to 64 mt for 2019. Border transfer is a processing quota and is the maximum amount of herring that can be transshipped to Canada via Canadian carrier vessels for human consumption. Border transfer has been under-utilized in recent years, and there has been no border transfer since 2015. Reducing the border transfer to 0 mt for 2019 would

ensure all herring caught in U.S. waters are available to U.S. Federal dealers for lobster bait or human consumption. Additionally, we are proposing that the fixed gear set-aside be reduced proportionally to the Area 1A sub-ACL to 64 mt. The Herring FMP allows up to 500 mt of the Area 1A sub-ACL to be allocated for the fixed gear fisheries in Area 1A (weirs and stop seines) that occur west of 67°16.8′ W long (Cutler, Maine). This set-aside is available for harvest by fixed gear within the specified area until November 1 of each fishing year. Any portion of this allocation that has not been harvested by November 1 is transferred back to the sub-ACL allocation for Area 1A. The proposed reduction of the fixed gear set aside is intended to allow additional herring harvest to be available to both fixed and mobile gears in Area 1A to help ensure OY is achieved. Like border transfer, the fixed gear set-aside has been under-utilized in recent years. Fixed gear landings tracked against the set-aside have averaged less than 12 mt in the past 5 years.

The Herring FMP requires we adjust for catch overages and underages in a subsequent year. Total catch in 2017 did not reach or exceed any of the management area sub-ACLs, so typically we would carryover those underages, or a portion of the underages, to increase sub-ACLs in 2019. However, to help ensure catch does not exceed the ABC/OFL in 2019 and to help prevent overfishing, we are proposing to not increase any sub-ACLs in 2019 based on carryover from underages in 2017.

All other herring specifications for 2019, including the river herring and shad catch caps, would remain unchanged from 2018. While our proposed adjustments to the herring specifications in 2019 are generally consistent with the Council's recommendations, our proposed ABC and the resulting ACL and sub-ACLs are not as conservative as those recommended by the Council. However, the specifications proposed in this action are expected to prevent overfishing and reduce the risk of the stock becoming overfished. We expect that implementing an ABC lower than the 30,688 mt ABC proposed in this action would not increase the probability of preventing overfishing or the stock from becoming overfished enough to outweigh the increased financial hardship on the herring and lobster fisheries. If herring specifications are too low, they may preclude a viable fishery in 2019 and some businesses may not be sustainable and may fail. Our proposed specifications for 2019 are intended to balance preventing overfishing and maintaining a viable herring fishery to achieve OY, while we consider approval and implementation of a long-term ABC control rule in Amendment 8 to the Herring FMP.

Herring Research Set-Aside Announcement

We are soliciting public comment on the Herring Research Set-Aside (RSA) program awards for 2019–2021. The Herring RSA Program allocates up to 3 percent of each management area sub-ACL annually, as established by the Council in Amendment 1 to the Herring FMP (72 FR 11251, March 12, 2007). Exempted Fishing Permits (EFPs) exempting vessels from certain herring management regulations have been routinely approved since 2007 to support compensation fishing that funds herring-related research consistent with RSA priorities identified by the Council. By continuing to issue these EFPs we would facilitate compensation fishing in support of the projects funded under the 2019 Herring RSA Program. Herring RSA proposals for 2019 are currently under review with the NEFSC, with selections expected in late November or early December of this year. RSA compensation fishing may be allowed as early as January 2019.

Consistent with previous herring RSA compensation fishing EFPs, vessels would be authorized to harvest herring RSA after a herring management area sub-ACL had been caught and the directed herring fishery is limited to a 2,000 lb (907.2 kg) limit of herring per day/trip. It would also allow vessels to harvest RSA during times when the sub-ACLs were not seasonally available for harvest, specifically during January through May in Area 1A and January through April in Area 1B. RSA grant recipients would be required to meet all EFP application requirements prior to the issuance of the EFPs.

If approved, the EFP applicants may request minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be issued without further notice if they are deemed essential to facilitate completion of the proposed research and have minimal impacts that do not change the scope of the initially approved EFP request. Any fishing activity conducted outside the scope of the exempted fishing activity would be prohibited.

Classification

The NMFS Assistant Administrator has determined that this proposed rule is consistent with the Herring FMP, national standards and other provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and other applicable law.

This proposed rule is exempt from review under Executive Order (E.O.) 12866 because this action contains no implementing regulations.

NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) for this proposed rule, as required by section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. 603. The IRFA describes the economic impact that this proposed rule would have on small entities, including small businesses, and also determines ways to minimize these impacts. The IRFA includes this section of the preamble to this rule and analyses contained in the SEA/RIR/IRFA for this action. A copy of the full analysis is available from the Council (see **ADDRESSES**). A summary of the IRFA follows.

Description of the Reasons Why Action by the Agency Is Being Considered and Statement of the Objectives of, and Legal Basis for, the Proposed Rule

This action proposes in-season adjustments to the herring specifications and sub-ACLs for 2019. A complete description of the reasons why this action is being considered, and the objectives of and legal basis for this action, are contained in the preamble to this proposed rule and are not repeated here.

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

The RFA recognizes three kinds of small entities: Small businesses, small organizations, and small governmental jurisdictions. For purposes of the RFA only, the small business criteria in the finfish fishing industry (NAICS 114111) is a firm that is independently owned and operated and not dominant in its field of operation, with gross annual receipts of $11 million or less. Small organizations and small governmental jurisdictions are not directly regulated by this action.

There are five permit categories in the herring fishery: (1) Limited access permit for all management areas (Category A); (2) limited access permit for access to Areas 2 and 3 only (Category B); (3) limited access incidental catch permit for 25 mt per trip (Category C); (4) an open access incidental catch permit for 3 mt per trip (Category D); and (5) an open access permit for limited access mackerel permit holders authorizing up to 9 mt per trip (Category E) in Areas 2 and 3.

In 2017 there were a total of 1,566 permitted herring vessels. Of those, 1,434 were exclusively Category D vessels. Of the remaining 132 permitted herring vessels, 22 belonged to large businesses. Every Category B permit was also authorized for Category C, and all but one Category E permitted vessel also carried a Category D authorization. We included Category E vessels that also have Category D authorization in the analysis. Table 2 presents the counts of permitted vessels by category along with their affiliated entity's small or large business status (the status of the company that holds the herring permit).

TABLE 2—NUMBER OF HERRING PERMITS BY CATEGORY, 2015–2017

Herring permit categories	Number of herring permits					
	2015		2016		2017	
	Large	Small	Large	Small	Large	Small
A	5	32	5	30	6	30
B/C	4	4	4	4	4	4
C (exclusive)	3	37	3	37	3	37
D (exclusive)	112	1222	115	1306	114	1320
E	9	39	9	40	9	39
Total	133	1334	136	1417	136	1430

Source: NMFS.

Table 3 refines the counts from Table 2 to include only those vessels that had revenue from herring at least once in the 3-year period of analysis. In 2017, there were 4 large businesses and 69 small that had revenue from herring.

TABLE 3—NUMBER OF HERRING PERMITS WITH HERRING REVENUE, 2015–2017

Herring permit categories	Number of herring permits					
	2015		2016		2017	
	Large	Small	Large	Small	Large	Small
A	4	20	4	19	4	19
B/C	0	2	0	2	0	3
C (exclusive)	0	11	0	9	0	12
D (exclusive)	0	27	0	29	0	31
E	0	4	0	1	0	4
Total	4	64	4	60	4	69

Source: NMFS

Finally, Table 4 defines the small entities affected by this proposed action—small businesses with a Herring Category A, B, C, or E permit and revenue from herring during the 2015–2017 period of analysis. There were 37, 31, and 38 such vessels in 2015, 2016, and 2017 respectively.

TABLE 4—AFFECTED SMALL ENTITIES, PERMITTED HERRING VESSELS WITH HERRING REVENUE, 2015–2017

Herring permit categories	Number of herring permits					
	2015		2016		2017	
	Large	Small	Large	Small	Large	Small
A	4	20	4	19	4	19
B/C	0	2	0	2	0	3
C (exclusive)	0	11	0	9	0	12
E	0	4	0	1	0	4
Total	4	37	4	31	4	38

Source: NMFS.

To better understand the impact of this action on the affected small businesses, we compared the revenue from herring fishing to total revenue brought in by the entity (business) that holds the herring permit. The 17 to 18 small entities with Category A permits show the most dependence on the herring fishery, with 49.75 percent to 62.03 percent of their revenue coming from herring landings. The 4 small Category E permitted entities have the least dependence on the herring fishery with less than one percent of total entity revenue coming from the herring fishery.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This proposed rule does not introduce any new reporting, recordkeeping, or other compliance requirements.

Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule

This action does not duplicate, overlap, or conflict with any other Federal rules.

Description of Significant Alternatives to the Proposed Action Which Accomplish the Stated Objectives of Applicable Statues and Which Minimize Any Significant Economic Impact on Small Entities

We are proposing to adjust the current herring specifications and sub-ACLs for 2019, consistent with the Herring FMP's objectives of preventing overfishing while maximizing social and economic benefits. Non-preferred alternatives would likely not accomplish these objectives for this action as well as the proposed action.

Alternative 1 would not achieve the stated objectives of the action because it has a less than 50-percent probability of preventing overfishing in 2019 and, thus, is inconsistent the Magnuson-Stevens Act. Additionally, Alternative 1 would negatively impact the herring stock by increasing the probability that it would become overfished. The primary difference between Alternative 2 (Council-recommended) and Alternative 3 (proposed action) are the proposed specifications for ABC and the resulting ACL for 2019. The ABC associated with the proposed action (30,688 mt) is higher than the ABC associated with Alternative 2 (21,266 mt). After applying the management uncertainty buffer (6,200 mt) to the ABC, the resulting ACL associated with the proposed action (24,488 mt) is almost 10,000 mt higher than the ACL associated with the Alternative 2 (15,065 mt).

We expect that implementing an ABC lower than 30,688 mt in 2019 would not increase the probability of preventing overfishing or the stock from becoming overfished enough to outweigh the increased financial hardship on the herring and lobster fisheries. If the ACL is too low, it may preclude a viable fishery in 2019 and some businesses may not be sustainable and may fail. The proposed ABC for 2019 is intended to balance preventing overfishing and maintaining a viable herring fishery to achieve OY, while we consider approval and implementation of a long-term ABC control rule in Amendment 8 the Herring FMP.

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

Dated: November 27, 2018.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2018–26097 Filed 11–29–18; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 83, No. 231
Friday, November 30, 2018

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 27, 2018.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by December 31, 2018 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW, Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food Safety and Inspection Service

Title: Certificate of Medical Examination.

OMB Control Number: 0583–0167.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*), and the Egg products Inspection Act (EPIA) (21 U.S.C. 1031 *et seq.*). These statutes mandate that FSIS protect the public by ensuring that meat and poultry products are safe, wholesome, unadulterated, and properly labeled and packaged. FSIS will use a form FSIS 4339–1, Certificate of Medical Examination (with report of medical History) to collect information from applicant.

Need and Use of the Information: FSIS will use the information from FSIS 4339–1 form to determine whether an applicant for an FSIS Food Inspector, Consumer Safety Inspector, or Veterinary Medical Officer in-plant position meets the Office of Personnel Management-approved medical qualification standards for the position. The form will ensure accurate collection of the required data.

Description of Respondents: Individuals or households.

Number of Respondents: 500.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 750.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2018–26036 Filed 11–29–18; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 27, 2018.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by December 31, 2018 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725—17th Street NW, Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: Specimen Submission.

OMB Control Number: 0579–0090.

Summary of Collection: The Animal Health Protection Act of 2002 (AHPA) is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. Disease prevention is the most effective

method for maintaining a healthy animal population and for enhancing the United States' ability to globally compete in the trade of animals and animal products. VS Forms 10–4 and 10–4A, Specimen Submission are critical components of APHIS' disease surveillance mission. They are used routinely when specimens (such as blood, milk, tissue, or urine) from any animal (including cattle, swine, sheep, goats, horses, and poultry) are submitted to APHIS' National Veterinary Services Laboratories (NVSL) for disease testing. VS Form 5–38, Parasite Submission form, is completed by State veterinarians or other State representatives, accredited veterinarians, private laboratories, research institutions, and owners or producer.

Need and Use of the Information: Using the Specimen Submission Form and Continuation Sheet (APHIS VS 10–4 & 10–4A), State or Federal veterinarians, accredited veterinarians, or other State and Federal representatives will document the collection and submission of specimens for laboratory analysis. The form identifies the individual animal from which the specimen is taken as well as the animal's herd or flock; the type of specimen submitted, and the purpose of submitting the specimen. Occasionally the time pressures exerted by or field conditions existing during a disease outbreak leave submitters no time to find or fill out the 10–4; thus, a Nonconforming Submission using whatever scrap of paper is handy. The National Tick Surveillance Program is based on the information submitted on the Parasite Submission Form (VS 5–38), in addition to critical surveillance information needed for the Cattle Fever Tick Eradication Program. This information identifies the individual submitting the tick samples. Without the information APHIS would not have the critical information necessary to effectively operate a disease surveillance program.

Description of Respondents: State, Local or Tribal Government; Business or other for-profit.

Number of Respondents: 1,773.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 8,605.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2018–26027 Filed 11–29–18; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2010–0100]

Environmental Impact Statement; Cattle Fever Tick Control Barrier in South Texas: Record of Decision

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: This notice advises the public of the Animal and Plant Health Inspection Service's record of decision for the final environmental impact statement titled ''Cattle Fever Tick Eradication Program—Tick Control Barrier: Maverick, Starr, Webb, and Zapata Counties, Texas.''

DATES: An official of the Animal and Plant Health Inspection Service-Veterinary Services signed the record of decision on July 12, 2018.

ADDRESSES: You may read the final environmental impact statement and record of decision in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming. The record of decision, final environmental impact statement, and supporting information may also be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2010-0100.* To obtain copies of the documents, contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: For questions related to the Cattle Fever Tick Eradication Program, contact Dr. Denise Bonilla, Entomologist, Cattle Fever Tick Eradication Program Manager, Surveillance, Preparedness and Response Services, VS, APHIS, Natural Resources Research Center, Building B, 2150 Centre Avenue, Fort Collins, CO 80526; (970) 494–7317. For questions related to the environmental impact statement, contact Ms. Michelle Gray, Environmental Protection Specialist, Environmental and Risk Analysis Services, PPD, APHIS, 4700 River Road Unit 149, Riverdale, MD 20737; (301) 851–3146.

SUPPLEMENTARY INFORMATION: On February 15, 2011, we published in the **Federal Register** (76 FR 8709–8710) a notice [1] of intent to prepare an environmental impact statement (EIS) for a proposed cattle fever tick control barrier in South Texas. This notice solicited comments from the public for additional alternatives and environmental impacts that should be examined further in the EIS and identified public meetings that the Animal and Plant Health Inspection Service (APHIS) would host concerning the scope of the EIS and other pertinent issues.

On July 24, 2013, we published a notice of availability in the **Federal Register** (78 FR 44521–44522) for the draft EIS and invited public comment through August 30, 2013. Responses to those comments are in the final EIS. On June 1, 2018, the U.S. Environmental Protection Agency published a notice of the availability of the final EIS in the **Federal Register** (83 FR 25451–25452, Docket No. ER–FRL–9039–6) and invited public comment through July 2, 2018.

The National Environmental Policy Act (NEPA) implementing regulations in 40 CFR 1506.10 require a minimum 30-day waiting period between the time a final EIS is published and the time an agency makes a decision on an action covered by the EIS. APHIS has reviewed the final EIS and comments received during the 30-day waiting period and has concluded that the final EIS fully analyzes the issues covered by the draft EIS and addresses the comments and suggestions submitted by commenters. This notice advises the public that the waiting period has elapsed, and APHIS has issued a record of decision (ROD) to implement the preferred alternative described in the final EIS.

The ROD has been prepared in accordance with: (1) NEPA, as amended (42 U.S.C. 4321 *et seq.*); (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508); (3) USDA regulations implementing NEPA (7 CFR part 1b); and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Done in Washington, DC, this 26th day of November 2018.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2018–26068 Filed 11–29–18; 8:45 am]

BILLING CODE 3410–34–P

[1] The notices, comments, EIS, record of decision, and supporting documents for this docket can be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2010-0100.*

CIVIL RIGHTS COMMISSION

Sunshine Act Meeting Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of Commission business meeting.

DATES: Friday, December 7, 2018, at 10 a.m. EST.

ADDRESSES: Place: National Place Building, 1331 Pennsylvania Ave. NW, 11th Floor, Suite 1150, Washington, DC 20245 (entrance on F Street NW).

FOR FURTHER INFORMATION CONTACT: Brian Walch; phone (202) 376–8371; TTY: (202) 376–8116; *publicaffairs@usccr.gov.*

SUPPLEMENTARY INFORMATION: This business meeting is open to the public. Public call-in (listen-only) information: Toll-free: 1–800–682–9934, Conference ID 7671081. Stay abreast of updates at *www.usccr.gov, https://twitter.com/USCCRgov,* and *https://www.facebook.com/USCCRgov/.* The event will also live-stream at *https://www.youtube.com/user/USCCR/videos.* (Streaming information is subject to change.) Persons with disabilities who need accommodation should contact Pamela Dunston at (202) 376–8105 or at *access@usccr.gov* at least seven (7) business days before the scheduled date of the meeting.

Meeting Agenda

I. Approval of Agenda
II. Business Meeting
- A. Presentation by Rhode Island Advisory Committee Chair on the Committee's recently released report, Payday Lending in Rhode Island
- B. Presentation by Connecticut Advisory Committee Chair on the Committee's recently released advisory memorandum, Solitary Confinement in Connecticut
- C. Presentation by Vermont Advisory Committee Chair on the Committee's recently released advisory memorandum, Housing Discrimination in Vermont: A Handshake and a Smile
- D. Discussion and vote on discovery plan, outline, and timeline for Commission project on Women in Prison
- E. Discussion and vote on briefing date for Commission project on Sexual Harassment in Federal Workplaces
- F. Management and Operations
- Staff Director's Report

III. Adjourn Meeting

Dated: November 28, 2018.

Brian Walch,

Director, Communications and Public Engagement.

[FR Doc. 2018–26202 Filed 11–28–18; 4:15 pm]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Michigan 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 that the Michigan Advisory Committee (Committee) will hold a meeting on Friday, December 14, 2018, at 12:00 p.m. EST the purpose of the meeting is to continue discussing details for a 2019 briefing on voting rights.

DATES: The meeting will be held on Friday, December 14, 2018, at 12:00 p.m. EST.

Public Call Information: Dial: 877–260–1479; Conference ID: 3377560.

FOR FURTHER INFORMATION CONTACT: Ana Victoria Fortes, DFO, at *afortes@usccr.gov* or 213–894–3437.

SUPPLEMENTARY INFORMATION: Members of the public can listen to the discussion. 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. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Regional Programs Unit Office, U.S. Commission on Civil Rights, 230 S. Dearborn St., Suite 2120, Chicago, IL 60604. They may also be faxed to the Commission at (312) 353–8324, or emailed to Carolyn Allen at *callen@usccr.gov.* Persons who desire additional information may contact the Regional Programs Office at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Office, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Michigan Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Office at the above email or street address.

Agenda

I. Welcome and Roll Call
II. Approval of Minutes for November 14, 2018 Meeting
III. Planning Discussion
IV. Next Steps
V. Public Comment
VI. Adjournment

Dated: November 26, 2018.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2018–26012 Filed 11–29–18; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Wyoming 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 the meeting of the Wyoming Advisory Committee (Committee) to the Commission will be held at 1:00 p.m. (Mountain Time) Wednesday, December 12, 2018. The purpose of this meeting is for the Committee to discuss project topics and receive information on USCCR project process.

DATES: The meeting will be held on Wednesday, December 12, 2018 at 1:00 p.m. MT.

FOR FURTHER INFORMATION CONTACT: Ana Victoria Fortes (DFO) at *afortes@usccr.gov* or (213) 894–3437.

SUPPLEMENTARY INFORMATION:

Public Call Information: Dial: 877–260–1479; Conference ID: 2208701.

This meeting is available to the public through the following toll-free call-in number: 877–260–1479, conference ID number: 2208701. 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 meetings at *https://facadatabase.gov/committee/meetings.aspx?cid=283.*

Please click on the ''Meeting Details'' and ''Documents'' links. Records generated from these meetings may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meetings. 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 and Roll Call
II. USCCR Project Stages
III. Discuss Project Topics
IV. Vote on Project Topic
V. Next Steps
  a. Schedule next meeting
  b. Project proposal (tentative)
VI. Public Comment
VII. Adjournment

Dated: November 26, 2018.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2018–26022 Filed 11–29–18; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–985]

Xanthan Gum From the People's Republic of China: Continuation of Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (Commerce) and the International Trade Commission (ITC) that revocation of the antidumping duty (AD) order on xanthan gum from the People's Republic of China (China) would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, Commerce is publishing a notice of continuation of the AD duty order.

DATES: Applicable November 30, 2018.

FOR FURTHER INFORMATION CONTACT: Magd Zalok or Howard Smith, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4162 or (202) 482–5193, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 19, 2013, Commerce published in the **Federal Register** the AD order on xanthan gum from China.[1] On June 1, 2018, Commerce published the notice of initiation of this sunset review of the *Order,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] Commerce conducted this sunset review on an expedited basis, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(*2*) because it received a complete timely, and adequate response from a domestic interested party [3] but no substantive responses from respondent interested parties. As a result of its review, Commerce determined pursuant to sections 751(c)(1) and 752(c) of the Act, that revocation of the *Order* would likely lead to a continuation or recurrence of dumping. Commerce also notified the ITC of the magnitude of the dumping margins likely to prevail should the *Order* be revoked.[4] On November 20, 2018, the ITC published its determination, pursuant to section 751(c) of the Act, that revocation of the AD duty order on xanthan gum from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[5]

Scope of the Order

The merchandise covered by the scope of the *Order* includes dry xanthan gum, whether or not coated or blended with other products. Xanthan gum is included in this order regardless of physical form, including, but not limited to, solutions, slurries, dry powders of any particle size, or unground fiber.

Merchandise covered by the scope of the *Order* is classified in the Harmonized Tariff Schedule of the United States at subheading 3913.90.20.15. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope is dispositive.[6]

Continuation of the Order

As a result of the determinations by Commerce and the ITC that revocation of the *Order* would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act and 19 CFR 351.218(a), Commerce hereby orders the continuation of the AD order on

[1] *See Xanthan Gum from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order,* 78 FR 43143 (July 19, 2013) (*Order*).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 83 FR 25436 (June 1, 2018).

[3] *See* Letter from ADM to Commerce re, ''Five-Year (''Sunset'') Review Of Antidumping Duty Order On Xanthan Gum From The People's Republic Of China/Domestic Industry Notice Of Intent To Participate In Sunset Review,'' dated June 15, 2018, and Letter from CP Kelco to Commerce re, ''Xanthan Gum from the People's Republic of China: CP Kelco U.S., Inc.'s Notice Of Intent To Participate,'' dated June 18, 2018.

[4] *See* Xanthan Gum from the People's Republic of China: Final Results of the Expedited First Sunset Review of the Antidumping Duty Order, 83 FR 48589 (September 26, 2018) (*Final Results*).

[5] *See* xanthan gum from China: First Review, Inv. No. 731–TA–1203, 83 FR 58592 (November 20, 2018).

[6] For complete description of the scope of the *Order, see* ''Issues and Decision Memorandum for the Expedited First Sunset Review of the Antidumping Duty Order on Xanthan Gum from the People's Republic of China,'' dated September 19, 2018.

xanthan gum from China. U.S. Customs and Border Protection will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of the continuation of the *Order* will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next sunset review of the *Order* not later than 30 days prior to the fifth anniversary of the effective date of continuation.

This five-year sunset review and this notice are in accordance with section 751(c) and 751(d)(2) of the Act and published pursuant to section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: November 27, 2018.

Gary Taverman,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2018–26170 Filed 11–29–18; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG513

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Pacific Coast Groundfish Fishery; Application for an Exempted Fishing Permit

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

ACTION: Notice; request for comments.

SUMMARY: NMFS announces the receipt of an exempted fishing permit application titled, ''*Year-round Coastwide Midwater Rockfish EFP: Monitoring and Minimizing Salmon Bycatch When Targeting Rockfish in the Shorebased IFQ Fishery.*'' The application, submitted by the West Coast Seafood Processors Association, Environmental Defense Fund, Oregon Trawl Commission, and Midwater Trawlers Cooperative, requests a permit to test whether removing certain gear, time, and area restrictions for vessels fishing under the Trawl Rationalization Program's Shorebased Individual Fishing Quota Program may impact the nature and extent of bycatch of prohibited species (*e.g.,* Chinook salmon). This exempted fishing permit would allow participating groundfish bottom and midwater trawl vessels more flexibility than allowed in current regulations to target pelagic rockfish species, such as widow, chilipepper, and yellowtail rockfish. Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed exempted fishing permits.

DATES: Comments must be received no later than 5 p.m., local time on December 17, 2018.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2018–0112, by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2018-0112,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments. The EFP application will be available under ''Supporting Documents'' through the same link.
- *Mail:* Submit written comments to Lynn Massey, West Coast Region, NMFS, 501 W Ocean Blvd., Ste. 4200, Long Beach, CA 90802–4250.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and would 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 would be publicly accessible. NMFS would accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments would be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Lynn Massey, West Coast Region, NMFS, at (562) 436–2462, *lynn.massey@noaa.gov.*

SUPPLEMENTARY INFORMATION: This action is authorized by the Pacific Coast Groundfish Fishery Management Plan (FMP) and implementing regulations at 50 CFR 600.745, which allow NMFS Regional Administrators to authorize exempted fishing permits (EFPs) to test fishing activities that would otherwise be prohibited.

In 2017, NMFS permitted 32 vessels to fish under the 2017 Trawl Gear EFP. The EFP exempted limited entry bottom and midwater trawl vessels from the minimum mesh size requirement, and exempted limited entry bottom trawl vessels from the requirement to use selective flatfish trawl gear shoreward of the Trawl Rockfish Conservation Area (RCA) north of 42° North latitude (N lat). The purpose of this EFP was to collect information on potential impacts to prohibited and protected species from modifying or eliminating certain gear and area regulations by allowing participants to configure their gear to re-establish a targeted rockfish fishery for widow, yellowtail, and chilipepper rockfish. From March 2017 to December 2017, a total of 11 limited entry groundfish bottom trawl vessels went on 63 EFP trips and landed 1,355 metric tons (mt) of groundfish, totaling $1,613,178 in revenue. Prohibited species bycatch included five Chinook salmon and no sturgeon.

To continue collecting information on the impacts of modifying or eliminating gear and area regulations, the Pacific Fishery Management Council (Council) recommended and NMFS issued, a 2018 Trawl Gear EFP that expanded on the 2017 Trawl Gear EFP. As with the 2017 EFP, the 2018 EFP was intended to collect data on if and how the removal of certain gear, time, and area restrictions for the Shorebased Individual Fishing Quota (IFQ) Program may impact the nature and extent of prohibited species bycatch. In addition to the exemptions provided by the 2017 Trawl Gear EFP (*i.e.,* required minimum mesh size and requirement to use a selective flatfish trawl shoreward of the Trawl RCA and north of 42° N lat.), the 2018 Trawl Gear EFP provided participating vessels exemptions from the following limited entry prohibitions:

- Fishing with midwater groundfish trawl gear north of 40°10′ N lat. in all areas (*i.e.,* seaward, within, and shoreward of the RCA) prior to May 15th each year;
- Fishing with midwater groundfish trawl gear south of 40°10′ N lat. within the boundaries of the Trawl RCA;
- Bringing a new haul onboard before a previous haul is stowed; and
- Carrying and fishing more than one type of groundfish trawl gear (midwater and bottom trawl gear) on the same trip.

The 2018 Trawl Gear EFP began on January 1, 2018. As of October 23, 2018, a total of 15 vessels (7 midwater-only trawlers, 4 bottom-only trawlers, and 4 that used both gears) have completed 289 EFP trips and landed approximately 9,000 mt of groundfish, totaling

approximately $7 million in revenue. Those vessels harvested 213 Chinook salmon and no sturgeon or coho salmon.

At the June 2018 Council meeting, the 2017 and 2018 Trawl Gear EFP applicants submitted a modified EFP application titled, ''*Year-round Coastwide Midwater Rockfish EFP: Monitoring and Minimizing Salmon Bycatch When Targeting Rockfish in the Shorebased IFQ Fishery*'' (herein referred to as the ''2019 Trawl Gear EFP''). At the September 2018 meeting, the Council recommended that NMFS implement this EFP for 2019, and made a preliminary determination to recommend the EFP to NMFS for 2020. Separately, NMFS has issued a proposed trawl gear rule that would incorporate some of the exemptions included in the 2017 and 2018 EFPs into the groundfish regulations (Proposed rule: 83 FR 45396, September 7, 2018; final rule expected to publish in late November/early December 2018). The exemptions authorized under this 2019 Trawl Gear EFP will be finalized following the publication of the trawl gear rule so that the EFP does not include exemptions from requirements which may be removed from regulations by the rule. The 2019 Trawl Gear EFP is anticipated to include, at a minimum, exemptions from the following limited entry restrictions:

- The requirement to use selective flatfish trawl gear, and the prohibition on using small footrope trawl gear, other than selective flatfish trawl gear, shoreward of the Trawl RCA between 42° N lat. and 40°10′ N lat.;
- The prohibition on fishing with midwater groundfish trawl gear north of 40°10′ N lat. in all areas (*i.e.,* seaward, within, and shoreward of the RCA) prior to May 15th each year;
- The prohibition on fishing with midwater groundfish trawl gear south of 40°10′ N lat. within the boundaries of the Trawl RCA; and
- The prohibition on retaining certain prohibited species.

If NMFS approves this EFP, vessels fishing on an EFP trip with limited entry bottom trawl gear would be permitted to use any small footrope gear that meets the definition in regulations at § 660.11 shoreward of the Trawl RCA and between 42° N lat. and 40°10′ N lat. Vessels fishing on an EFP trip with limited entry midwater trawl gear would be permitted to fish within all areas north of 40°10′ N lat. and within the boundaries and seaward of the Trawl RCA south of 40°10′ N lat. Midwater trawling will still be prohibited shoreward of the Trawl RCA south of 40°10′ N lat. Participating vessels would not be constrained to the Pacific whiting primary season dates in existing groundfish regulations (see CFR 660.131). Participating vessels would be required to carry observers or use a NMFS-approved electronic monitoring system on 100 percent of trips, as is currently required in the IFQ program. Participating vessels would also be required to retain all salmon (excluding salmon already sampled by the West Coast Groundfish Observer (WCGOP) program) until offloading.

A goal of this EFP is to collect information on the effects of lifting the restrictions described above on bycatch, including bycatch of Endangered Species Act (ESA)-listed species. Previous analyses suggest that bycatch rates of ESA-listed salmon and green sturgeon could increase as a result of the increased and changes in gear configurations resulting from this EFP. However, because a targeted fishery for chilipepper, widow, and yellowtail rockfish has not existed in more than a decade, and because the current groundfish trawl fishery has changed considerably in recent years, available data may have limited utility for predicting current impacts to protected and prohibited species in fisheries conducted with the exemptions that would be allowed under the EFP. NMFS staff worked with the applicants to develop an EFP that would increase the ability of fishery participants to target pelagic rockfish species while also minimizing bycatch to the extent practicable and collecting information about bycatch. To address potential increased protected and prohibited species encounters, the EFP applicants proposed gear-based Chinook salmon bycatch limits for midwater trawl and bottom trawl EFP vessels in 2019 (based on the Council Groundfish Management Team's recommendations at the September 2018 meeting; Agenda Item I.8.a). Under this proposal, if Chinook salmon catch on EFP trips for either gear type reaches the applicable bycatch limit, NMFS would revoke the EFP for that gear type for the remainder of the year.

During discussion at the September 2018 meeting, the Council recommended simplifying the EFP terms by proposing that the Chinook bycatch limits be based only on the 42° N lat. management line, rather than by gear type north and south of the 42° N lat. line. This recommendation would reduce unnecessary complexity while still providing adequate safeguards for limiting salmon bycatch under the EFP. If this EFP is approved, NMFS would set a bycatch limit of 1,000 Chinook salmon north of 42° N lat. and 100 Chinook salmon south of 42° N lat. for vessels declared into the EFP, regardless of gear type. If either of these bycatch limits are reached, NMFS would revoke the EFP for both gear types in the respective management area (*i.e.,* north or south of 42° N lat.).

The application includes a requirement to retain and land salmon bycatch on all EFP trips, consistent with current requirements for vessels participating in the shoreside Pacific whiting fishery. The intent of this provision is to provide a complete census of salmon bycatch for each EFP trip and maximize the amount of biological and genetic salmon samples. At the September 2018 meeting, the Council expressed a desire to provide state fish and wildlife agencies the opportunity to sample salmon bycatch. This sampling effort would be in addition to the salmon sampling already conducted by WCGOP. To address the request for additional sampling, the Council requested that NMFS work with NOAA's Office of Law Enforcement and state fish and wildlife agencies to establish proper chain-of-custody and sampling protocols in the event that salmon are landed. NMFS is supportive of making salmon bycatch available to state fish and wildlife agencies for additional sampling, however NMFS is confident that WCGOP's sampling approach is sufficient to collect the necessary scientific information for assessing salmon bycatch.

The EFP applicants have not proposed a specific list of participating vessels, but rather are proposing that NMFS publish a public notice to gauge interest from limited entry groundfish midwater and bottom trawl vessels. Depending on the amount of interest and where vessels may be fishing, NMFS may need to limit participation by time and area to mitigate potential impacts.

Information collected under the EFP would be used to support analysis for potential new gear regulations and modifications to existing gear regulations. Because many of the current gear regulations have been in place for more than ten years, it is difficult for NMFS, the Council, and industry to predict the impacts of removing these regulations. In the past ten years, the industry has changed significantly. Reduction in capacity, innovations in gear technologies, and changes in management have all contributed to these changes. This EFP would help demonstrate what potential impacts, if any, today's fleet may have if some of the current gear, area, and time regulations are modified from what is currently in regulation.

NMFS is proposing to approve the 2019 Trawl Gear EFP, covering all the exemptions stated above, following the conclusion of the public comment period and review of public comment. Pending approval, NMFS would issue the permits for the EFP to the vessel owner or designated representative as the ''EFP holder.'' NMFS intends to use an adaptive management approach in which NMFS may revise requirements and protocols to improve the program without issuing another **Federal Register** Notice, provided that the modifications fall within the scope of the original EFP. In addition, the applicants may request minor modifications and extensions to the EFP throughout the course of research. NMFS may grant EFP modifications and extensions without further public notice if the changes are essential to facilitate completing the proposed research and result in only a minimal change in the scope or impacts of the initially approved EFP request.

NMFS analyzed the potential effects of implementing the 2018 Trawl Gear EFP in an environmental assessment (EA), dated December 2017 (Available at: *http://www.westcoast.fisheries.noaa.gov*). In that EA, NMFS stated that it anticipated issuing additional, similar, one-year EFPs that would cover a portion or all of the components discussed in the EA. Those EFPs would be supported by the analyses in the EA, as long as there were not substantial changes to the affected environment (*e.g.,* status of the stock), components of the EFP (*i.e.,* gear, area, and time restrictions), or unanticipated effects on the environment from permitting fishing activities that were not discussed in the EA's analysis. Since the 2019 Trawl Gear EFP meets those criteria, NMFS does not anticipate any adverse environmental impacts from the 2019 Trawl Gear EFP beyond those analyzed in the EA for the 2018 Trawl Gear and future similar EFPs. NMFS welcomes public comment on the NEPA coverage for this EFP.

After publication of this document in the **Federal Register**, NMFS may approve and issue the EFP after the close of the public comment period. NMFS will consider comments submitted, as well as the Council's discussion at their September 2018 meeting, in deciding whether to approve the application as requested. NMFS may approve the application in its entirety or may make any alterations needed to achieve the goals of the EFP.

Authority: 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 773 *et seq.,* and 16 U.S.C. 7001 *et seq.*

Dated: November 27, 2018.

Karen H. Abrams,

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

[FR Doc. 2018–26049 Filed 11–29–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG589

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Management Area; Cost Recovery Programs

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

ACTION: Notice of standard prices and fee percentages.

SUMMARY: NMFS publishes standard prices and fee percentages for cost recovery for the Amendment 80 Program, the American Fisheries Act (AFA) Program, the Aleutian Islands Pollock (AIP) Program, and the Western Alaska Community Development Quota (CDQ) groundfish and halibut Programs. The fee percentage for 2018 is 0.75 percent for the Amendment 80 Program, 0.24 percent for the AFA inshore cooperatives, 0.34 percent for the AFA mothership cooperative, 3.0 percent for the AIP program, and 0.66 percent for the CDQ groundfish and halibut Programs. This action is intended to provide the 2018 standard prices and fee percentages to calculate the required payment for cost recovery fees due by December 31, 2018.

DATES: The standard prices and fee percentages are valid on November 30, 2018.

FOR FURTHER INFORMATION CONTACT: Carl Greene, Fee Coordinator, 907–586–7105.

SUPPLEMENTARY INFORMATION:

Background

Section 304(d) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) authorizes and requires the collection of cost recovery fees for limited access privilege programs and the CDQ Program. Cost recovery fees recover the actual costs directly related to the management, data collection, and enforcement of the programs. Section 304(d) of the Magnuson-Stevens Act mandates that cost recovery fees not exceed three percent of the annual ex-vessel value of fish harvested by a program subject to a cost recovery fee, and that the fee be collected either at the time of landing, filing of a landing report, or sale of such fish during a fishing season or in the last quarter of the calendar year in which the fish is harvested.

NMFS manages the Amendment 80 Program, AFA Program, and AIP Program as limited access privilege programs. On January 5, 2016, NMFS published a final rule to implement cost recovery for these three limited access privilege programs and the CDQ groundfish and halibut programs (81 FR 150). The designated representative (for the purposes of cost recovery) for each program is responsible for submitting the fee payment to NMFS on or before the due date of December 31 of the year in which the landings were made. The total dollar amount of the fee due is determined by multiplying the NMFS published fee percentage by the ex-vessel value of all landings under the program made during the fishing year. NMFS publishes this notice of the fee percentages for the Amendment 80, AFA, AIP, and CDQ groundfish and halibut fisheries in the **Federal Register** by December 1 each year.

Standard Prices

The fee liability is based on the ex-vessel value of fish harvested in each program. For purposes of calculating cost recovery fees, NMFS calculates a standard ex-vessel price (standard price) for each species. A standard price is determined using information on landings purchased (volume) and ex-vessel value paid (value). For most groundfish species, NMFS annually summarizes volume and value information for landings of all fishery species subject to cost recovery in order to estimate a standard price for each species. The standard prices are described in U.S. dollars per pound for landings made during the year. The standard prices for all species in the Amendment 80, AFA, AIP, and CDQ groundfish and halibut programs are listed in Table 1. Each landing made under each program is multiplied by the appropriate standard price to arrive at an ex-vessel value for each landing. These values are summed together to arrive at the ex-vessel value of each program (fishery value).

Fee Percentage

NMFS calculates the fee percentage each year according to the factors and methods described in Federal regulations at 50 CFR 679.33(c)(2), 679.66(c)(2), 679.67(c)(2), and 679.95(c)(2). NMFS determines the fee percentage that applies to landings

made during the year by dividing the total costs directly related to the management, data collection, and enforcement of each program (direct program costs) during the year by the fishery value. NMFS captures direct program costs through an established accounting system that allows staff to track labor, travel, contracts, rent, and procurement. For 2018, the direct program costs were tracked from October 1, 2017, to September 30, 2018 (the end of the fiscal year). The individual 2018 fee percentages for the Amendment 80 Program, the American Fisheries Act (AFA) Program, the Aleutian Islands Pollock Program, and the Western Alaska Community Development Quota (CDQ) groundfish and halibut Programs are higher relative to percentages calculated for the programs in 2017. Although fishery values in each program rose in 2018 relative to 2017, direct program costs in 2018 also rose, and contributed to the higher percentages.

NMFS will provide an annual report that summarizes direct program costs for each of the programs in early 2019. NMFS calculates the fishery value as described under the section ''Standard Prices.''

Amendment 80 Program Standard Prices and Fee Percentage

The Amendment 80 Program allocates total allowable catches (TACs) of groundfish species, other than Bering Sea pollock, to identified trawl catcher/processors in the Bering Sea and Aleutian Islands (BSAI). The Amendment 80 Program allocates a portion of the BSAI TACs of six species: Atka mackerel, Pacific cod, flathead sole, rock sole, yellowfin sole, and Aleutian Islands Pacific ocean perch. Participants in the Amendment 80 sector have established cooperatives to harvest these allocations. Each Amendment 80 cooperative is responsible for payment of the cost recovery fee for fish landed under the Amendment 80 Program. Cost recovery requirements for the Amendment 80 Program are at 50 CFR 679.95.

For most Amendment 80 species, NMFS annually summarizes volume and value information for landings of all fishery species subject to cost recovery in order to estimate a standard price for each fishery species. Regulations specify that for rock sole, NMFS shall calculate a separate standard price for two periods—January 1 through March 31, and April 1 through October 31, which accounts for a substantial difference in estimated rock sole prices during the first quarter of the year relative to the remainder of the year. The volume and value information is obtained from the First Wholesale Volume and Value Report, and the Pacific Cod Ex-Vessel Volume and Value Report.

Using the fee percentage formula described above, the estimated percentage of direct program costs to fishery value for the 2018 calendar year is 0.75 percent for the Amendment 80 Program. For 2018, NMFS applied the fee percentage to each Amendment 80 species landing that was debited from an Amendment 80 cooperative quota allocation between January 1 and December 31 to calculate the Amendment 80 fee liability for each Amendment 80 cooperative. The 2018 fee payments must be submitted to NMFS on or before December 31, 2018. Payment must be made in accordance with the payment methods set forth in 50 CFR 679.95(a)(3)(iv).

AFA Standard Price and Fee Percentages

The AFA allocates the Bering Sea directed pollock fishery TAC to three sectors—catcher/processor, mothership, and inshore. Each sector has established cooperatives to harvest the sector's exclusive allocation. In 2018, the cooperatives for the mothership sector and the inshore sector are responsible for paying the fee for Bering Sea pollock landed under the AFA. Cost recovery requirements for the AFA sectors are at 50 CFR 679.66.

NMFS calculates the standard price for pollock using the most recent annual value information reported to the Alaska Department of Fish & Game for the Commercial Operator's Annual Report and compiled in the Alaska Commercial Fisheries Entry Commission Gross Earnings data for Bering Sea pollock. Due to the time required to compile the data, there is a one-year delay between the gross earnings data year and the fishing year to which it is applied. For example, NMFS used 2017 gross earnings data to calculate the standard price for 2018 pollock landings.

Under the fee percentage formula described above, the estimated percentage of direct program costs to fishery value for the 2018 calendar year is 0.24 percent for the AFA inshore sector, and 0.34 percent for the AFA mothership sector. To calculate the 2018 fee liabilities, NMFS applied the respective fee percentages to the landings of Bering Sea pollock debited from each cooperative's fishery allocation that occurred between January 1 and December 31. The 2018 fee payments must be submitted to NMFS on or before December 31, 2018. Payment must be made in accordance with the payment methods set forth in 50 CFR 679.66(a)(4)(iv).

AIP Program Standard Price and Fee Percentage

The AIP Program allocates the Aleutian Islands directed pollock fishery TAC to the Aleut Corporation, consistent with the Consolidated Appropriations Act of 2004 (Pub. L. 108–109), and its implementing regulations. Annually, prior to the start of the pollock season, the Aleut Corporation provides NMFS with the identity of its designated representative for harvesting the Aleutian Islands directed pollock fishery TAC. The same individual is responsible for the submission of all cost recovery fees for pollock landed under the AIP Program. Cost recovery requirements for the AIP Program are at 50 CFR 679.67.

NMFS calculates the standard price for pollock using the most recent annual value information reported to the Alaska Department of Fish & Game for the Commercial Operator's Annual Report and compiled in the Alaska Commercial Fisheries Entry Commission Gross Earnings data for Aleutian Islands pollock. Due to the time required to compile the data, there is a one-year delay between the gross earnings data year and the fishing year to which it is applied. For example, NMFS used 2017 gross earnings data to calculate the standard price for 2018 pollock landings.

For the 2018 fishing year, the Aleut Corporation selected participants to harvest or process the Aleutian Islands directed pollock fishery TAC. Some harvest occurred; however, the majority of that TAC was eventually reallocated to the Bering Sea directed pollock fishery TAC. Due to the small harvest, the estimated percentage of direct program costs to fishery value for the 2018 calendar year were disproportionately high and well above 3.0 percent. Pursuant to section 304(d)(2)(B) of the Magnuson-Stevens Act, the fee percentage amount must not exceed 3.0 percent. Therefore, the 2018 fee percentage is set at 3.0 percent. To calculate the 2018 fee liability, NMFS applied the respective fee percentage to the pollock landings attributed to the AIP Program that occurred between January 1 and December 31. The 2018 fee payments must be submitted to NMFS on or before December 31, 2018. Payment must be made in accordance with the payment methods set forth in 50 CFR 679.67(a)(3)(iv).

CDQ Standard Price and Fee Percentage

The CDQ Program was implemented in 1992 to provide access to BSAI

fishery resources to villages located in Western Alaska. Section 305(i) of the Magnuson-Stevens Act identifies sixty-five villages eligible to participate in the CDQ Program and the six CDQ groups to represent these villages. CDQ groups receive exclusive harvesting privileges of the TACs for a broad range of crab species, groundfish species, and halibut. NMFS implemented a CDQ cost recovery program for the BSAI crab fisheries in 2005 (70 FR 10174, March 2, 2005) and published the cost recovery fee percentage for the 2018/2019 crab fishing year on July 19, 2018 (83 FR 34119). This notice provides the cost recovery fee percentage for the CDQ groundfish and halibut programs. Each CDQ group is subject to cost recovery fee requirements for landed groundfish and halibut, and the designated representative of each CDQ group is responsible for submitting payment for their CDQ group. Cost recovery requirements for the CDQ Program are at 50 CFR 679.33.

For most CDQ groundfish species, NMFS annually summarizes volume and value information for landings of all fishery species subject to cost recovery in order to estimate a standard price for each fishery species. The volume and value information is obtained from the First Wholesale Volume and Value Report and the Pacific Cod Ex-Vessel Volume and Value Report. For CDQ halibut and fixed-gear sablefish, NMFS calculates the standard prices using information from the Individual Fishing Quota (IFQ) Ex-Vessel Volume and Value Report, which collects information on both IFQ and CDQ volume and value.

Using the fee percentage formula described above, the estimated percentage of direct program costs to fishery value for the 2018 calendar year is 0.66 percent for the CDQ groundfish and halibut programs. For 2018, NMFS applied the calculated CDQ fee percentage to all CDQ groundfish and halibut landings made between January 1 and December 31 to calculate the CDQ fee liability for each CDQ group. The 2018 fee payments must be submitted to NMFS on or before December 31, 2018. Payment must be made in accordance with the payment methods set forth in 50 CFR 679.33(a)(3)(iv).

TABLE 1—STANDARD EX-VESSEL PRICES BY SPECIES FOR THE 2018 FISHING YEAR

Species	Gear type	Reporting period	Standard ex-vessel price per pound ($)
Arrowtooth flounder	All	January 1, 2018–October 31, 2018	$0.22
Atka mackerel	All	January 1, 2018–October 31, 2018	0.32
Flathead sole	All	January 1, 2018–October 31, 2018	0.26
Greenland turbot	All	January 1, 2018–October 31, 2018	0.60
CDQ halibut	Fixed gear	October 1, 2017–September 30, 2018	4.95
Pacific cod	Fixed gear	January 1, 2018–October 31, 2018	0.41
	Trawl gear	January 1, 2018–October 31, 2018	0.38
Pacific ocean perch	All	January 1, 2018–October 31, 2018	0.22
Pollock	All	January 1, 2017–December 31, 2017	0.14
Rock sole	All	January 1, 2018–March 31, 2018	0.28
	All	April 1, 2018–October 31, 2018	0.20
Sablefish	Fixed gear	October 1, 2017–September 30, 2018	2.89
	Trawl gear	January 1, 2018–October 31, 2018	0.77
Yellowfin sole	All	January 1, 2018–October 31, 2018	0.20

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

Dated: November 26, 2018.

Karen H. Abrams,

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

[FR Doc. 2018–25989 Filed 11–29–18; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from the Procurement List.

SUMMARY: This action adds services to the Procurement List that will be provided by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes products and services from the Procurement List previously furnished by such agencies.

DATES: *Date added to and deleted from the Procurement List:* December 30, 2018.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov*.

SUPPLEMENTARY INFORMATION:

Additions

On 4/20/2018 (83 FR 77) and 10/19/2018 (83 FR 203), the Committee for Purchase From People Who Are Blind or Severely Disabled published notices of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the services and impact of the additions on the current or most recent contractors, the Committee has determined that the services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will provide the services to the Government.

2. The action will result in authorizing small entities to provide the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following services are added to the Procurement List:

Services

Service Type: Custodial Service.
Mandatory for: U.S. Army, ACC Aberdeen, PEO Facilities, Fort Belvoir, VA.
Mandatory Source of Supply: Melwood Horticultural Training Center, Inc., Upper Marlboro, MD.
Contracting Activity: Dept of the Army, W6Qk ACC–APG.

Service Type: Sourcing, Warehousing, Assembly, and Kitting Service.
Mandatory for: USPFO Connecticut, National Guard Bureau, National Guard Armory, 360 Broad Street, Hartford, CT.
Mandatory Source of Supply: Industries for the Blind and Visually Impaired, Inc., West Allis, WI.
Contracting Activity: Dept of the Army, W7MZ USPFO Activity CT ARNG.

Deletions

On 10/19/2018 (83 FR 203) and 10/26/2018 (83 FR 208), the Committee for Purchase From People Who Are Blind or Severely Disabled published notices of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the products and services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the products and services deleted from the Procurement List.

End of Certification

Accordingly, the following products and services are deleted from the Procurement List:

Products

NSN(s)—Product Name(s):
7930–01–517–4178—Cleaner, Industrial, Multi-Purpose, SKILCRAFT Savvy Green, 32 oz.
7930–01–517–4171—Cleaner, Industrial, Multi-Purpose, SKILCRAFT Savvy Green, 1 GL
7930–01–517–4172—Cleaner, Industrial, Multi-Purpose, SKILCRAFT Savvy Green, 5 GL
7930–01–517–4177—Cleaner, Industrial, Multi-Purpose, SKILCRAFT Savvy Green, 55 GL
7930–01–517–2726—Cleaner, Heavy Duty, Industrial, Multi-Purpose, SKILCRAFT Savvy Green Plus, 32 oz.
7930–01–517–4186—Cleaner, Heavy Duty, Industrial, Multi-Purpose, SKILCRAFT Savvy Green Plus, 5 GL
7930–01–517–4185—Cleaner, Industrial, Multi-Purpose, SKILCRAFT Savvy Green, 1 gal
7930–01–517–4187—Cleaner, Heavy Duty, Industrial, Multi-Purpose, SKILCRAFT Savvy Green Plus, 55 GL
Mandatory Source of Supply: VisionCorps, Lancaster, PA
Contracting Activities: General Services Administration, Fort Worth, TX, Department of Veterans Affairs, Strategic Acquisition Center

NSN(s)—Product Name(s): 5330–00–884–4807—Gasket and Preformed Packing Set
Mandatory Source of Supply: Walterboro Vocational Rehabilitation Center, Walterboro, SC
Contracting Activity: Defense Logistics Agency Troop Support

NSN(s)—Product Name(s): 7240–00–889–3785—Pail, Utility, Plastic, 5-Pint
Mandatory Source of Supply: Community Enterprises of St Clair County, Port Huron, MI
Contracting Activity: GSA/FSS Greater Southwest Acquisition, Fort Worth, TX

Services

Service Type: Janitorial/Custodial Service
Mandatory for: U.S. Army Reserve Center: 2838–98 Woodhaven Road Philadelphia Memorial, Philadelphia, PA
Mandatory Source of Supply: The Chimes, Inc., Baltimore, MD
Contracting Activity: Dept of the Army, W40M NORTHEREGION Contract OFC

Service Type: Switchboard Operation Service
Mandatory for: Shaw Air Force Base, SC
Mandatory Source of Supply: Palmetto Goodwill Services, North Charleston, SC
Contracting Activity: DEPT OF THE AIR FORCE, FA4803 20 CONS LGCA

Service Type: Grounds Maintenance Service
Mandatory for:
U.S. Army Reserve Center: 2838–98 Woodhaven Road Philadelphia Memorial, Philadelphia, PA; U.S. Army Reserve Center: 2501 Ford Road, Bristol Veterans, Bristol, PA
Mandatory Source of Supply: The Chimes, Inc., Baltimore, MD
Contracting Activity: DEPT OF THE ARMY, W6QM MICC CTR–FT DIX (RC)

Service Type: Laundry Service
Mandatory for: Department of Homeland Security: Alien Detention & Removal (ADR)
Immigration & Customs Enforcement (IEC) and Custom, San Diego, CA
Mandatory Source of Supply: Job Options, Inc., San Diego, CA
Contracting Activity: U.S. Customs and Border Protection, Border Enforcement Contracting Division

Service Type: Janitorial/Custodial Service
Mandatory for: Veterans Affairs Medical Center: OI Services Center, Edward Hines Jr., 1st Avenue, Bldg. 20, Hines, IL
Mandatory Source of Supply: Jewish Vocational Service and Employment Center, Chicago, IL
Contracting Activity: Veterans Affairs, Department of, Acquisition Service—FREDERICK

Michael R. Jurkowski,

Business Management Specialist, Business Operations.

[FR Doc. 2018–26066 Filed 11–29–18; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Deletions from the Procurement List.

SUMMARY: The Committee is proposing to delete a product and services from the Procurement List that was previously furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Comments must be received on or before:* December 30, 2018.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia, 22202–4149.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Deletions

The following product and services are proposed for deletion from the Procurement List:

Product

NSN(s)—Product Name(s): 7520–00–286–1724—File, Sorter, Letter, 1–31, Blue
Mandatory Source of Supply: Exceptional Children's Foundation, Culver City, CA

Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR(2, New York, NY

Services

Service Type: Supply Room/Motor Vehicle Service
Mandatory for: Federal Aviation Administration: Great Lakes Region, Des Plaines, IL
Mandatory Source of Supply: Jewish Vocational Service and Employment Center, Chicago, IL
Contracting Activity: DEPARTMENT OF TRANSPORTATION
Service Type: Janitorial Service
Mandatory for: USDA Natural Resources Conservation Service Shiprock Field Office, Old Post Office Route 491 Shiprock, NM
Mandatory Source of Supply: Presbyterian Medical Services, Santa Fe, NM
Contracting Activity: NATURAL RESOURCES CONSERVATION SERVICE, AZ STATE OFFICE (NRCS)
Service Types: Trash Pick-up Service Cleaning Service
Mandatory for: Crane Division, Naval Surface Warfare Center, Crane, IN
Mandatory Source of Supply: Orange County Rehabilitative and Developmental Services, Inc., Paoli, IN
Contracting Activity: DEPT OF THE NAVY, U S FLEET FORCES COMMAND

Michael R. Jurkowski,

Business Management Specialist, Business Operations.

[FR Doc. 2018–26065 Filed 11–29–18; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Withdrawal of the Notice of Intent To Prepare a Draft Environmental Impact Statement (DEIS) in Cooperation With the North Carolina Department of Transportation and South Carolina Department of Transportation for Extending SC 31 (Carolina Bays Parkway), in Horry County, South Carolina, To Connect to US 17, in Brunswick County, North Carolina

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice.

SUMMARY: The U.S. Army Corps of Engineers, Wilmington District, Wilmington Regulatory Division and the U.S. Army Corps of Engineers, Charleston District, Charleston Regulatory Division (collectively COE) are issuing this notice to advise the public that a State (North Carolina Department of Transportation [NCDOT] and South Carolina Department of Transportation [SCDOT]) funded Draft Environmental Impact Statement (DEIS) will no longer be prepared by the COE, while acting as lead federal agency, for improvements to SC 31 starting near Little River, Horry County, South Carolina and running northeast to US 17, in an area between Calabash and Shallotte, Brunswick County, North Carolina. On July 6, 2017 the COE issued a Notice of Intent to prepare a DEIS for the ''Carolina Bays Parkway Extension'', NCDOT Project 44604 and SCDOT Project P029554. Recent commitment of federal funds has altered various aspects of this project, including the designation of the lead federal agency. Due to these developments, the COE will no longer act in this capacity, but rather as a cooperating agency throughout the evaluation of the project. At the appropriate time, a separate notice will be issued within the **Federal Register** identifying the lead agency, describing the project, and detailing the evaluation process.

FOR FURTHER INFORMATION CONTACT: Questions about the COE's current role in this project can be directed to Mr. Brad Shaver, Regulatory Project Manager (Wilmington District), Wilmington Regulatory Field Office, 69 Darlington Avenue, Wilmington, NC 28403, by telephone: (910) 251–4611, or by email at *Brad.E.Shaver@USACE.army.mil* or Ms. Amanda Heath, Regulatory Project Manager (Charleston District), Charleston Regulatory Office, 69A Hagood Avenue, Charleston, SC 29403, by telephone: (843) 329–8025, or by email at *Amanda.L.Heath@usace.army.mil.*

Scott McLendon,

Chief, Regulatory Division, Wilmington District.

[FR Doc. 2018–26041 Filed 11–29–18; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Notice of Availability of the Record of Decision for the Final Missouri River Recovery Management Plan and Environmental Impact Statement

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice; availability of the Record of Decision.

SUMMARY: The U.S. Army Corps of Engineers (USACE) announces the availability of the Record of Decision (ROD) for the Final Missouri River Recovery Management Plan and Environmental Impact Statement (MRRMP–FEIS) published in the **Federal Register** on Friday, August 31, 2018. The USACE Northwestern Division Commander signed the ROD on November 20, 2018. Copies of the ROD along with the MRRMP–FEIS and other supporting documents are available for viewing on the Missouri River Recovery Program website at: *http://www.nwo.usace.army.mil/mrrp/mgmt-plan/.*

FOR FURTHER INFORMATION CONTACT: Tiffany Vanosdall, U.S. Army Corps of Engineers at (402) 995–2695 or by email at *tiffany.k.vanosdall@usace.army.mil.*

SUPPLEMENTARY INFORMATION: The USACE has developed the MRRMP–FEIS in cooperation with the U.S. Fish and Wildlife Service (USFWS). This document is the USACE Record of Decision for the MRRMP–FEIS dated August, 2018. The MRRMP–FEIS is a programmatic assessment of major federal actions necessary to avoid a finding of jeopardy for the pallid sturgeon (*Scaphirhynchus albus*), interior least tern (*Sterna antillarum*), and the Northern Great Plains piping plover (*Charadrius melodus*) caused by operation of the Missouri and Kansas River reservoir systems and operation and maintenance of the Missouri River Bank Stabilization and Navigation Project. After consultation with the USFWS, and extensive collaboration, analysis, and independent scientific review, USACE has identified Alternative 3 (Mechanical Construction Only) as the selected alternative. Alternative 3 will meet the species objectives and fulfill the purpose and need of the plan while avoiding and minimizing adverse impacts to stakeholders. Importantly, Alternative 3 would be implemented within an adaptive management framework detailed in the Science and Adaptive Management Plan (SAMP). The ROD documents why the USACE has chosen to implement Alternative 3 as described in the MRRMP–FEIS.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2018–26040 Filed 11–29–18; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

National Advisory Council on Indian Education; Meeting

AGENCY: National Advisory Council on Indian Education (NACIE), U.S. Department of Education.

ACTION: Announcement of a closed and open teleconference meeting.

SUMMARY: This notice sets forth the announcement of an upcoming meeting to be conducted by the National Advisory Council on Indian Education (NACIE). Notice of the meeting is required by section 10(a)(2) of the Federal Advisory Committee Act.

DATES: The NACIE teleconference meeting will be held on December 17, 2018 from 3:00 p.m.–5:00 p.m. (EST). The closed portion of the meeting will take place first from 3:00 p.m. to 3:45 p.m. The open portion of the meeting will take place from 4:00 p.m. to 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Tina Hunter, Designated Federal Official, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue SW, Washington, DC 20202. Telephone: 202–205–8527. Fax: 202–205–0310. Email: *tina.hunter@ed.gov.*

SUPPLEMENTARY INFORMATION:

NACIE's Statutory Authority and Function: The National Advisory Council on Indian Education is authorized by section 7141 of the Elementary and Secondary Education Act of 1965 (ESEA) as amended by the Every Student Succeeds Act (ESSA), 20 U.S.C. 7471. The Council is established within the Department of Education to advise the Secretary of Education on the funding and administration (including the development of regulations, and administrative policies and practices) of any program over which the Secretary has jurisdiction and includes Indian children or adults as participants or programs that may benefit Indian children or adults, including any program established under Title VII, Part A of the Elementary and Secondary Education Act. The Council submits to the Congress a report on its activities, including any recommendations the Council considers appropriate for the improvement of Federal education programs that include Indian children or adults as participants or that may benefit Indian children or adults and recommendations concerning the funding of any such program.

Meeting Agenda: The purpose of the closed portion of the meeting is to convene the Council to discuss the outcome of the subcommittee interviews of eligible applicants to fill the vacant Director position in the Office of Indian Education. In accordance with 41 CFR 102–3.155, this portion of the meeting will be closed due to the confidential nature of the information that will be discussed in evaluating each candidate's qualifications for the position of Director in the Office of the Indian Education. The open portion of the meeting will be a discussion of, and Council vote on, NACIE's Annual Report Subcommittee recommendations. There will be a conference line limit of 50 people on a first-come basis for the open portion of the meeting. The dial in information for the first 50 is as follows:

Dial-in Number: 202–991–0393

Conference ID: 61695881

Access to Records of the Meeting: The Department will post the official report of the open meeting on the OESE website at: *http://www2.ed.gov/about/offices/list/oese/index.html?src=oc* 21 days after the meeting. Pursuant to the FACA, the public may also inspect the materials at the Office of Indian Education, United States Department of Education, 400 Maryland Avenue SW, Washington, DC 20202, Monday–Friday, 8:30 a.m. to 5:00 p.m. Eastern Daylight Saving Time or by emailing *TribalConsultation@ed.gov* or by calling Terrie Nelson on (202) 401–0424 to schedule an appointment.

Electronic Access to this Document: The official version of this document is the document published in the **Federal Register**. Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the Adobe website. You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Authority: Section 7141 of the Elementary and Secondary Education Act of 1965 (ESEA) as amended by the Every Student Succeeds Act (ESSA), 20 U.S.C. 7471.

Frank Brogan,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2018–26130 Filed 11–29–18; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Application for New Awards; Expanding Opportunity Through Quality Charter Schools Program (CSP)—Grants to Charter Management Organizations for the Replication and Expansion of High-Quality Charter Schools

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for fiscal year (FY) 2019 for CSP—Grants to Charter Management Organizations for the Replication and Expansion of High-Quality Charter Schools, Catalog of Federal Domestic Assistance (CFDA) number 84.282M.

DATES:

Applications Available: November 30, 2018.

Date of Pre-Application Webinar: Thursday, December 6, 2018, 12:00 p.m., Washington, DC time.

Deadline for Transmittal of Applications: January 10, 2019.

Deadline for Intergovernmental Review: February 28, 2019.

Pre-Application Webinar Information: The Department will hold a pre-application meeting via webinar for prospective applicants on Thursday, December 6, 12:00 p.m., Washington, DC time. Individuals interested in attending this meeting are encouraged to pre-register by emailing their name, organization, and contact information with the subject heading ''CMO GRANTS PRE–APPLICATION MEETING'' to *charterschools@ed.gov.* There is no registration fee for attending this meeting.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 12, 2018 (83 FR 6003) and available at *www.gpo.gov/fdsys/pkg/FR-2018-02-12/pdf/2018-02558.pdf.*

FOR FURTHER INFORMATION CONTACT: Eddie Moat, U.S. Department of Education, 400 Maryland Avenue SW,

Room 4W259, Washington, DC 20202–5970. Telephone: (202) 401–2266. *Email: charterschools@ed.gov.*

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

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The major purposes of the CSP are to expand opportunities for all students, particularly traditionally underserved students, to attend *charter schools* and meet challenging State academic standards; provide financial assistance for the planning, program design, and initial implementation of public *charter schools;* increase the number of *high-quality charter schools* [1] available to students across the United States; evaluate the impact of *charter schools* on student achievement, families, and communities; share best practices between *charter schools* and other public schools; encourage States to provide facilities support to *charter schools;* and support efforts to strengthen the *charter school* authorizing process. Through CSP Grants to Charter Management Organizations for the Replication and Expansion of High-Quality Charter Schools (CFDA number 84.282M) (also referred to as CMO [*i.e.,* Charter Management Organization] grants or the CMO grant program), the Department provides funds to *charter management organizations* (CMOs) on a competitive basis to enable them to *replicate* or *expand* one or more *high-quality charter schools.* Grant funds may be used to *expand* the enrollment of one or more existing *high-quality charter schools,* or to *replicate* one or more new *charter schools* that are based on an existing, *high-quality charter school* model.

Background: The CMO grant program is intended to support *high-quality charter schools* that are operated by high-performing *CMOs* seeking to broaden and increase their impact on student achievement. Since FY 2010, the Department has awarded almost 80 new CMO grants, resulting in a portfolio of high-quality *CMOs* using Federal funds to *replicate* and *expand* their successful *charter school* models to serve greater numbers of students, particularly *educationally disadvantaged students.*

We have published elsewhere in this issue of the **Federal Register** a notice of final priorities, requirements, definitions, and selection criteria (NFP) for use in this and future CMO competitions. The NFP aligns with the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (ESEA), and clarifies key statutory provisions. In the FY 2019 CMO competition, we are using several priorities from the NFP and one priority from the Education Department General Administrative Regulations.

First, applicants must choose to submit their applications under one of two absolute priorities—*Absolute Priority 1—Rural Community* or *Absolute Priority 2—Low-Income Demographic.* A major purpose of this program is to *replicate* and *expand high-quality charter schools* that serve *educationally disadvantaged students.* Students living in *rural communities* often have few high-quality educational options and face unique challenges. Similarly, we believe it is critical to ensure that students who are *individuals from low-income families,* particularly such students who attend schools with high percentages of students who are *individuals from low-income families,* have access to multiple high-quality educational options. Accordingly, in order to receive a grant under this competition, applicants must demonstrate that they will *replicate* or *expand* one or more *high-quality charter schools* in a *rural community,* or operate or manage *charter schools* with student bodies that are comprised of at least 40 percent of students who are *individuals from low-income families.*

This competition also includes five competitive preference priorities. First, we encourage applicants to propose projects that focus on replicating or expanding *high-quality charter schools* with an intentional focus on racially and socioeconomically diverse student bodies, consistent with nondiscrimination requirements contained in the U.S. Constitution and Federal civil rights laws.

Second, we encourage applicants to propose to reopen one or more *academically poor-performing public schools* as *charter schools,* based on a successful *charter school* model. In order to receive points, an applicant must ensure that the replicated *high-quality charter school* maintains a student body population that is demographically similar to that of the *academically poor-performing public school,* consistent with nondiscrimination requirements in the U.S. Constitution and Federal civil rights laws. In accordance with the most recent version of the Department's Charter Schools Program Nonregulatory Guidance (issued in January 2014),[2] grantees may exempt from any admissions lotteries students who are enrolled in a public school, including an *academically poor-performing public school,* at the time it is reopened as a public *charter school,* as permissible under State law.

Third, we encourage applicants to propose to *replicate* or *expand* high-quality *charter schools* that serve high school students. To meet this priority, applicants must demonstrate that they will prepare students for postsecondary education and provide support for their graduates to enroll and persist in, and obtain a degree or certificate from, postsecondary education institutions. In addition, to meet this priority, applicants must propose one or more specific performance measures that will provide valid and reliable information on their students' progress to and through postsecondary education institutions.

Fourth, we encourage applications from eligible entities that would *replicate* or *expand high-quality charter schools* that are designed to meet the unique educational needs of *Native American* students, consistent with nondiscrimination requirements in the U.S. Constitution and Federal civil rights laws. In order to meet this priority, an applicant must submit a letter of support from an *Indian Tribe* or *Indian organization* in the community where the *charter school* will be located, meaningfully collaborate with such *Indian Tribe* or *Indian organization,* and propose to *replicate* or *expand* one or more high-quality *charter schools* with a mission and project focus that addresses the unique educational needs of *Native American* students, such as through the use of instruction that reflects and preserves *Native American language,* culture, and history.

Finally, we encourage *novice applicants* to apply.

Priorities: This notice includes two absolute priorities and five competitive preference priorities. The absolute priorities and Competitive Preference Priorities 1–4 are from the NFP for this program published elsewhere in this issue of the **Federal Register**. Competitive Preference Priority 5 is from 34 CFR 75.225.

Absolute Priorities: For FY 2019 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are absolute priorities.

[1] Italicized terms are defined in the Definitions section of this notice.

[2] See: *http://www2.ed.gov/programs/charter/fy14cspnonregguidance.doc.*

Under 34 CFR 75.105(c)(3), we consider only applications that meet one of these priorities.

Each of these absolute priorities constitutes its own funding category. Applicants may propose projects that address both absolute priorities, but must clearly indicate under which absolute priority they are officially applying. The Secretary intends to award grants under each absolute priority for which applications of sufficient quality are submitted.

The priorities are:

Absolute Priority 1—Rural Community.

Under this priority, applicants must propose to *replicate* or *expand* one or more *high-quality charter schools* in a *rural community.*

Absolute Priority 2—Low-Income Demographic.

Under this priority, applicants must demonstrate that at least 40 percent of the students across all of the *charter schools* the applicant operates or manages are *individuals from low-income families,* and that the applicant will maintain the same, or a substantially similar, percentage of such students across all of its *charter schools* during the grant period.

Competitive Preference Priorities: These priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we will award up to an additional three points to an application that addresses Competitive Preference Priority 1, up to an additional three points to an application that addresses Competitive Preference Priority 2, up to an additional three points to an application that addresses Competitive Preference Priority 3, up to an additional three points to an application that addresses Competitive Preference Priority 4, and an additional three points to an application that meets Competitive Preference Priority 5. The maximum number of competitive preference priority points an application can receive for this competition is 15.

These priorities are:

Competitive Preference Priority 1—Promoting Diversity. (up to 3 points)

Under this priority, applicants must propose to *replicate* or *expand high-quality charter schools* that have an intentional focus on recruiting students from racially and socioeconomically diverse backgrounds and maintaining racially and socioeconomically diverse student bodies in those *charter schools,* consistent with nondiscrimination requirements contained in the U.S. Constitution and Federal civil rights laws.

Competitive Preference Priority 2—Reopening Academically Poor-performing Public Schools as Charter Schools. (up to 3 points)

Under this priority, applicants must—

(i) Demonstrate past success working with one or more *academically poor-performing public schools* or schools that previously were designated as persistently lowest-achieving schools or priority schools under the former School Improvement Grant program or in States that exercised ESEA flexibility, respectively, under the ESEA, as amended by the No Child Left Behind Act of 2001 (NCLB); and

(ii) Propose to use grant funds under this program to reopen one or more *academically poor-performing public schools* as *charter schools* during the project period by—

(A) Replicating one or more *high-quality charter schools* based on a successful *charter school* model for which the applicant has provided evidence of success; and

(B) Targeting a demographically similar student population in the replicated *charter schools* as was served by the *academically poor-performing public schools,* consistent with nondiscrimination requirements contained in the U.S. Constitution and Federal civil rights laws.

Competitive Preference Priority 3—High School Students. (up to 3 points)

Under this priority, applicants must propose to—

(i) *Replicate* or *expand high-quality charter schools* to serve high school students, including *educationally disadvantaged students*;

(ii) Prepare students, including *educationally disadvantaged students,* in those schools for enrollment in postsecondary education institutions through activities such as, but not limited to, accelerated learning programs (including Advanced Placement and International Baccalaureate courses and programs, dual or concurrent enrollment programs, and early college high schools), college counseling, career and technical education programs, career counseling, internships, work-based learning programs (such as apprenticeships), assisting students in the college admissions and financial aid application processes, and preparing students to take standardized college admissions tests;

(iii) Provide support for students, including *educationally disadvantaged students,* who graduate from those schools and enroll in postsecondary education institutions in persisting in, and attaining a degree or certificate from, such institutions, through activities such as, but not limited to, mentorships, ongoing assistance with the financial aid application process, and establishing or strengthening peer support systems for such students attending the same institution; and

(iv) Propose one or more project-specific performance measures, including aligned leading indicators or other interim milestones, that will provide valid and reliable information about the applicant's progress in preparing students, including *educationally disadvantaged students,* for enrollment in postsecondary education institutions and in supporting those students in persisting in and attaining a degree or certificate from such institutions. An applicant addressing this priority and receiving a CMO grant must provide data that are responsive to the measure(s), including performance targets, in its annual performance reports to the Department.

(v) For purposes of this priority, postsecondary education institutions include institutions of higher education, as defined in section 8101(29) of the ESEA, and one-year training programs that meet the requirements of section 101(b)(1) of the Higher Education Act of 1965, as amended (HEA).

Competitive Preference Priority 4—Replicating or Expanding High-quality Charter Schools to Serve Native American Students. (up to 3 points)

Under this priority, applicants must—

(i) Propose to *replicate* or *expand* one or more *high-quality charter schools* that—

(A) Utilize targeted outreach and recruitment in order to serve a *high proportion* of *Native American* students, consistent with nondiscrimination requirements contained in the U.S. Constitution and Federal civil rights laws;

(B) Have a mission and focus that will address the unique educational needs of *Native American* students, such as through the use of instructional programs and teaching methods that reflect and preserve *Native American language,* culture, and history; and

(C) Have a governing board with a substantial percentage of members who are members of *Indian Tribes* or *Indian organizations* located within the area to be served by the replicated or expanded *charter school*;

(ii) Submit a letter of support from at least one *Indian Tribe* or *Indian organization* located within the area to be served by the replicated or expanded *charter school*; and

(iii) Meaningfully collaborate with the *Indian Tribe(s)* or *Indian organization(s)* from which the applicant has received a letter of support in a timely, active, and ongoing manner with respect to the development and implementation of the

educational program at the *charter school*.

Competitive Preference Priority 5—Novice Applicants. (0 or 3 points)

This priority is for applications submitted by *novice applicants.*

Definitions:

The following definitions are from sections 4310 and 8101 of the ESEA, 34 CFR 75.225 and 77.1, and the NFP.

Academically poor-performing public school means:

(a) A school identified by the State for comprehensive support and improvement under section 1111(c)(4)(D)(i) of the ESEA; or

(b) A public school otherwise identified by the State or, in the case of a *charter school,* its authorized public chartering agency, as similarly academically poor-performing. (NFP)

Ambitious means promoting continued, meaningful improvement for program participants or for other individuals or entities affected by the grant, or representing a significant advancement in the field of education research, practices, or methodologies. When used to describe a performance target, whether a performance target is ambitious depends upon the context of the relevant performance measure and the baseline for that measure. (34 CFR 77.1)

Authorized public chartering agency means a State educational agency, local educational agency, or other public entity that has the authority pursuant to State law and approved by the Secretary to authorize or approve a *charter school*. (Section 4310(1) of the ESEA)

Baseline means the starting point from which performance is measured and targets are set. (34 CFR 77.1)

Charter management organization means a nonprofit organization that operates or manages a network of *charter schools* linked by centralized support, operations, and oversight. (Section 4310(3) of the ESEA)

Charter school means a public school that—

(i) In accordance with a specific State statute authorizing the granting of charters to schools, is exempt from significant State or local rules that inhibit the flexible operation and management of public schools, but not from any rules relating to the other requirements of this paragraph;

(ii) Is created by a developer as a public school, or is adapted by a developer from an existing public school, and is operated under public supervision and direction;

(iii) Operates in pursuit of a specific set of educational objectives determined by the school's developer and agreed to by the authorized public chartering agency;

(iv) Provides a program of elementary or secondary education, or both;

(v) Is nonsectarian in its programs, admissions policies, employment practices, and all other operations, and is not affiliated with a sectarian school or religious institution;

(vi) Does not charge tuition;

(vii) Complies with the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*), section 444 of the General Education Provisions Act (20 U.S.C. 1232g) (commonly referred to as the ''Family Educational Rights and Privacy Act of 1974''), and part B of the Individuals with Disabilities Education Act;

(viii) Is a school to which parents choose to send their children, and that—

(A) Admits students on the basis of a lottery, consistent with section 4303(c)(3)(A), if more students apply for admission than can be accommodated; or

(B) In the case of a school that has an affiliated charter school (such as a school that is part of the same network of schools), automatically enrolls students who are enrolled in the immediate prior grade level of the affiliated charter school and, for any additional student openings or student openings created through regular attrition in student enrollment in the affiliated charter school and the enrolling school, admits students on the basis of a lottery as described in clause (A);

(ix) Agrees to comply with the same Federal and State audit requirements as do other elementary schools and secondary schools in the State, unless such State audit requirements are waived by the State;

(x) Meets all applicable Federal, State, and local health and safety requirements;

(xi) Operates in accordance with State law;

(xii) Has a written performance contract with the authorized public chartering agency in the State that includes a description of how student performance will be measured in charter schools pursuant to State assessments that are required of other schools and pursuant to any other assessments mutually agreeable to the authorized public chartering agency and the charter school; and

(xiii) May serve students in early childhood education programs or postsecondary students. (Section 4310(2) of the ESEA)

Child with a disability means—

(i) In general—

The term ''child with a disability'' means a child—

(A) With intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ''emotional disturbance''), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(B) Who, by reason thereof, needs special education and related services.

(ii) Child aged 3 through 9.

The term ''child with a disability'' for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child—

(A) Experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: Physical development; cognitive development; communication development; social or emotional development; or adaptive development; and

(B) Who, by reason thereof, needs special education and related services. (Section 8101(4) of the ESEA)

Educationally disadvantaged student means a student in one or more of the categories described in section 1115(c)(2) of the ESEA, which include children who are economically disadvantaged, students who are children with disabilities, migrant students, English learners, neglected or delinquent students, homeless students, and students who are in foster care. (NFP)

Expand, when used with respect to a *high-quality charter school,* means to significantly increase enrollment or add one or more grades to the *high-quality charter school*. (Section 4310(7) of the ESEA)

High proportion, when used to refer to *Native American* students, means a fact-specific, case-by-case determination based upon the unique circumstances of a particular *charter school* or proposed *charter school*. The Secretary considers ''high proportion'' to include a majority of *Native American* students. In addition, the Secretary may determine that less than a majority of *Native American* students constitutes a ''high proportion'' based on the unique circumstances of a particular *charter school* or proposed *charter school,* as

described in the application for funds. (NFP)

High-quality charter school means a *charter school* that—

(a) Shows evidence of strong academic results, which may include strong student academic growth, as determined by a State;

(b) Has no significant issues in the areas of student safety, financial and operational management, or statutory or regulatory compliance;

(c) Has demonstrated success in significantly increasing student academic achievement, including graduation rates where applicable, for all students served by the *charter school;* and

(d) Has demonstrated success in increasing student academic achievement, including graduation rates where applicable, for each of the subgroups of students, as defined in section 1111(c)(2), except that such demonstration is not required in a case in which the number of students in a group is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student. (Section 4310(8) of the ESEA)

Indian organization means an organization that—

(a) Is legally established—

(i) By Tribal or inter-Tribal charter or in accordance with State or Tribal law; and

(ii) With appropriate constitution, by-laws, or articles of incorporation;

(b) Includes in its purposes the promotion of the education of Indians;

(c) Is controlled by a governing board, the majority of which is Indian;

(d) If located on an Indian reservation, operates with the sanction or by charter of the governing body of that reservation;

(e) Is neither an organization or subdivision of, nor under the direct control of, any institution of higher education; and

(f) Is not an agency of State or local government. (NFP)

Indian Tribe means a federally-recognized or a State-recognized Tribe. (NFP)

Individual from a low-income family means an individual who is determined by a State educational agency or local educational agency to be a child from a low-income family on the basis of (a) data used by the Secretary to determine allocations under section 1124 of the ESEA, (b) data on children eligible for free or reduced-price lunches under the Richard B. Russell National School Lunch Act, (c) data on children in families receiving assistance under part A of title IV of the Social Security Act, (d) data on children eligible to receive medical assistance under the Medicaid program under title XIX of the Social Security Act, or (e) an alternate method that combines or extrapolates from the data in items (a) through (d) of this definition. (NFP)

Institution of higher education means an educational institution in any State that—

(i) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, or persons who meet the requirements of section 484(d) of the HEA;

(ii) Is legally authorized within such State to provide a program of education beyond secondary education;

(iii) Provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;

(iv) Is a public or other nonprofit institution; and

(v) Is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time. (NFP)

Logic model (also referred to as theory of action) means a framework that identifies key project components of the proposed project (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes. (34 CFR 77.1)

Native American means an Indian (including an Alaska Native), Native Hawaiian, or Native American Pacific Islander. (NFP)

Native American language means the historical, traditional languages spoken by *Native Americans.* (NFP)

Novice applicant means—

(a) Any applicant for a grant from the Department that—

(i) Has never received a grant or subgrant under the program from which it seeks funding;

(ii) Has never been a member of a group application, submitted in accordance with 34 CFR 75.127–75.129, that received a grant under the program from which it seeks funding; and

(iii) Has not had an active discretionary grant from the Federal Government in the five years before the deadline date for applications for new awards under the program.

(b) In the case of a group application submitted in accordance with §§ 75.127–75.129, a group that includes only parties that meet the requirements of paragraph (a)(i) of this section. (34 CFR 75.225)

Performance measure means any quantitative indicator, statistic, or metric used to gauge program or project performance. (34 CFR 77.1)

Performance target means a level of performance that an applicant would seek to meet during the course of a project or as a result of a project. (34 CFR 77.1)

Replicate, when used with respect to a *high-quality charter school,* means to open a new *charter school,* or a new campus of a *high-quality charter school,* based on the educational model of an existing *high-quality charter school,* under an existing charter or an additional charter, if permitted or required by State law. (Section 4310(9) of the ESEA)

Rural community means a community that is served by a local educational agency that is eligible to apply for funds under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under title V, part B of the ESEA. Applicants may determine whether a particular local educational agency is eligible for these programs by referring to information on the following Department websites. For the SRSA program: *www2.ed.gov/programs/reapsrsa/eligible16/index.html.* For the RLIS program: *www2.ed.gov/programs/reaprlisp/eligibility.html.* (NFP)

Application Requirements:

Applications for CSP CMO grant funds must address the following application requirements. These requirements are from the NFP and sections 4303 [3] and 4305 of the ESEA. The source of each requirement is provided in parentheses following each requirement. An applicant must respond to requirement (a) in a stand-alone section of the application or in an appendix. For all other application

[3] Per section 4305(c) of the ESEA, CMO grants shall have the same terms and conditions as grants awarded to State entities under section 4303. For clarity, the Department has replaced the term ''State entity'' with ''applicant'' in the requirements that derive from section 4303.

requirements, an applicant may choose to respond to each requirement separately or in the context of the applicant's responses to the selection criteria in section V.2 of this notice.

Applicants for funds under this program must—

(a) Describe the *applicant's* objectives in running a quality *charter school* program and how the program will be carried out, including—

(i) A description of how the applicant will ensure that *charter schools* receiving funds under this program meet the educational needs of their students, including children with disabilities and English learners. (Section 4303(f)(1)(A)(x) of the ESEA)

(ii) A description of how the applicant will ensure that each *charter school* receiving funds under this program has considered and planned for the transportation needs of the school's students. (Section 4303(f)(1)(E) of the ESEA)

(b) For each *charter school* currently operated or managed by the applicant, provide—

(i) Student assessment results for all students and for each subgroup of students described in section 1111(c)(2);

(ii) Attendance and student retention rates for the most recently completed school year and, if applicable, the most recent available four-year adjusted cohort graduation rates and extended-year adjusted cohort graduation rates; and

(iii) Information on any significant compliance and management issues encountered within the last three school years by any school operated or managed by the eligible entity, including in the areas of student safety and finance. (Section 4305(b)(3)(A) of the ESEA)

(c) Describe the educational program that the applicant will implement in each *charter school* receiving funding under this program, including—

(i) Information on how the program will enable all students to meet the challenging State academic standards;

(ii) The grade levels or ages of students who will be served; and

(iii) The instructional practices that will be used. (Section 4305(b)(3)(B)(ii) of the ESEA)

(d) Demonstrate that the applicant currently operates or manages more than one *charter school.* For purposes of this program, multiple *charter schools* are considered to be separate schools if each school—

(i) Meets each element of the definition of ''*charter school*'' under section 4310(2) of the ESEA; and

(ii) Is treated as a separate school by its *authorized public chartering agency* and the State in which the *charter school* is located, including for purposes of accountability and reporting under title I, part A of the ESEA. (NFP)

(e) Provide information regarding any compliance issues, and how they were resolved, for any *charter schools* operated or managed by the applicant that have—

(i) Closed;

(ii) Had their charter(s) revoked due to problems with statutory or regulatory compliance, including compliance with sections 4310(2)(G) and (J) of the ESEA; or

(iii) Had their affiliation with the applicant revoked or terminated, including through voluntary disaffiliation. (NFP)

(f) Provide a complete *logic model* for the grant project. The *logic model* must include the applicant's objectives for replicating or expanding one or more *high-quality charter schools* with funding under this program, including the number of *high-quality charter schools* the applicant proposes to *replicate* or *expand.* (NFP)

(g) If the applicant currently operates, or is proposing to *replicate* or *expand* a single-sex *charter school* or coeducational *charter school* that provides a single-sex class or extracurricular activity (collectively referred to as a ''single-sex educational program''), demonstrate that the existing or proposed single-sex educational program is in compliance with title IX of the Education Amendments of 1972 (20 U.S.C. 1681, *et seq.*) and its implementing regulations, including 34 CFR 106.34. (NFP)

(h) Describe how the applicant currently operates or manages the *high-quality charter schools* for which it has presented evidence of success and how the proposed *replicated* or *expanded charter schools* will be operated or managed, including the legal relationship between the applicant and its schools. If a legal entity other than the applicant has entered or will enter into a performance contract with an *authorized public chartering agency* to operate or manage one or more of the applicant's schools, the applicant must also describe its relationship with that entity. (NFP)

(i) Describe how the applicant will solicit and consider input from parents and other members of the community on the implementation and operation of each *replicated* or *expanded charter school,* including in the area of school governance. (NFP)

(j) Describe the lottery and enrollment procedures that will be used for each replicated or expanded *charter school* if more students apply for admission than can be accommodated, including how any proposed weighted lotteries comply with section 4303(c)(3)(A) of the ESEA. (NFP)

(k) Describe how the applicant will ensure that all eligible children with disabilities receive a free appropriate public education in accordance with Part B of the Individuals with Disabilities Education Act (IDEA). (NFP)

(l) Describe how the proposed project will assist *educationally disadvantaged students* in mastering challenging State academic standards. (NFP)

(m) Provide a budget narrative, aligned with the activities, target grant project outputs, and outcomes described in the *logic model,* that outlines how grant funds will be expended to carry out planned activities. (NFP)

(n) Provide the applicant's most recent independently audited financial statements prepared in accordance with generally accepted accounting principles. (NFP)

(o) Describe the applicant's policies and procedures to assist students enrolled in a *charter school* that closes or loses its charter to attend other high-quality schools. (NFP)

(p) Provide—

(i) A request and justification for waivers of any Federal statutory or regulatory provisions that the applicant believes are necessary for the successful operation of the *charter schools* to be *replicated* or *expanded;* and

(ii) A description of any State or local rules, generally applicable to public schools, that will be waived, or otherwise not apply, to such schools. (NFP)

Assurances.

Applications for CSP CMO grant funds must provide the following assurances. These assurances are from sections 4303 and 4305 of the ESEA. The source of each assurance is provided in parentheses following each assurance.

Applicants for funds under this program must provide assurances that—

(a) The grantee will support *charter schools* in meeting the educational needs of their students, as described in section 4303(f)(1)(A)(x) of the ESEA. (Section 4303(f)(2)(B) of the ESEA)

(b) The grantee will ensure that each *charter school* receiving funds under this program makes publicly available, consistent with the dissemination requirements of the annual State report card under section 1111(h) of the ESEA, including on the website of the school, information to help parents make informed decisions about the education options available to their children, including—

(i) Information on the educational program;

(ii) Student support services;

(iii) Parent contract requirements (as applicable), including any financial obligations or fees;

(iv) Enrollment criteria (as applicable); and

(v) Annual performance and enrollment data for each of the subgroups of students, as defined in section 1111(c)(2) of the ESEA, except that such disaggregation of performance and enrollment data shall not be required in a case in which the number of students in a group is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student. (Section 4303(f)(2)(G) of the ESEA)

(c) The eligible entity has sufficient procedures in effect to ensure timely closure of low-performing or financially mismanaged *charter schools* and clear plans and procedures in effect for the students in such schools to attend other high-quality schools. (Section 4305(b)(3)(C) of the ESEA)

Program Authority: Title IV, Part C of the ESEA, as amended.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 76, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended in 2 CFR part 3474. (d) The NFP.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $90,000,000.

Estimated Range of Awards: $250,000–$15,000,000 per year.

Estimated Average Size of Awards: $2,000,000 per year.

Maximum Award: See *Reasonable and Necessary Costs* in section III.4.(a) for information regarding the maximum amount of funds that may be awarded per new school seat and per new school.

Estimated Number of Awards: 20–30.

Note: The Department is not bound by any estimates in this notice. The estimated range and average size of awards are based on a single 12-month budget period. We may use available funds to support multiple 12-month budget periods for one or more grantees.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants: CMOs.* Eligible applicants may apply individually or as part of a group or consortium.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

3. *Subgrantees:* A grantee under this program may not award subgrants.

4. *Other:* (a) *Reasonable and Necessary Costs:* The Secretary may elect to impose maximum limits on the amount of grant funds that may be awarded per *charter school replicated,* per *charter school expanded,* or per new school seat created.

For this competition, the maximum limit of grant funds that may be awarded per new or expanded *charter school* is $1,500,000.

Note: Applicants must ensure that all costs included in the proposed budget are authorized under the CSP and are reasonable and necessary in light of the goals and objectives of the proposed project. Any costs determined by the Secretary to be unauthorized, or otherwise unreasonable or unnecessary, will be removed from the final approved budget.

(b) *Other CSP Grants:* A *charter school* that previously has received CSP funds for replication or expansion under this program, or for opening or preparing to operate a new *charter school,* replication, or expansion under the CSP Grants to State Entities (State Entities) program (CFDA number 84.282A) or CSP Grants to Developers for the Opening of New Charter Schools and for the Replication and Expansion of High-quality Charter Schools (Developers) program (CFDA numbers 84.282B and 84.282E), may not use funds under this grant to carry out the same activities. However, such *charter school* may be eligible to receive funds under this competition to *expand* the *charter school* beyond the existing grade levels or student count.

Likewise, a *charter school* that receives funds under this competition is ineligible to receive funds to carry out the same activities under the State Entities program (CFDA number 84.282A) or Developers program (CFDA numbers 84.282B and 84.282E), including for opening or preparing to operate a new *charter school,* replication, or expansion.

(c) *Costs for Evaluation:* Consistent with 34 CFR 75.590, CMO grant funds may be used to cover post-award costs associated with an evaluation described in response to Selection Criterion (c) in this notice, provided that such costs are reasonable and necessary to meet the objectives of the approved project.

IV. Application and Submission Information

1. *Application Submission Instructions:* For information on how to submit an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 12, 2018 (83 FR 6003) and available at *www.gpo.gov/fdsys/pkg/FR-2018-02-12/pdf/2018-02558.pdf.*

2. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the CMO grant competition, your application may include business information that you consider proprietary. In 34 CFR 5.11, we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

4. *Funding Restrictions:* Grantees under this program must use the grant funds to *replicate* or *expand* the *charter school* model or models for which the applicant has presented evidence of success. Specifically, grant funds must be used to carry out allowable activities, as described in section 4305(b)(1) of the ESEA. In addition, grant funds must be used to carry out one or more of the activities described in section 4303(h), which include—

(a) Preparing teachers, school leaders, and specialized instructional support personnel, including through paying costs associated with—

(i) Providing professional development; and

(ii) Hiring and compensating, during the applicant's planning period

specified in the application for funds, one or more of the following:

(A) Teachers,

(B) School leaders, and

(C) Specialized instructional support personnel.

(b) Acquiring supplies, training, equipment (including technology), and educational materials (including developing and acquiring instructional materials).

(c) Carrying out necessary renovations to ensure that a new school building complies with applicable statutes and regulations, and minor facilities repairs (excluding construction).

(d) Providing one-time, startup costs associated with providing transportation to students to and from the *charter school.*

(e) Carrying out community engagement activities, which may include paying the cost of student and staff recruitment.

(f) Providing for other appropriate, non-sustained costs related to the replication or expansion of *high-quality charter schools* when such costs cannot be met from other sources.

Further, under section 4305(b)(1) of the ESEA, CMO grant funds must be used to open and prepare for the operation of one or more replicated *high-quality charter schools* or to expand one or more *high-quality charter schools.* Within the context of opening and preparing for the operation of one or more replicated *high-quality charter schools* or expanding one or more *high-quality charter schools,* a portion of grant funds can be used for appropriate, non-sustained costs associated with the expansion or improvement of the grantee's oversight or management of its *charter schools,* provided that (i) the specific *charter schools* being replicated or expanded under the grant are the intended beneficiaries of such expansion or improvement; (ii) such expansion or improvement is intended to improve the grantee's ability to manage or oversee the *charter schools* being replicated or expanded under the grant; and (iii) the costs cannot be met from other sources. In order to use grant funds for this purpose, an applicant should describe how the proposed costs are necessary to meet the objectives of the project and reasonable in light of the overall cost of the project.

We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 60 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all of the application narrative.

V. Application Review Information

1. *Selection Criteria.* The selection criteria are from the NFP and 34 CFR 75.210. The source of each selection factor is included in parentheses following each factor. The maximum possible score for addressing all of the criteria in this section is 100 points. The maximum possible score for addressing each criterion is indicated in parentheses following the criterion.

In evaluating an application, the Secretary considers the following criteria:

(a) *Quality of the eligible applicant* (45 points).

In determining the quality of the eligible applicant, the Secretary considers the following factors:

(i) The extent to which the academic achievement results (including annual student performance on statewide assessments and annual student attendance and retention rates and, where applicable and available, student academic growth, high school graduation rates, college attendance rates, and college persistence rates) for *educationally disadvantaged students* served by the *charter schools* operated or managed by the applicant have exceeded the average academic achievement results for such students served by other public schools in the State (15 points). (NFP)

(ii) The extent to which one or more *charter schools* operated or managed by the applicant have closed; have had a charter revoked due to noncompliance with statutory or regulatory requirements; or have had their affiliation with the applicant revoked or terminated, including through voluntary disaffiliation (15 points). (NFP)

(iii) The extent to which one or more *charter schools* operated or managed by the applicant have had any significant issues in the area of financial or operational management or student safety, or have otherwise experienced significant problems with statutory or regulatory compliance that could lead to revocation of the school's charter (15 points). (NFP)

(b) Significance of *contribution in assisting educationally disadvantaged students* (30 points).

In determining the significance of the contribution the proposed project will make in expanding educational opportunities for *educationally disadvantaged students* and enabling those students to meet challenging State academic standards, the Secretary considers the following factors:

(i) The extent to which *charter schools* currently operated or managed by the applicant serve *educationally disadvantaged students,* particularly students with disabilities [4] and English learners, at rates comparable to surrounding public schools or, in the case of virtual *charter schools,* at rates comparable to public schools in the State (15 points). (NFP)

(ii) The quality of the plan to ensure that the *charter schools* the applicant proposes to *replicate* or *expand* will recruit, enroll, and effectively serve *educationally disadvantaged students,* particularly students with disabilities and English learners (15 points). (NFP)

(c) *Quality of the evaluation plan for the proposed project* (10 points)

In determining the quality of the evaluation plan for the proposed project, the Secretary considers the extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the proposed project, as described in the applicant's *logic model,* and that will produce quantitative and qualitative data by the end of the grant period. (NFP)

(d) *Quality of the management plan and personnel* (15 points).

In determining the quality of the applicant's management plan, the

[4] For purposes of this competition, ''students with disabilities'' or ''student with a disability'' has the same meaning as ''children with disabilities'' or ''child with a disability,'' respectively, as defined in section 8101(4) of the ESEA (and this NIA). Under section 8101(4), ''child with a disability,'' has the same meaning given that term in section 602 of the IDEA.

Secretary considers the following factors:

(i) The ability of the applicant to sustain the operation of the replicated or expanded *charter schools* after the grant has ended, as demonstrated by the multi-year financial and operating model required under section 4305(b)(3)(B)(iii) of the ESEA (5 points). (NFP)

(ii) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks (5 points). (34 CFR 75.210(g)(2)(i))

(iii) The qualifications, including relevant training and experience, of key project personnel (5 points). (34 CFR 75.210(e)(3)(ii))

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications under any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose specific conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $150,000), under 2 CFR 200.205(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management, or SAM. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all other Federal funds you receive exceed $10,000,000.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case the Secretary establishes a data collection period.

5. *Performance Measures:* (a) The Secretary has two performance indicators to measure progress towards achieving the purposes of the program, which are discussed elsewhere in this notice. The performance indicators are: (1) The number of *charter schools* in operation around the Nation and (2) the percentage of fourth- and eighth-grade *charter school* students who are achieving at or above the proficient level on State assessments in mathematics and reading/language arts. Additionally, the Secretary has established the following measure to examine the efficiency of the CSP: The Federal cost per student in implementing a successful school (defined as a school in operation for three or more consecutive years).

(b) *Project-Specific Performance Measures.* Applicants must propose project-specific *performance measures* and *performance targets* consistent with the objectives of the proposed project. Applications must provide the following information as directed under 34 CFR 75.110(b) and (c):

(1) *Performance measures.* How each proposed *performance measure* would accurately measure the performance of the project and how the proposed *performance measure* would be consistent with the *performance measures* established for the program funding the competition.

(2) *Baseline data.* (i) Why each proposed *baseline* is valid; or (ii) if the applicant has determined that there are no established *baseline* data for a particular *performance measure,* an explanation of why there is no established *baseline* and of how and when, during the project period, the applicant would establish a valid *baseline* for the *performance measure.*

(3) *Performance targets.* Why each proposed *performance target* is *ambitious* yet achievable compared to the *baseline* for the *performance measure* and when, during the project period, the applicant would meet the *performance target(s).*

(4) *Data collection and reporting.* (i) The data collection and reporting methods the applicant would use and why those methods are likely to yield reliable, valid, and meaningful performance data; and (ii) the applicant's capacity to collect and report reliable, valid, and meaningful performance data, as evidenced by high-quality data collection, analysis, and reporting in other projects or research.

All grantees must submit an annual performance report with information that is responsive to these *performance measures.*

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things, whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the *performance targets* in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

7. *Project Director's Meeting:* Applicants approved for funding under this competition must attend a two-day meeting for project directors at a location to be determined in the continental United States during each year of the project. Applicants may include the cost of attending this meeting as an administrative cost in their proposed budgets.

VII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of the Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: November 27, 2018.

James C. Blew,

Acting Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2018–26094 Filed 11–29–18; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Orders Issued Under Section 3 of the Natural Gas Act During October 2018

	FE docket Nos.
MPOWER ENERGY LLC	18–149–NG
STAND ENERGY CORPORATION	18–150–NG
MEXICANA DE COBRE, S.A. DE C.V	18–151–NG
CALPINE ENERGY SERVICES, L.P	18–152–NG
NORTHWESTERN CORPORATION d/b/a NORTHWESTERN ENERGY	18–153–NG
UGI ENERGY SERVICES, LLC	18–129–NG
PETRO HARVESTER OPERATING COMPANY, LLC	18–143–NG
CITY OF GLENDALE WATER AND POWER	18–139–NG
IMPERIAL IRRIGATION DISTRICT	18–141–NG
SPRAGUE OPERATING RESOURCES LLC	18–140–NG
MAY DAY MOVERS, LLC	18–142–NG
DIRECT ENERGY MARKETING, LLC	18–146–NG
SPECTRUM LNG, L.L.C	18–147–LNG
PUGET SOUND ENERGY, INC	18–148–LNG
BP ENERGY COMPANY	18–154–NG
EXELON GENERATION COMPANY, LLC	18–155–NG
ENERGIA DE BAJA CALIFORNIA, S. DE R.L. DE C.V	18–156–NG
ENERGIA CHIHUAHUA, S.A. DE C.V	18–157–NG
MC GLOBAL GAS CORPORATION	18–158–LNG
TEXAS EASTERN TRANSMISSION, LP	18–159–NG
CASTLETON COMMODITIES MERCHANT TRADING L.P	18–161–NG

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of orders.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy gives notice that during October 2018, it

issued orders granting authority to import and export natural gas, to import and export liquefied natural gas (LNG), and vacating prior authorization. These orders are summarized in the attached appendix and may be found on the FE website at *https://www.energy.gov/fe/listing-doefe-authorizationsorders-issued-2018-0.*

They are also available for inspection and copying in the U.S. Department of Energy (FE–34), Division of Natural Gas Regulation, Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Docket Room 3E–033, Forrestal Building, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–9478. The Docket Room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, on November 27, 2018.

Amy Sweeney,

Director, Division of Natural Gas Regulation.

APPENDIX—DOE/FE ORDERS GRANTING IMPORT/EXPORT AUTHORIZATIONS

4278	10/16/18	18–149–NG	MPower Energy LLC	Order 4278 granting blanket authority to import/export natural gas from/to Canada.
4279	10/16/18	18–150–NG	Stand Energy Corporation	Order 4279 granting blanket authority to export natural gas to Canada/Mexico.
4280	10/16/18	18–151–NG	Mexicana de Cobre, S.A. de C.V.	Order 4280 granting blanket authority to export natural gas to Mexico.
4281	10/16/18	18–152–NG	Calpine Energy Services, L.P	Order 4281 granting blanket authority to import natural gas from Canada.
4282	10/16/18	18–153–NG	Northwestern Corporation d/b/a Northwestern Energy.	Order 4282 granting blanket authority to import/export natural gas from/to Canada.
Errata	10/25/18	18–129–NG	UGI Energy Services, LLC	Errata Order 4257.
4283	10/25/18	18–143–NG	Petro Harvester Operating Company, LLC.	Order 4283 granting long-term authority to export natural gas to Canada.
4284	10/25/18	18–139–NG	City of Glendale Water and Power.	Order 4284 granting blanket authority to import natural gas from Canada.
4285	10/25/18	18–141–NG	Imperial Irrigation District	Order 4285 granting blanket authority to import/export natural gas from/to Mexico.
4286	10/25/18	18–140–NG	Sprague Operating Resources LLC.	Order 4286 granting blanket authority to import natural gas from Canada.
4287	10/25/18	18–142–NG	May Day Movers, LLC	Order 4287 granting blanket authority to export natural gas to Canada/Mexico.
4288	10/25/18	18–146–NG	Direct Energy Business Marketing, LLC.	Order 4288 granting blanket authority to import/export natural gas from/to Canada.
4289	10/25/18	18–147–LNG	Spectrum LNG, L.L.C	Order 4249 granting blanket authority to export LNG to Mexico by truck.
4290	10/25/18	18–148–LNG	Puget Sound Energy, Inc	Order 4290 granting blanket authority to import LNG from Canada by truck.
4291	10/25/18	18–154–NG	BP Energy Company	Order 4291 granting blanket authority to import/export natural gas from/to Canada/Mexico.
4292	10/25/18	18–155–NG	Exelon Generation Company, LLC.	Order 4292 granting blanket authority to import/export natural gas from/to Canada.
4293	10/25/18	18–156–NG	Energia de Baja California, S. de R.L. de C.V.	Order 4293 granting blanket authority to export natural gas to Mexico.
4294	10/25/18	18–157–NG	Energia Chihuahua, S.A. de C.V.	Order 4294 granting blanket authority to export natural gas to Mexico.
4295	10/25/18	18–158–LNG	MC Global Gas Corporation	Order 4295 granting blanket authority to import LNG from various international sources by vessel.
4296	10/25/18	18–159–NG	Texas Eastern Transmission, LP.	Order 4296 granting blanket authority to import/export natural gas from/to Mexico.
4297	10/25/18	18–161–NG	Castleton Commodities Merchant Trading L.P.	Order 4297 granting blanket authority to import/export natural gas from/to Canada/Mexico.

[FR Doc. 2018–26085 Filed 11–29–18; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP19–310–000]

Arena Energy, LP, Castex Offshore, Inc., EnVen Energy Ventures, LLC, Fieldwood Energy LLC, Walter Oil & Gas Corporation, W&T Offshore, Inc. v. High Point Gas Transmission, LLC; Notice of Complaint

Take notice that on November 21, 2018, 2018, pursuant to Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206 (2018), Arena Energy LP, Castex Offshore, Inc., EnVen Energy Ventures, LLC, Fieldwood Energy LLC, W&T Offshore, Inc., and Walter Oil & Gas Corporation (Complainants) filed a complaint against High Point Gas Transmission, LLC (Respondent), alleging that Respondent failed to adequately respond to a request for transportation service, is in violation of the Commission's open-access transportation policies, the Commission's policies with respect to an interstate pipeline acquiring off-system capacity, and Respondent's

FERC Gas Tariff., all as more fully explained in the complaint.

The Complainants certify that a copy of the complaint was served on Respondent's corporate representatives designated on the Commission's Corporate Officials List.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on December 11, 2018.

Dated: November 23, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–26006 Filed 11–29–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP19–16–000]

Chattanooga Gas Company; Notice of Application

Take notice that on November 9, 2018, Chattanooga Gas Company (CGC), 2207 Olan Mills Drive, Chattanooga, TN 37421, filed in Docket No. CP19–16–000, an application pursuant to section 7(f) of the Natural Gas Act (NGA) and the Commission's regulations requesting a service area determination allowing CGC to expand or enlarge its facilities, without further authorization from the Commission. CGC requests a service area determination with respect to its entire Tennessee local distribution company (LDC) service area as well as a few small geographic areas in Georgia into which CGC's mainline and service lines extend. CGC also requests: (i) A finding that CGC qualifies as an LDC for the purposes of section 311 of the Natural Gas Policy Act of 1978 (NGPA); (ii) a waiver of the Commission's accounting and reporting requirements and other regulatory requirements ordinarily applicable to natural gas companies under the NGA and the NGPA; and (iii) such further relief as the Commission may deem appropriate, all as more fully described in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this application should be directed to Elizabeth Wade, Senior Counsel, AGL Resources Inc., Ten Peachtree Place NE, Atlanta, GA 30309, by telephone at (404) 584–3160 or by email at *ewade@southernco.com* or Daniel P. Archuleta, Troutman Sanders LLP, 401 Ninth Street NW, Suite 1000, Washington, DC 20004, by telephone at (202) 274–2926 or by email at *daniel.archuleta@troutman.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 3 copies of filings made in the proceeding with the Commission and must provide a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list and will be notified of any meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek court review of the Commission's final order.

As of the February 27, 2018 date of the Commission's order in Docket No. CP16–4–001, the Commission will apply its revised practice concerning out-of-time motions to intervene in any new Natural Gas Act section 3 or section 7 proceeding.[1] Persons desiring to become a party to a certificate proceeding are to intervene in a timely manner. If seeking to intervene out-of-time, the movant is required to ''show good cause why the time limitation should be waived,'' and should provide justification by reference to factors set forth in Rule 214(d)(1) (18 CFR 385.214(d)(1)) of the Commission's Rules and Regulations.

The Commission strongly encourages electronic filings of comments, protests, and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 3 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street NE, Washington, DC 20426.

Comment Date: 5:00 p.m. Eastern time on December 14, 2018.

Dated: November 23, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–26007 Filed 11–29–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Number: PR18–87–001.

Applicants: ONEOK Field Services Company, L.L.C.

Description: Tariff filing per 284.123(b), (e)+(g): Revised Statement of Operating Conditions to be effective 11/1/2018;

Filed Date: 11/20/18.

Accession Number: 201811205196.

Comments Due: 5 p.m. ET 12/11/18.

284.123(g) *Protests Due:* 5 p.m. ET 12/11/18.

Docket Numbers: RP19–307–000.

Applicants: Black Hills Utility Holdings, Inc., Black Hills Energy Services Company.

Description: Joint Application for Temporary Waivers of Capacity Release, Regulations and Policies, et al. of Black Hills Utility, Holdings, Inc., et al. under RP19–307.

Filed Date: 11/20/18.

Accession Number: 20181120–5220.

Comments Due: 5 p.m. ET 11/29/18.

Docket Numbers: RP19–308–000.

Applicants: Alliance Pipeline L.P.

Description: § 4(d) Rate Filing: APL Nov2018 Delivery Point Cleanup, Filing to be effective 12/21/2018.

Filed Date: 11/21/18.

Accession Number: 20181121–5018.

Comments Due: 5 p.m. ET 12/3/18.

Docket Numbers: RP19–309–000.

Applicants: Columbia Gulf Transmission, LLC.

Description: § 4(d) Rate Filing: CGT Total Amendment Filing to be effective 11/25/2018.

Filed Date: 11/21/18.

Accession Number: 20181121–5095.

Comments Due: 5 p.m. ET 12/3/18.

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 date(s). 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: November 26, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–26056 Filed 11–29–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC19–28–000.

Applicants: Homer City Generation, L.P.

Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Homer City Generation, L.P.

Filed Date: 11/21/18.

Accession Number: 20181121–5157.

Comments Due: 5 p.m. ET 12/12/18.

Docket Numbers: EC19–29–000.

Applicants: SRIV Partnership LLC, NJR Clean Energy Ventures II Corporation, Alexander Wind Farm, LLC, Ringer Hill Wind, LLC, Carroll Area Wind Farm, LLC, Medicine Bow Wind, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of SRIV Partnership LLC.

Filed Date: 11/21/18.

Accession Number: 20181121–5162.

Comments Due: 5 p.m. ET 12/12/18.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG19–25–000.

Applicants: Calpine Gilroy Cogen, L.P.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 11/26/18.

Accession Number: 20181126–5068.

Comments Due: 5 p.m. ET 12/17/18.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2718–032; ER10–2719–032.

Applicants: Cogen Technologies Linden Venture, L.P., East Coast Power Linden Holding, L.L.C.

Description: Notice of Non-Material Change in Status of Cogen Technologies Linden Venture, L.P., et al.

Filed Date: 11/26/18.

Accession Number: 20181126–5041.

Comments Due: 5 p.m. ET 12/17/18.

Docket Numbers: ER11–3859–017; ER14–1699–007; ER17–436–005; ER17–437–008.

Applicants: Dighton Power, LLC, Milford Power, LLC, Marcus Hook Energy, L.P., Marcus Hook 50, L.P.

Description: Notice of change in status of the SEG MBR Entities, et al.

Filed Date: 11/21/18.

Accession Number: 20181121–5160.

Comments Due: 5 p.m. ET 12/12/18.

Docket Numbers: ER19–294–000.

Applicants: GE Oleander LLC.

Description: Amendment to November 6, 2018 GE Oleander LLC tariff filing.

Filed Date: 11/21/18.

Accession Number: 20181121–5156.

Comments Due: 5 p.m. ET 12/5/18.

Docket Numbers: ER19–392–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 1887R8 Westar Energy, Inc. NITSA NOA to be effective 11/1/2018.

[1] *Tennessee Gas Pipeline Company, L.L.C.,* 162 FERC ¶ 61,167 at P 50 (2018).

Filed Date: 11/26/18.
Accession Number: 20181126–5026.
Comments Due: 5 p.m. ET 12/17/18.
Docket Numbers: ER19–393–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 1888R8 Westar Energy, Inc. NITSA NOA to be effective 11/1/2018.
Filed Date: 11/26/18.
Accession Number: 20181126–5032.
Comments Due: 5 p.m. ET 12/17/18.
Docket Numbers: ER19–394–000.
Applicants: Southwest Power Pool, Inc.
Applicants: § 205(d) Rate Filing: 1890R8 Westar Energy, Inc. NITSA NOA to be effective 11/1/2018.
Filed Date: 11/26/18.
Accession Number: 20181126–5033.
Comments Due: 5 p.m. ET 12/17/18.
Docket Numbers: ER19–395–000.
Applicants: AEP Texas Inc.
Description: § 205(d) Rate Filing: AEPTX-Rayos Del Sol Solar Project Interconnection Agreement to be effective 11/6/2018.
Filed Date: 11/26/18.
Accession Number: 20181126–5054.
Comments Due: 5 p.m. ET 12/17/18.
Docket Numbers: ER19–396–000.
Applicants: AES Shady Point, LLC.
Description: Baseline eTariff Filing: AES Shady Point MBR Application to be effective 11/27/2018.
Filed Date: 11/26/18.
Accession Number: 20181126–5055.
Comments Due: 5 p.m. ET 12/17/18.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF18–452–000.
Applicants: North American Natural Resources, Inc.
Description: Supplement to November 20, 2018 Refund Report of North American Natural Resources, Inc.
Filed Date: 11/26/18.
Accession Number: 20181126–5063.
Comments Due: 5 p.m. ET 11/26/18.

Take notice that the Commission received the following PURPA 210(m)(3) filings:

Docket Numbers: QM19–1–000.
Applicants: Missouri Basin Municipal Power Agency.
Description: Application of Missouri Basin Municipal Power Agency to Terminate Mandatory PURPA Purchase Obligation.
Filed Date: 11/21/18.
Accession Number: 20181121–5155.
Comments Due: 5 p.m. ET 12/19/18.

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: November 26, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–26055 Filed 11–29–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER18–2486–001.
Applicants: San Diego Gas & Electric Company.
Description: Tariff Amendment: SDGE IV SOLAR AGMT 57 V 11 LGIA AMENDMENT to be effective 9/27/2018.
Filed Date: 11/21/18.
Accession Number: 20181121–5099.
Comments Due: 5 p.m. ET 12/12/18.
Docket Numbers: ER19–91–001.
Applicants: GRP Franklin, LLC.
Description: Tariff Amendment: Amendment to MBR Application to be effective 12/8/2018.
Filed Date: 11/21/18.
Accession Number: 20181121–5100.
Comments Due: 5 p.m. ET 12/12/18.
Docket Numbers: ER19–92–001.
Applicants: GRP Madison, LLC.
Description: Tariff Amendment: Amendment to MBR Application to be effective 12/8/2018.
Filed Date: 11/21/18.
Accession Number: 20181121–5102.
Comments Due: 5 p.m. ET 12/12/18.
Docket Numbers: ER19–388–000.
Applicants: Entergy Arkansas, Inc.
Description: § 205(d) Rate Filing: Updated LBA Agreements to be effective 1/1/2019.
Filed Date: 11/21/18.
Accession Number: 20181121–5093.
Comments Due: 5 p.m. ET 12/12/18.
Docket Numbers: ER19–389–000.
Applicants: Marco DM Holdings, L.L.C.
Description: § 205(d) Rate Filing: Notice of change in status to be effective 1/21/2019.
Filed Date: 11/21/18.
Accession Number: 20181121–5107.
Comments Due: 5 p.m. ET 12/12/18.
Docket Numbers: ER19–390–000.
Applicants: Southwestern Public Service Company.
Description: § 205(d) Rate Filing: SPS–GSEC–RBEC–IA–Kemp substation 0.0.0 to be effective 11/22/2018.
Filed Date: 11/21/18.
Accession Number: 20181121–5120.
Comments Due: 5 p.m. ET 12/12/18.
Docket Numbers: ER19–391–000.
Applicants: Panda Hummel Station LLC.
Description: Baseline eTariff Filing: Application for Reactive Service Tariff to be effective 11/24/2018.
Filed Date: 11/23/18.
Accession Number: 20181123–5045.
Comments Due: 5 p.m. ET 12/14/18.

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: November 23, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–26008 Filed 11–29–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4202–024]

KEI (Maine) Power Management (II) LLC; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* 4202–024.

c. *Date Filed:* September 26, 2018.

d. *Submitted By:* KEI (Maine) Power Management (II) LLC (KEI Power).

e. *Name of Project:* Lowell Tannery Hydroelectric Project.

f. *Location:* On the Passadumkeag River, in Penobscot County, Maine. No federal lands are occupied by the project works or located within the project boundary.

g. *Filed Pursuant to:* 18 CFR 5.3 and 5.5 of the Commission's regulations.

h. Potential *Applicant Contact:* Lewis C. Loon, KEI (USA) Power Management Inc., 423 Brunswick Avenue, Gardiner, Maine 04345; (207) 203–3027; email—*Lewis.Loon@kruger.com.*

i. *FERC Contact:* Dr. Nicholas Palso at (202) 502–8854; or email at *nicholas.palso@ferc.gov.*

j. KEI Power filed its request to use the Traditional Licensing Process on September 26, 2018. KEI Power provided public notice of its request on September 24, 2018. In a letter dated November 23, 2018, the Director of the Division of Hydropower Licensing approved KEI Power's request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with the U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR part 402; and NOAA Fisheries under section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.920. We are also initiating consultation with the Maine State Historic Preservation Officer, as required by section 106 of the National Historic Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating KEI Power as the Commission's non-federal representative for carrying out informal consultation pursuant to section 7 of the Endangered Species Act and section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act; and consultation pursuant to section 106 of the National Historic Preservation Act.

m. KEI Power filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). A copy is also available for inspection and reproduction at the address in paragraph h.

o. The licensee states its unequivocal intent to submit an application for a subsequent license for Project No. 4202. Pursuant to 18 CFR 16.20, each application for a subsequent license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by September 30, 2021.

p. Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Dated: November 23, 2018.

Kimberly D. Bose,

Secretary.

[FR Doc. 2018–25986 Filed 11–29–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP19–15–000]

Atlanta Gas Light Company; Notice of Application

Take notice that on November 9, 2018, Atlanta Gas Light Company (AGL), Ten Peachtree Place NE, Atlanta, GA 30309, filed in Docket No. CP19–15–000, an application pursuant to section 7(f) of the Natural Gas Act (NGA) and the Commission's regulations requesting a service area determination allowing AGL to expand or enlarge its facilities, without further authorization from the Commission. AGL requests a service area determination with respect to its entire Georgia local distribution company (LDC) service area as well as a few small geographic areas in Tennessee into which AGL's mainline and service lines extend. AGL also requests: (i) A finding that AGL qualifies as an LDC for the purposes of section 311 of the Natural Gas Policy Act of 1978 (NGPA); (ii) a waiver of the Commission's accounting and reporting requirements and other regulatory requirements ordinarily applicable to natural gas companies under the NGA and the NGPA; and (iii) such further relief as the Commission may deem appropriate, all as more fully described in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this application should be directed to Elizabeth Wade, Senior Counsel, AGL Resources Inc., Ten Peachtree Place NE, Atlanta, GA 30309, by telephone at (404) 584–3160 or by email at *ewade@southernco.com* or Daniel P. Archuleta, Troutman Sanders LLP, 401 Ninth Street NW, Suite 1000, Washington, DC 20004, by telephone at (202) 274–2926 or by email at *daniel.archuleta@troutman.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to

obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 3 copies of filings made in the proceeding with the Commission and must provide a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list and will be notified of any meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek court review of the Commission's final order.

As of the February 27, 2018 date of the Commission's order in Docket No. CP16–4–001, the Commission will apply its revised practice concerning out-of-time motions to intervene in any new Natural Gas Act section 3 or section 7 proceeding.[1] Persons desiring to become a party to a certificate proceeding are to intervene in a timely manner. If seeking to intervene out-of-time, the movant is required to ''show good cause why the time limitation should be waived,'' and should provide justification by reference to factors set forth in Rule 214(d)(1) (18 CFR 385.214(d)(1)) of the Commission's Rules and Regulations.

The Commission strongly encourages electronic filings of comments, protests, and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 3 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

Comment Date: 5:00 p.m. Eastern Time on December 14, 2018.

Dated: November 23, 2018.

Kimberly D. Bose,

Secretary.

[FR Doc. 2018–25984 Filed 11–29–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP19–17–000]

Notice of Amendment: Midship Pipeline Company, LLC

Take notice that on November 14, 2018, Midship Pipeline Company, LLC (Midship), 700 Milam Street, Suite 1900, Houston, Texas 77002, filed an application pursuant to section 7(c) of the Natural Gas Act and Parts 157 and 284 of the Commission's regulations requesting authorization to amend its Certificate of Public Convenience and Necessity issued on August 13, 2018, in Docket No. CP17–458–000 [1] in order to allow for a minor re-route on its Midcontinent Supply Header Interstate Pipeline Project (MIDSHIP Project). Specifically, Midship requests an estimated 0.8-mile pipeline reroute in Bryan County, Oklahoma, located approximately 400-feet southwest of the certificated pipeline route to avoid a sensitive feature and mitigate stakeholder concerns. Midship states that the proposed route modification would not result in any changes to the estimated project costs of the MIDSHIP Project and that no shippers would be adversely affected, all as more fully set forth in the application, which is on file with the Commission and open to public inspection.

The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding the proposed amendment should be directed to Karri Mahmoud, Director, Regulatory Project Development, 700 Milam Street, Suite 1900, Houston, Texas 77002, by telephone at (713) 375–5000, or by email at *karri.mahmoud@cheniere.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice, the Commission staff will either: Complete its environmental analysis (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 3 copies of filings made with the Commission and must provide a copy to the applicant and to every other party in

[1] *Tennessee Gas Pipeline Company, L.L.C.,* 162 FERC ¶ 61,167 at P 50 (2018).

[1] *Midship Pipeline Company, LLC,* 164 FERC ¶ 61,103 (2018).

the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list and will be notified of any meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek court review of the Commission's final order.

As of the February 27, 2018 date of the Commission's order in Docket No. CP16–4–001, the Commission will apply its revised practice concerning out-of-time motions to intervene in any new Natural Gas Act section 3 or section 7 proceeding.[2] Persons desiring to become a party to a certificate proceeding are to intervene in a timely manner. If seeking to intervene out-of-time, the movant is required to ''show good cause why the time limitation should be waived,'' and should provide justification by reference to factors set forth in Rule 214(d)(1) of the Commission's Rules and Regulations.[3]

The Commission strongly encourages electronic filings of comments, protests, and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 3 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

Comment Date: 5:00 p.m. Eastern Time on December 14, 2018.

Dated: November 23, 2018.

Kimberly D. Bose,

Secretary.

[FR Doc. 2018–25985 Filed 11–29–18; 8:45 am]

BILLING CODE 6717–01–P

[2] *Tennessee Gas Pipeline Company, L.L.C.,* 162 FERC ¶ 61,167 at ¶ 50 (2018).

[3] 18 CFR 385.214(d)(1).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP19–17–000]

Midship Pipeline Company, LLC; Notice of Intent To Prepare an Environmental Assessment for a Proposed Amendment of the Midcontinent Supply Header Interstate Pipeline Project and Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of a proposed amendment (0.8-mile reroute) of Midship Pipeline Company, LLC's (Midship Pipeline) Midcontinent Supply Header Interstate Pipeline Project (MIDSHIP Project) in Bryan County, Oklahoma.[1] The Commission will use this EA in its decision-making process to determine whether the amendment is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies about issues regarding the amendment/reroute. The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from its action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires the Commission to discover concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. To ensure that your comments are timely and properly recorded, please submit your comments so that the Commission receives them in Washington, DC on or before 5:00 p.m. Eastern Time on December 24, 2018.

You can make a difference by submitting your specific comments or concerns about the reroute. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the EA. Commission staff will consider all filed comments during the preparation of the EA.

If you sent comments on this project to the Commission before the opening of this docket on November 14, 2018, you will need to file those comments in Docket No. CP19–17–000 to ensure they are considered as part of this proceeding.

This notice is being sent to the Commission's current environmental mailing list for this amendment. State and local government representatives should notify their constituents of this proposed amendment and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable easement agreement. You are not required to enter into an agreement. However, if the Commission approves the amendment, that approval conveys with it the right of eminent domain. Therefore, if you and the company do not reach an easement agreement, the pipeline company could initiate condemnation proceedings in court. In such instances, compensation would be determined by a judge in accordance with state law.

Midship Pipeline provided landowners with a fact sheet prepared by FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is also available for viewing on the FERC website (*www.ferc.gov*) at *https://www.ferc.gov/resources/guides/gas/gas.pdf.*

Public Participation

The Commission offers a free service called eSubscription which makes it easy to stay informed of all issuances and submittals regarding the dockets/projects to which you subscribe. These instant email notifications are the fastest

[1] On August 13, 2018, the Commission issued a Certificate of Public Convenience and Necessity for the 234.1-mile-long MIDSHIP Project under Docket No. CP17–458–000.

way to receive notification and provide a link to the document files which can reduce the amount of time you spend researching proceedings. To sign up go to *www.ferc.gov/docs-filing/esubscription.asp.*

For your convenience, there are three methods you can use to submit your comments to the Commission. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the *eComment* feature, which is located on the Commission's website (*www.ferc.gov*) under the link to *Documents and Filings.* Using eComment is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the *eFiling* feature, which is located on the Commission's website (*www.ferc.gov*) under the link to *Documents and Filings.* With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''*eRegister.*'' You will be asked to select the type of filing you are making; a comment on a particular project is considered a ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address. Be sure to reference the project docket number (CP19–17–000) with your submission: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426.

Summary of the Proposed Project

Midship Pipeline proposes a 0.8-mile reroute between mileposts 195.2 to 195.9 of the MIDSHIP Project in Bryan County, Oklahoma. This reroute would shift the pipeline about 400 feet west and south of the certificated pipeline route. The general location of the reroute is shown in appendix 1.[2]

Land Requirements for Construction

Construction of the proposed reroute would disturb about 12.5 acres of land. Following construction, Midship Pipeline would maintain about 5.3 acres for permanent operation of the project; the remaining acreage would be restored and revert to former uses. This represents an increase from the certificated route of about 1.2 acres during construction and 0.5 acre during operation.

The EA Process

The EA will discuss impacts that could occur as a result of the proposed amendment under these general headings:

- Geology and soils;
- water resources and wetlands;
- vegetation and wildlife;
- threatened and endangered species;
- cultural resources;
- land use;
- air quality and noise;
- public safety; and
- cumulative impacts.

Commission staff will also evaluate reasonable alternatives to the proposed amendment, and make recommendations on how to lessen or avoid impacts on the various resource areas as applicable.

The EA will present Commission staffs' independent analysis of the issues. The EA will be available in electronic format in the public record through eLibrary [3] and the Commission's website (*https://www.ferc.gov/industries/gas/enviro/eis.asp*). If eSubscribed, you will receive instant email notification when the EA is issued. The EA may be issued for an allotted public comment period. Commission staff will consider all comments on the EA before making recommendations to the Commission. To ensure Commission staff have the opportunity to address your comments, please carefully follow the instructions in the Public Participation section, beginning on page 2.

With this notice, the Commission is asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate in the preparation of the EA.[4] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Consultation Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, the Commission is using this notice to initiate consultation with the applicable State Historic Preservation Office (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[5] Commission staff will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). The EA for this project will document findings on the impacts on historic properties and summarize the status of consultations under section 106.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, and anyone who submits comments on the project. Commission staff will update the environmental mailing list as the analysis proceeds to ensure that Commission notices related to this environmental review are sent to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed amendment.

If the Commission issues the EA for an allotted public comment period, a *Notice of Availability* of the EA will be sent to the environmental mailing list and will provide instructions to access the electronic document on the FERC's website (*www.ferc.gov*). If you need to make changes to your name/address, or if you would like to remove your name from the mailing list, please return the attached ''Mailing List Update Form'' (appendix 2).

[2] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE, Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[3] For instructions on connecting to eLibrary, refer to page 5 of this notice.

[4] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

[5] The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

Additional Information

Additional information about the amendment/reroute is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number in the ''Docket Number'' field, excluding the last three digits (*i.e.,* CP19–17). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

Dated: November 23, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–26005 Filed 11–29–18; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2014–0097 FRL–9986–26–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NESHAP for Plating and Polishing Area Sources (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), NESHAP for Plating and Polishing Area Sources (EPA ICR Number 2294.05, OMB Control Number 2060–0623), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through November 30, 2018. Public comments were previously requested, via the **Federal Register**, on June 29, 2017 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before December 31, 2018.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OECA–2014–0097 to: (1) EPA online using *www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460; and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–2970; fax number: (202) 564–0050; email address: *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov,* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Plating and Polishing Area Sources (40 CFR part 63, subpart WWWWWW) apply to both existing and new plating and polishing facilities that are an area source of hazardous air pollutant (HAP) emissions and that use one or more of the following metal HAP: Cadmium, chromium, lead manganese, or nickel (hereafter referred to as the plating and polishing metal HAP). A plating and polishing facility is a plant site that is engaged in any of the following processes: Non-chromium electroplating; electroless or non-electrolytic plating; other non-electrolytic metal coating processes such as chromate conversion coating, nickel acetate sealing, sodium dichromate sealing, and manganese phosphate coating, and thermal spraying; dry mechanical polishing of finished metals and formed products after plating or thermal spraying; electroforming; and electro-polishing. New facilities include those that commenced construction, modification, or reconstruction after the date of proposal. In general, all NESHAP standards require initial notifications, performance tests, and periodic reports by the owners/operators of the affected facilities. They are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance with 40 CFR part 63, subpart WWWWWW.

Form Numbers: None.

Respondents/affected entities: Plating and polishing area source facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart WWWWWW).

Estimated number of respondents: 2,900 (total).

Frequency of response: Initially and annually.

Total estimated burden: 67,700 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $7,410,000 (per year), which includes no annualized capital/startup or operation & maintenance costs.

Changes in the estimates: There is an increase in the total estimated burden and number of responses from the most-recently approved ICR due to several adjustments. First, burden hours were added to allow each facility to refamiliarize themselves with the regulatory requirements each year. Second, the number of sources that complete but do not submit annual compliance certifications was left out of the response count in the previous renewal and this has been corrected.

There is a decrease in the annualized capital or operation & maintenance costs since the previous renewal due to an adjustment. There are no ongoing monitoring requirements in the rule and no new sources are expected to incur capital/startup costs. Therefore, the capital/startup costs were reduced to zero since those costs have already been incurred when the existing sources became subject to the rule.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2018–25771 Filed 11–29–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2018–0604; FRL–9983–08]

TSCA Science Advisory Committee on Chemicals (SACC); Notice of Public Meetings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the peer review of the draft Risk Evaluation for Colour Index (C.I.) Pigment Violet 29 (PV29) and associated documents developed under EPA's existing chemical substance process under the Toxic Substances Control Act (TSCA). The peer review panel deliberations will be conducted during a 4-day, in-person, public meeting of the TSCA Science Advisory Committee on Chemicals (SACC). This in-person meeting will also include a general TSCA orientation for the TSCA SACC. A portion of the in-person meeting will be closed to the public for the committee's discussion of information claimed as confidential business information (CBI). Prior to the in-person meeting, there will be a public, 2-hour preparatory virtual meeting to consider the scope and clarity of the draft charge questions for this peer review. During these upcoming meetings, the public is invited to provide oral comments for the peer review on the draft risk evaluation for PV29 and related documents. Comments on the draft charge questions will be accepted prior to and during the 2-hour preparatory virtual meeting. The TSCA SACC peer review panel will consider these comments during their discussions.

DATES:

Meetings: The preparatory virtual meeting will be held on January 8, 2019, from 2 p.m. to approximately 4 p.m. (EST). The 4-day in-person meeting will be held from 1 p.m. (EST) to approximately 5:30 p.m. on January 29, 2019 and from 9 a.m. to approximately 5:30 p.m. on January 30, 31, and February 1, 2019.

Oral comments: Requests to make oral comments during the preparatory virtual meeting should be submitted on or before 12:00 p.m. (EST) on January 4, 2019. In order to be included on the meeting agenda, requests to make oral comments during the in-person 4-day peer review meeting should be submitted on or before January 14, 2019. Otherwise, requests to present oral comments during the in-person 4-day peer review meeting will be accepted until and possibly during the in-person meeting. Direct your requests to make oral comments to the Designated Federal Officer (DFO) listed under **FOR FURTHER INFORMATION CONTACT**.

For additional instructions, see Unit I.C. and Unit I.D. of the **SUPPLEMENTARY INFORMATION**.

Written comments: Written comments on the scope and clarity of the draft charge questions for the preparatory virtual meeting should be submitted on or before January 7, 2019. Written comments on the draft risk evaluation that are submitted on or before January 14, 2019 (see 83 FR 57473, November 15, 2018) (FRL–9986–45) will be provided to the peer review panel members before the meeting. You may also submit written comments on the first date of the in-person 4-day peer review meeting by providing 30 copies of your written comments to the DFO at the start of the meeting for the DFO to distribute to the panel members. The TSCA SACC will consider written comments during their discussions.

Special accommodations: For information on access or services for individuals with disabilities, and to request accommodation of a disability, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** at least 10 days prior to the meeting to give EPA as much time as possible to process your request.

ADDRESSES:

Preparatory Virtual Meeting: The January 8, 2019 preparatory virtual meeting is open to the public and will be conducted via webcast using Adobe Connect and telephone. Registration is required to participate by listening or presenting oral comments during the preparatory virtual meeting. Please visit *https://www.epa.gov/tsca-peer-review* website for additional information including how to register.

In-Person Meeting: The location of the January 29 to February 1, 2019 in-person meeting will be announced on the TSCA SACC website (*https://www.epa.gov/tsca-peer-review*) by mid-December 2018. The January 29 to February 1, 2019 in-person meeting may also be webcast. Please refer to the TSCA SACC website at *https://www.epa.gov/tsca-peer-review* for information on how to access the webcast. Please note that for the in-person meeting, the webcast is a supplementary public process provided only for convenience. If difficulties arise resulting in webcasting outages, the in-person meeting will continue as planned.

Comments for the peer review: Submit your written comments for the peer review, identified by docket identification (ID) number EPA–HQ–OPPT–2018–0604, by one of the following methods:

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

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

Requests to present oral comments, and requests for special accommodations. Submit requests to present oral comments or for special accommodations, to the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Dr. Todd Peterson, DFO, Office of Science Coordination and Policy (7201M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–6428; email address: *peterson.todd@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may be of interest to persons who are interested in risk evaluations of chemical substances under the Toxic Substances Control Act (TSCA). Since other entities may also be interested in this risk evaluation, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit CBI information to EPA through *regulations.gov* or via email. If your comments contain any information that you consider to be CBI or otherwise protected, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** to obtain special instructions before submitting your comments.

2. *Tips for preparing your comments.* When preparing and submitting your

comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

C. How may I participate in the preparatory virtual meeting?

1. Register. Registration for the January 8, 2019, preparatory virtual meeting is required. To participate by listening or making oral comments during this meeting please visit *https://www.epa.gov/tsca-peer-review* to register. Registration online will be confirmed by email that will include the webcast meeting Adobe Connect link and audio teleconference information.

2. Submit written comments. Written comments for the preparatory virtual meeting should be submitted, using the instructions in **ADDRESSES** and Unit I.B., on or before January 7, 2019. Written comments should focus on the scope and clarity of the draft charge questions and the TSCA SACC will consider those comments during their discussions.

3. Provide oral comments. To provide oral comments at the virtual meeting, please follow the applicable instructions to register on or before 12:00 p.m. (EST) on January 4, 2019. Oral comments to the TSCA SACC panel during the preparatory virtual meeting are limited to approximately 5 minutes due to the time limit of this meeting. Oral comments should focus on the scope and clarity of the draft charge questions and the panel will consider those comments during their discussions.

4. Participate in the virtual meeting. Follow the instructions in Unit I.C.1. to register for the January 8, 2019 preparatory meeting. Your confirmation will include the webcast meeting Adobe Connect link and audio teleconference information.

D. How may I participate in the in-person meeting?

You may participate in the in-person peer review meeting by following the instructions in this unit. To ensure proper receipt by EPA, it is imperative that you identify docket ID number EPA–HQ–OPPT–2018–0604 in the subject line on the first page of your request.

1. *Provide oral comments for the peer review.* The Agency encourages each individual or group wishing to make brief oral comments to the TSCA SACC during the in-person meeting to submit their request to the DFO listed under **FOR FURTHER INFORMATION CONTACT** on or before January 14, 2019, in order to be included on the meeting agenda. Requests to present oral comments for the peer review will be accepted until the date of the in-person meeting and, to the extent that time permits, the Chair of the TSCA SACC may permit the presentation of oral comments at the in-person meeting by interested persons who have not previously requested time.

Requests to make oral comments at the in-person meeting should identify the name of the individual making the presentation, the organization (if any) the individual will represent, and any requirements for audiovisual equipment. Oral comments before the TSCA SACC during the in-person meeting are limited to approximately 5 minutes unless prior arrangements have been made. In addition, each speaker should bring 30 copies of the comments and presentation for the DFO to distribute to the TSCA SACC at the meeting. The TSCA SACC will consider oral comments during their discussions.

2. *Provide written comments.* Follow the instructions in **ADDRESSES** and Unit I.B., to provide written comments on the draft risk evaluation.

3. *Attend the meeting.* Seating at the meeting will be open and on a first-come basis.

II. Background

A. Purpose of the TSCA SACC

The Science Advisory Committee on Chemicals (SACC) was established by EPA in 2016 under the authority of the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Public Law 114–182, 140 Stat. 448 (2016), and operates in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. The SACC supports activities under the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 *et seq.,* the Pollution Prevention Act (PPA), 42 U.S.C. 13101 *et seq.,* and other applicable statutes. The SACC provides expert independent scientific advice and recommendations to the EPA on the scientific and technical aspects of risk assessments, methodologies, and pollution prevention measures and approaches for chemicals regulated under TSCA.

The SACC is comprised of experts in: Toxicology; human health and environmental risk assessment; exposure assessment; and related sciences (*e.g.,* synthetic biology, pharmacology, biotechnology, nanotechnology, biochemistry, biostatistics, PBPK modeling, computational toxicology, epidemiology, environmental fate, and environmental engineering and sustainability). The SACC currently consists of 26 members. When needed, the committee will be assisted in their reviews by ad hoc participants with specific expertise in the topics under consideration.

B. In-Person Meeting

The focus of the TSCA SACC in-person meeting is to peer review the Agency's draft risk evaluation of C.I. Pigment Violet 29, which was developed under EPA's existing chemical substance process. C.I. Pigment Violet 29 is an organic pigment that has a low solubility, low volatility, is expected to be highly persistent, and has low bioaccumulation potential in fish and other animals. The pigment is utilized as an intermediate to create or adjust the color of other pigments, as well as in commercial paints, coatings, plastics, and rubber products.

Under TSCA, the purpose of the risk evaluation is to determine whether a chemical substance presents an unreasonable risk to health or the environment under the conditions of use, including an unreasonable risk to a relevant potentially exposed or susceptible subpopulation. EPA released the draft risk evaluation for C.I. Pigment Violet 29 for public review and comment on November 15, 2018 (83 FR 57473; FRL–9986–45), and is submitting the same materials to the TSCA SACC for peer review.

After the peer review process, EPA will consider reviewer comments and recommendations, and public comments, to finalize the risk evaluation.

Approximately one hour of the TSCA SACC's in-person meeting will be closed to the public for the TSCA SACC to consider and discuss material that has been claimed as CBI and provided to the Committee as background for the draft risk evaluation for PV29. In accordance with FACA section 10(d), and section (c)(4) of the Government in the Sunshine Act, 5 U.S.C. 552b, this approximately one-hour session of the TSCA SACC will be closed to the public to avoid the potential disclosure of CBI, which is protected from disclosure by statute. See the Administrator's determination for a closed meeting available in the docket identified by Docket ID No. EPA–HQ–OPPT–2018–0604 at *http://www.regulations.gov.*

C. TSCA SACC Documents and Meeting Minutes

EPA's background paper, related supporting materials, and draft charge/questions to the TSCA SACC are available on the TSCA SACC website and in docket. In addition, the Agency will provide additional background documents (*e.g.,* a list of the SACC Members participating in this meeting and the meeting agenda) as those

materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be available at *http://www.regulations.gov* and the TSCA SACC website at *https://www.epa.gov/tsca-peer-review.*

TSCA SACC will prepare meeting minutes and final report summarizing its recommendations to the Agency no later than 90 days after the meeting. The meeting minutes and final report will be posted on the TSCA SACC website and in the docket.

Authority: 15 U.S.C. 2625(o) *et seq.;* 5 U.S.C. Appendix 2 *et seq.*

Dated: November 21, 2018.

Stanley Barone, Jr.,

Acting Director, Office of Science Coordination and Policy.

[FR Doc. 2018–26084 Filed 11–29–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2013–0352; FRL–9984–08–OEI]

Information Collection Request Submitted To OMB for Review and Approval; Comment Request; NESHAP for Industrial, Commercial, and Institutional Boilers and Process Heaters (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), NESHAP for Industrial, Commercial, and Institutional Boilers and Process Heaters (EPA ICR No. 2028.09, OMB Control No. 2060–0551), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through November 30, 2018. Public comments were previously requested, via the **Federal Register**, on June 29, 2017, during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before December 31, 2018.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OECA–2014–0078, to: (1) EPA online using *www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460; and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–2970; fax number: (202) 564–0050; email address: *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed either online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Industrial, Commercial, and Institutional Boilers and Process Heaters apply to existing and new industrial, commercial, and institutional boilers and process heaters located at major sources of HAP. In general, all NESHAP standards require initial notifications, performance tests, and periodic reports by the owners/operators of the affected facilities. They are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance with 40 CFR part 63, DDDDD.

Form Numbers: None.

Respondents/affected entities: Industrial, commercial, and institutional boilers and process heaters.

Respondent's obligation to respond: Mandatory (40 CFR 63, subpart DDDDD).

Estimated number of respondents: 2,012 (total).

Frequency of response: Initially, semi-annually, annually, biennially, and every five years.

Total estimated burden: 597,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $196,000,000 (per year), which includes $131,000,000 in annualized capital/startup and/or operation & maintenance costs.

Changes in the Estimates: There is an adjustment increase in the total estimated burden as currently identified in the OMB Inventory of Approved Burdens. This increase is not due to any program changes. The change in burden and cost estimates occurred because there is continued growth for certain subcategories of equipment subject to the standard. In addition, the standards have been in effect for more than three years and the requirements are different during initial compliance (new facilities) as compared to on-going compliance (existing facilities). The previous ICR reflected those burdens and costs associated with the initial activities for subject facilities and provided for the timeframe for existing facilities to come into compliance prior to January 31, 2016. This included purchasing monitoring equipment, conducting initial performance tests, and establishing recordkeeping systems. This ICR reflects the on-going burden and costs for existing facilities. Activities for existing sources include annual testing, continuous monitoring of pollutants, and the submission of semiannual, biennial, or five-year reports, as determined for each subcategory.

There is an adjustment decrease in the number of responses as compared with the previous ICR. This decrease is a result of removing some of the one-time response requirements for existing sources that have already met the initial compliance requirements. There is an overall increase in the total capital/startup and annual operation and maintenance costs compared with the previous ICR. These changes assume all existing sources have met the initial requirements of the rule. In addition, there are a small number of new

facilities that are in the initial compliance phase described above.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2018–26081 Filed 11–29–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9042–6]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed 11/19/2018 Through 11/23/2018 Pursuant to 40 CFR 1506.9.

Notice: Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

EIS No. 20180284, Draft Supplement, USFS, MT, Stonewall Vegetation Project, Comment Period Ends: 01/14/2019, Contact: Laura Conway 406–791–7739.

EIS No. 20180285, Draft, USFWS, WA, Skookumchuck Wind Energy Project Proposed Habitat Conservation Plan and Incidental Take Permit for Marbled Murrelet, Bald Eagle, and Golden Eagle, Lewis and Thurston Counties, Washington, Comment Period Ends: 01/14/2019, Contact: Tim Romanski 360–753–5823.

EIS No. 20180286, Draft, BLM, ID, Caldwell Canyon Mine and Reclamation Plan, Comment Period Ends: 01/14/2019, Contact: Bill Volk 208–236–7503.

EIS No. 20180287, Final, UDOT, UT, I–15, Payson Main Street Interchange, Review Period Ends: 12/31/2018, Contact: Naomi Kisen 801–965–4005.

EIS No. 20180288, Final, OSM, MT, Western Energy Company's Rosebud Mine Area F, Review Period Ends: 12/31/2018, Contact: Logan Sholar 303–293–5036.

EIS No. 20180289, Draft, USFS, AZ, Fossil Creek Wild and Scenic River Comprehensive River Management Plan, Comment Period Ends: 02/28/2019, Contact: Marcos Roybal 928–203–2915.

EIS No. 20180290, Draft, BR, CA, Mendota Pool Group 20-Year Exchange Program, Comment Period Ends: 01/14/2019, Contact: Rain Emerson 559–262–0335.

EIS No. 20180291, Draft, BLM, UT, The Sevier Playa Potash Project, Utah, Comment Period Ends: 01/14/2019, Contact: Clara Stevens 435–743–3119.

Dated: November 27, 2018.

Robert Tomiak,

Director, Office of Federal Activities.

[FR Doc. 2018–26074 Filed 11–29–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2017–0720; FRL–9985–63]

Registration Review; Draft Human Health and/or Ecological Risk Assessments for Several Pesticides; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's draft human health and ecological risk assessments for the registration review of amitraz, bispyribac-sodium, bromoxynil, captan, chloropicrin, dazomet, diclosulam, florasulam, flucarbazone-sodium, fluroxypyr, formetanate, imazalil, imazamox, imazapic, imazaquin, imazethapyr, MCPA, metam sodium, metam potassium, methyl isothiocyanate (MITC), o-benzyl-p-chlorophenol, starlicide, tri-n butyl tetradecyl phosphonium chloride (TTPC), triphenyltin hydroxide (TPTH), and zinc salts. This notice also announces the availability of EPA's draft human health risk assessments for the registration review of *para*-dichlorobenzene and penoxsulam.

DATES: Comments must be received on or before January 29, 2019.

ADDRESSES: Submit your comments, to the docket identification (ID) number for the specific pesticide of interest provided in the Table in Unit IV, by one of the following methods:

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

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

FOR FURTHER INFORMATION CONTACT:

For pesticide specific information contact: The Chemical Review Manager for the pesticide of interest identified in the Table in Unit IV.

For general questions on the registration review program, contact: Dana Friedman, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 347–8827; email address: *friedman.dana@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the Chemical Review Manager identified in the Table in Unit IV.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to 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 comment that includes information claimed as CBI, a copy of the comment 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.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at

http://www.epa.gov/dockets/comments.html.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. Background

Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. As part of the registration review process, the Agency has completed comprehensive draft human health and/or ecological risk assessments for all pesticides listed in the Table in Unit IV. After reviewing comments received during the public comment period, EPA may issue a revised risk assessment, explain any changes to the draft risk assessment, and respond to comments and may request public input on risk mitigation before completing a proposed registration review decision for the pesticides listed in the Table in Unit IV. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

III. Authority

EPA is conducting its registration review of the chemicals listed in the Table in Unit IV pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA, a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5) (7 U.S.C. 136a(c)(5)). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

IV. What action is the Agency taking?

Pursuant to 40 CFR 155.58, this notice announces the availability of EPA's human health and/or ecological risk assessments for the pesticides shown in the following table, and opens a 60-day public comment period on the risk assessments.

TABLE—DRAFT RISK ASSESSMENTS BEING MADE AVAILABLE FOR PUBLIC COMMENT

Registration review case name and No.	Docket ID No.	Chemical review manager and contact information
Amitraz, Case 0234	EPA–HQ–OPP–2009–1015	Veronica Dutch, *dutch.veronica@epa.gov*, 703–308–8585.
Bispyribac-sodium, Case 7258	EPA–HQ–OPP–2014–0074	Moana Appleyard, *appleyard.moana@epa.gov*, 703–308–8175.
Bromoxynil, Case 2070	EPA–HQ–OPP–2012–0896	Michelle Nolan, *nolan.michelle@epa.gov*, 703–347–0258.
Captan, Case 0120	EPA–HQ–OPP–2013–0296	Christina Scheltema, *scheltema.christina@epa.gov*, 703–308–2201.
Chloropicrin, Case 0040	EPA–HQ–OPP–2013–0153	Lauren Bailey, *bailey.lauren@epa.gov*, 703–347–0374.
Dazomet, Case 2135	EPA–HQ–OPP–2013–0080	Katherine St. Clair, *stclair.katherine@epa.gov*, 703–347–8778.
Diclosulam, Case 7249	EPA–HQ–OPP–2015–0285	Susan Bartow, *bartow.susan@epa.gov*, 703–603–0065.
Florasulam, Case 7274	EPA–HQ–OPP–2015–0548	Moana Appleyard, *appleyard.moana@epa.gov*, 703–308–8175.
Flucarbazone-sodium, Case 7251	EPA–HQ–OPP–2013–0283	Veronica Dutch, *dutch.veronica@epa.gov*, 703–308–8585.
Fluroxypyr, Case 7248	EPA–HQ–OPP–2014–0570	Caitlin Newcamp, *newcamp.caitlin@epa.gov*, 703–347–0325.
Formetanate HCl, Case 0091	EPA–HQ–OPP–2010–0939	Patricia Biggio, *biggio.patricia@epa.gov*, 703–347–0547.
Imazalil, Case 2325	EPA–HQ–OPP–2013–0305	Michelle Nolan, *nolan.michelle@epa.gov*, 703–347–0258.
Imazamox, Case 7238	EPA–HQ–OPP–2014–0395	Patricia Biggio, *biggio.patricia@epa.gov*, 703–347–0547.
Imazapic, Case 7234	EPA–HQ–OPP–2014–0279	Eric Fox, *fox.ericm@epa.gov*, 703–347–0104.
Imazaquin, Case 7204	EPA–HQ–OPP–2014–0224	Matthew Manupella, *manupella.Matthew@epa.gov*, 703–347–0411.
Imazethapyr, Case 7208	EPA–HQ–OPP–2013–0774	Katherine St. Clair, *stclair.katherine@epa.gov*, 703–347–8778.
MCPA, Case 0017	EPA–HQ–OPP–2014–0180	Julie Javier, *javier.julie@epa.gov*, 703–347–0790.
Metam Sodium and Metam Potassium, Case 2390.	EPA–HQ–OPP–2013–0140	Leigh Rimmer, *rimmer.leigh@epa.gov*, 703–347–0553.
Methyl isothiocyanate (MITC), Case 2405.	EPA–HQ–OPP–2013–0242	Megan Snyderman, *snyderman.megan@epa.gov*, 703–347–0671.
o-Benzyl-p-Chlorophenol, Case 2045	EPA–HQ–OPP–2011–0423	Erin Dandridge, *dandridge.erin@epa.gov*, 703–347–0185.
para-Dichlorobenzene, Case 3058	EPA–HQ–OPP–2016–0117	Linsey Walsh, *walsh.linsey@epa.gov*, 703–347–8030.
Penoxsulam, Case 7265	EPA–HQ–OPP–2015–0303	Samantha Thomas, *thomas.samantha@epa.gov*, 703–347–0514.
Starlicide, Case 2610	EPA–HQ–OPP–2011–0696	Linsey Walsh, *walsh.linsey@epa.gov*, 703–347–8030.
Tri-n butyl tetradecyl phosphonium chloride (TTPC), Case 5111.	EPA–HQ–OPP–2011–0952	Daniel Halpert, *halpert.daniel@epa.gov*, 703–347–0133.
Triphenyltin Hydroxide (TPTH), Case 0099.	EPA–HQ–OPP–2012–0413	Katherine St. Clair, *stclair.katherine@epa.gov*, 703–347–8778.
Zinc and Zinc Salts, Case 4099	EPA–HQ–OPP–2009–0011	Kimberly Wilson, *wilson.kimberly@epa.gov*, 703–347–0495.

Pursuant to 40 CFR 155.53(c), EPA is providing an opportunity, through this notice of availability, for interested parties to provide comments and input concerning the Agency's draft human health and/or ecological risk assessments for the pesticides listed in the Table in Unit IV. The Agency will consider all comments received during the public comment period and make changes, as appropriate, to a draft human health and/or ecological risk assessment. EPA may then issue a revised risk assessment, explain any changes to the draft risk assessment, and respond to comments.

Information submission requirements. Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

- To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.
- The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English and a written transcript must accompany any information submitted as an audiographic or videographic record. Written material may be submitted in paper or electronic form.
- Submitters must clearly identify the source of any submitted data or information.
- Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.

As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

Authority: 7 U.S.C. 136 *et seq.*

Dated: October 25, 2018.

Yu-Ting Guilaran,

Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2018–26086 Filed 11–29–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2014–0085; FRL–9974–64–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NESHAP for Friction Materials Manufacturing (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR)—NESHAP for Friction Materials Manufacturing (EPA ICR Number 2025.07, OMB Control Number 2060–0481) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through August 31, 2018. Public comments were requested previously, via the **Federal Register** on June 29, 2017 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before December 31, 2018.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OECA–2014–0085, to: (1) EPA online using *www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460; and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–2970; fax number: (202) 564–0050; email address: *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: Owners and operators of affected facilities are required to comply with reporting and record keeping requirements for the general provisions of 40 CFR part 63, subpart A, as well as the specific requirements at 40 CFR part 63, subpart QQQQQ. This includes submitting initial notifications, performance tests and periodic reports and results, and maintaining records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These reports are used by EPA to determine compliance with the standards.

Form Numbers: None.

Respondents/affected entities: Friction materials manufacturing facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart QQQQQ).

Estimated number of respondents: 2 (total).

Frequency of response: Initially and semiannually.

Total estimated burden: 659 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $69,700 (per year), which includes $544 in either annualized capital/start up and/or operation & maintenance costs.

Changes in the estimates: There is an adjustment decrease in the total estimated burden as currently identified in the OMB Inventory of Approved Burdens. This decrease is not due to any program changes. The change in the burden occurred due to a decrease in the respondent universe.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2018–25768 Filed 11–29–18; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, with revision, the Application to Become a Savings and Loan Holding Company or to Acquire a Savings Association or Savings and Loan Holding Company (FR LL–10(e); OMB No. 7100–0336).

DATES: Comments must be submitted on or before January 29, 2019.

ADDRESSES: You may submit comments, identified by *FR LL–10(e),* by any of the following methods:

- *Agency website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include OMB number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *http://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room 3515, 1801 K Street NW (between 18th and 19th Streets NW), Washington, DC 20006 between 9 a.m. and 5 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the PRA OMB submission, including the proposed reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, if approved. These documents will also be made available on the Board's public website at *http://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears below.

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC, 20551.

SUPPLEMENTARY INFORMATION: On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal Under OMB Delegated Authority To Extend for Three Years, With Revision, the Following Information Collection

Report title: Application to Become a Savings and Loan Holding Company or to Acquire a Savings Association or Savings and Loan Holding Company.

Agency form number: FR LL–10(e).

OMB control number: 7100–0336.

Frequency: Event generated.

Respondents: Entities seeking prior approval to become or acquire a savings and loan holding company (SLHC).

Estimated number of respondents: 15.

Estimated average hours per response: 60.

Estimated annual burden hours: 900.

General description of report: This collection of information consists of information that must be filed in connection with certain proposals involving the formation, acquisition, or merger of an SLHC. The Board requires the submission of this filing from an applicant for regulatory and supervisory purposes and to allow the Board to fulfill its statutory obligations to review these transactions under section 10(e) of the Home Owners' Loan Act (HOLA) and the Board's Regulation LL—Savings and Loan Holding Companies. The Board uses the information submitted by applicants to evaluate these transactions with respect to the financial and managerial resources and future prospects of the company(ies) and savings association(s) involved, the effect of the acquisition on the savings association(s), the insurance risk to the Deposit Insurance Fund, the convenience and needs of communities to be served, and competitive effects.[1]

Proposed revisions: The Board proposes to change the name and title of its current Form H-(e), which the Board inherited from the Office of Thrift Supervision (OTS) when the OTS's supervisory authority over SLHCs was transferred to the Board, to Application to Become a Savings and Loan Holding Company or to Acquire a Savings Association or Savings and Loan Holding Company (FR LL–10(e)), and to make numerous other revisions to this collection of information. These changes would make the form consistent with

[1] *See* 12 U.S.C. 1467a(e)(2).

the format of other Board forms; incorporate information on the Board's policies and procedures for processing applications; improve the clarity of the information requests; reflect the impact of new laws, regulations, capital requirements, and accounting rules; and delete information requests that are not typically useful for the analysis of a proposed transaction. The revisions also are intended to increase transparency by ensuring that initial filings include the information that the Federal Reserve System requires to evaluate a transaction and thereby reducing the need for subsequent information requests, which may delay the Board's consideration of a filing and create additional burden for filers.

Legal authorization and confidentiality: The FR LL–10(e) is authorized pursuant to Section 10(b)(2) of the Home Owners' Loan Act (12 U.S.C. 1467a(b)) and is mandatory. The information on the FR LL–10(e) is not considered confidential unless the applicant requests confidential treatment pursuant to exemption 4 (confidential business information) or 6 (confidential personal information) of the Freedom of Information Act, 5 U.S.C. 552(b)(4) and (b)(6). All such requests for confidential treatment would be reviewed on a case-by-case basis.

Board of Governors of the Federal Reserve System, November 27, 2018.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2018–26089 Filed 11–29–18; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, without revision, the *Domestic Branch Notification* (*FR 4001;* OMB No. 7100–0097).

DATES: Comments must be submitted on or before January 29, 2019.

ADDRESSES: You may submit comments, identified by *FR 4001,* by any of the following methods:

- *Agency website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include OMB number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove sensitive PII (personally identifiable information) at the commenter's request. Public comments may also be viewed electronically or in paper form in Room 3515, 1801 K Street NW. (between 18th and 19th Streets NW), Washington, DC 20006 between 9 a.m. and 5 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the PRA OMB submission, including the proposed reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, once approved. These documents will also be made available on the Board's public website at: *http://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears below.

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions; including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal prior.

Proposal To Approve Under OMB Delegated Authority the Extension for Three Years, Without Revision, of the Following Report

Report title: Domestic Branch Notification.

Agency form number: FR 4001.

OMB control number: 7100–0097.

Frequency: On Occasion.

Respondents: State member banks (SMBs).

Estimated number of respondents: 320.

Estimated average hours per response: Expedited notifications, 1.5 hours; and nonexpedited notifications, 2 hours.

Estimated annual burden hours: Expedited notifications, 98 hours; and nonexpedited notifications, 510 hours.

General description of report: The Federal Reserve Act and the Board's

Regulation H require a state member bank to seek prior approval of the Federal Reserve System before establishing or acquiring a domestic branch. Such requests for approval must be filed as applications at the appropriate Reserve Bank for the state member bank. Due to the limited information that a state member bank generally has to provide for branch proposals, there is no formal reporting form for a domestic branch application. A state member bank is required to notify the Federal Reserve by letter of its intent to establish one or more new branches and provide with the letter evidence that public notice of the proposed branch(es) has been published by the state member bank in the appropriate newspaper(s).[1] The Federal Reserve uses the information provided to fulfill its statutory obligation to review branch applications before acting on the proposals and otherwise to supervise state member banks.

Legal authorization and confidentiality: The Board's filing requirements associated with Domestic Branch Notification are authorized under section 9(3) of the Federal Reserve Act (12 U.S.C. 321), which requires state member banks to obtain Board approval before establishing a domestic branch (Board's Regulation H (12 CFR 208.6)). The obligation of state member banks to request prior approval from the Federal Reserve to establish a domestic branch is mandatory. The information contained in a state member bank's Domestic Branch Notification is considered public. A state member bank's request that any portion(s) of a Domestic Branch Notification be kept confidential pursuant to exemption 4 of the Freedom of Information Act (5 U.S.C. 552(b)(4)) must be submitted in accordance with section 261.15 of the Board's Rules Regarding Availability of Information (12 CFR 261.15).

Board of Governors of the Federal Reserve System, November 27, 2018.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2018–26087 Filed 11–29–18; 8:45 am]

BILLING CODE 6210–01–P

[1] Per Rules of Procedure (12 CFR 262), Board regulations require the use of newspaper for public notifications. For the purposes of FR 4001, the newspaper used must be in the general circulation of the community or communities in which the head office of the bank and the proposed branch are located.

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, without revision, the Recordkeeping Provisions Associated with the Guidance on Sound Incentive Compensation Policies (FR 4027; OMB No. 7100–0327).

DATES: Comments must be submitted on or before January 29, 2019.

ADDRESSES: You may submit comments, identified by *FR 4027,* by any of the following methods:

- *Agency website: http://www.federalreserve.gov*. Follow the instructions for submitting comments at *http://www.federalreserve.gov/apps/foia/proposedregs.aspx*.
- *Email: regs.comments@federalreserve.gov*. Include OMB number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *http://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room 3515, 1801 K Street NW (between 18th and 19th Streets NW), Washington, DC 20006 between 9 a.m. and 5 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the PRA OMB submission, including the proposed reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, if approved. These documents will also be made available on the Board's public website at *http://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears below.

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance,

and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal Under OMB Delegated Authority To Extend for Three Years, Without Revision, the Following Information Collection

Report title: Recordkeeping Provisions Associated with the Guidance on Sound Incentive Compensation Policies.

Agency form number: FR 4027.

OMB control number: 7100–0327.

Frequency: Annual.

Respondents: Banking organizations.

Estimated number of respondents: One-time implementation for large institutions: 1; one-time implementation for small institutions: 1; ongoing maintenance: 5,503.

Estimated average hours per response: One-time implementation for large institutions: 480; one-time implementation for small institutions: 80; ongoing maintenance: 40.

Estimated annual burden hours: 228,960.

General description of report:

Compatibility With Effective Controls and Risk Management

Pursuant to Principle 2 of the Guidance, a banking organization's risk-management processes and internal controls should reinforce and support the development and maintenance of balanced incentive compensation arrangements. Principle 2 states that banking organizations should create and maintain sufficient documentation to permit an audit of the organization's processes for establishing, modifying, and monitoring incentive compensation arrangements. Additionally, large banking organizations should maintain policies and procedures that (i) identify and describe the role(s) of the personnel, business units, and control units authorized to be involved in the design, implementation, and monitoring of incentive compensation arrangements; (ii) identify the source of significant risk-related inputs into these processes and establish appropriate controls governing the development and approval of these inputs to help ensure their integrity; and (iii) identify the individual(s) and control unit(s) whose approval is necessary for the establishment of new incentive compensation arrangements or modification of existing arrangements.

Strong Corporate Governance

Pursuant to Principle 3 of the Guidance, banking organizations should have strong and effective corporate governance to help ensure sound compensation practices. The Guidance states that a banking organization's board of directors should approve and document any material exceptions or adjustments to the organization's incentive compensation arrangements established for senior executives.

Legal authorization and confidentiality: The recordkeeping provisions of the Guidance are authorized pursuant to sections 9, 11(a), 25, and 25A of the Federal Reserve Act (12 U.S.C. 248(a), 325, 602, and 625); section 5 of the Bank Holding Company Act (12 U.S.C. 1844); section 10(b)(2) of the Home Owners' Loan Act (12 U.S.C. 1467a(b)(2)); section 7(c) of the International Banking Act (12 U.S.C. 3105(c)); and section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1(c)).

Because the recordkeeping provisions are contained within guidance, which is nonbinding, they are voluntary. There are no reporting forms associated with this information collection.

Because the incentive compensation records would be maintained at each banking organization, the Freedom of Information Act (''FOIA'') would only be implicated if the Board obtained such records as part of the examination or supervision of a banking organization. In the event the records are obtained by the Board as part of an examination or supervision of a financial institution, this information is considered confidential pursuant to exemption 8 of the FOIA, which protects information contained in ''examination, operating, or condition reports'' obtained in the bank supervisory process (5 U.S.C. 552(b)(8)). In addition, the information may also be kept confidential under exemption 4 for the FOIA, which protects commercial or financial information obtained from a person that is privileged or confidential (5 U.S.C. 552(b)(4)).

Consultation outside the agency: The Board has consulted with the OCC and FDIC to confirm that there will be no revisions to the Guidance, and that the one-time implementation burden should be reduced, as these agencies do not expect any banking organizations to newly implement the recordkeeping requirements associated with the Guidance. Each agency may update their respective respondent count if needed.

Board of Governors of the Federal Reserve System, November 27, 2018.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2018–26088 Filed 11–29–18; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier CMS–10691]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Department of Health and Human Services.

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 January 29, 2019.

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 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) 786–1326.

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–10691 Data Request and Attestation for PDP Sponsors

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

Type of Information Collection Request: New collection (request for a new OMB control number); *Title of Information Collection:* Data Request and Attestation for PDP Sponsors; *Use:* Section 50354 of the Bipartisan Budget Act of 2018 (BBA) provides that the Secretary shall establish a process under which the sponsor of a Prescription Drug Plan (PDP) that provide prescription drug benefits under Medicare Part D may request, beginning in plan year 2020, that the Secretary provide on a periodic basis and in an electronic format standardized extracts of Medicare claims about its plan enrollees. Section 50354 of the BBA further specifies that PDP sponsors receiving such Medicare claims data for their corresponding PDP plan enrollees may use the data for: (1) Optimizing therapeutic outcomes through improved medication use, (2) improving care coordination so as to prevent adverse healthcare outcomes, such as preventable emergency department visits and hospital readmissions, and (3) for any other purposes determined appropriate by the Secretary. Section 50354 also states that the PDP sponsor may not use the data: (1) To inform coverage determinations under Part D, (2) to conduct retroactive review of medically accepted conditions, (3) to facilitate enrollment changes to a different PDP or a MA–PD plan offered by the same parent organization, (4) to inform marketing benefits; and (5) for any other purpose the Secretary determines is necessary to include in order to protect the identity of individuals entitled to or enrolled in Medicare, and to protect the security of personal health information. This proposed information collection request would allow the PDP sponsor to submit a request to CMS for claims data for its enrollees and to attest that it will adhere to the permitted uses and limitations on the use of the Medicare claims data that are listed in 42 CFR 423.153. *Form Number:* CMS–10691 (OMB control number: 0938–TBD); *Frequency:* Occasionally; *Affected Public:* Private sector; *Number of Respondents:* 63; *Total Annual Responses:* 68; *Total Annual Hours:* 1.36. (For policy questions regarding this collection contact Kari Gaare at 410–786–8612.)

Dated: November 27, 2018.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2018–26052 Filed 11–29–18; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3374–N]

Medicare Program; Request for Nominations for Members for the Medicare Evidence Development & Coverage Advisory Committee

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: This notice announces the request for nominations for membership on the Medicare Evidence Development & Coverage Advisory Committee (MEDCAC). Among other duties, the MEDCAC provides advice and guidance to the Secretary of the Department of Health and Human Services (the Secretary) and the Administrator of the Centers for Medicare & Medicaid Services (CMS) concerning the adequacy of scientific evidence available to CMS in making coverage determinations under the Medicare program.

The MEDCACs fundamental purpose is to support the principles of an evidence-based determination process for Medicare's coverage policies. MEDCAC panels provide advice to CMS on the strength of the evidence available for specific medical treatments and technologies through a public, participatory, and accountable process.

DATES: Nominations must be received by Monday, January 7, 2019.

ADDRESSES: You may mail nominations for membership to the following address: Centers for Medicare & Medicaid Services, Center for Clinical Standards and Quality, Attention: Leah Cromwell or Maria Ellis, 7500 Security Boulevard, Mail Stop: S3–02–01, Baltimore, MD 21244 or send via email to *MEDCACnomination@cms.hhs.gov.*

FOR FURTHER INFORMATION CONTACT: Maria Ellis, Executive Secretary for the MEDCAC, Centers for Medicare & Medicaid Services, Center for Clinical Standards and Quality, Coverage and Analysis Group, S3–02–01, 7500 Security Boulevard, Baltimore, MD 21244 or contact Ms. Ellis by phone (410–786–0309) or via email at *Maria.Ellis@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Secretary signed the initial charter for the Medicare Coverage Advisory Committee (MCAC) on November 24, 1998. A notice in the

Federal Register (63 FR 68780) announcing establishment of the MCAC was published on December 14, 1998. The MCAC name was updated to more accurately reflect the purpose of the committee and on January 26, 2007, the Secretary published a notice in the **Federal Register** (72 FR 3853), announcing that the Committee's name changed to the Medicare Evidence Development & Coverage Advisory Committee (MEDCAC). The current Secretary's Charter for the MEDCAC is available on the CMS website at: *http://www.cms.hhs.gov/FACA/Downloads/medcaccharter.pdf,* or you may obtain a copy of the charter by submitting a request to the contact listed in the **FOR FURTHER INFORMATION** section of this notice.

The MEDCAC is governed by provisions of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. App. 2), which sets forth standards for the formulation and use of advisory committees, and is authorized by section 222 of the Public Health Service Act as amended (42 U.S.C. 217A).

We are requesting nominations for candidates to serve on the MEDCAC. Nominees are selected based upon their individual qualifications and not solely as representatives of professional associations or societies. We wish to ensure adequate representation of the interests of both women and men, members of all ethnic groups, and physically challenged individuals. Therefore, we encourage nominations of qualified candidates who can represent these interests.

The MEDCAC consists of a pool of 100 appointed members including: 90 at-large standing members (10 of whom are patient advocates), and 10 representatives of industry interests. Members generally are recognized authorities in clinical medicine including subspecialties, administrative medicine, public health, biological and physical sciences, epidemiology and biostatistics, clinical trial design, health care data management and analysis, patient advocacy, health care economics, medical ethics or other relevant professions.

The MEDCAC works from an agenda provided by the Designated Federal Official. The MEDCAC reviews and evaluates medical literature and technology assessments, and hears public testimony on the evidence available to address the impact of medical items and services on health outcomes of Medicare beneficiaries. The MEDCAC may also advise the Centers for Medicare & Medicaid Services (CMS) as part of Medicare's ''coverage with evidence development'' initiative.

II. Provisions of the Notice

As of June 2019, there will be 20 membership terms expiring. Of the 20 memberships expiring, 1 is an industry representative and the remaining 19 membership openings are for the at-large standing MEDCAC membership.

All nominations must be accompanied by curricula vitae. Nomination packages should be sent to Leah Cromwell or Maria Ellis at the address listed in the **ADDRESSES** section of this notice. Nominees are selected based upon their individual qualifications. Nominees for membership must have expertise and experience in one or more of the following fields:

- Clinical medicine including subspecialties
- Administrative medicine
- Public health
- Biological and physical sciences
- Epidemiology and biostatistics
- Clinical trial design
- Health care data management and analysis
- Patient advocacy
- Health care economics
- Medical ethics
- Other relevant professions

We are looking particularly for experts in a number of fields. These include cancer screening, genetic testing, clinical epidemiology, psychopharmacology, screening and diagnostic testing analysis, and vascular surgery. We also need experts in biostatistics in clinical settings, dementia treatment, minority health, observational research design, stroke epidemiology, and women's health.

The nomination letter must include a statement that the nominee is willing to serve as a member of the MEDCAC and appears to have no conflict of interest that would preclude membership. We are requesting that all curricula vitae include the following:

- Date of birth
- Place of birth
- Social security number
- Title and current position
- Professional affiliation
- Home and business address
- Telephone and fax numbers
- Email address
- List of areas of expertise

In the nomination letter, we are requesting that nominees specify whether they are applying for a patient advocate position, for an at-large standing position, or as an industry representative. Potential candidates will be asked to provide detailed information concerning such matters as financial holdings, consultancies, and research grants or contracts in order to permit evaluation of possible sources of financial conflict of interest. Department policy prohibits multiple committee memberships. A federal advisory committee member may not serve on more than one committee within an agency at the same time.

Members are invited to serve for overlapping 2-year terms. A member may continue to serve after the expiration of the member's term until a successor is named. Any interested person may nominate one or more qualified persons. Self-nominations are also accepted. Individuals interested in the representative positions must include a letter of support from the organization or interest group they would represent.

III. Collection of Information

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Dated: November 21, 2018.

Kate Goodrich,

Director, Center for Clinical Standards and Quality, Chief Medical Officer, Centers for Medicare & Medicaid Services.

[FR Doc. 2018–26090 Filed 11–29–18; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–D–1446]

Self-Monitoring Blood Glucose Test Systems for Over-the-Counter Use; Draft Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of the draft guidance for industry and FDA staff entitled ''Self-Monitoring Blood Glucose Test Systems for Over-the-Counter Use.'' This draft guidance document describes studies and information that FDA recommends be used when submitting premarket notifications (510(k)s) for self-monitoring blood glucose test

systems (SMBGs) that are for over-the-counter (OTC) home use by lay users. This guidance is not meant to address blood glucose monitoring test systems (BGMS) that are intended for prescription point-of-care use in professional healthcare settings (*e.g.,* hospitals, physician offices, and long-term care facilities). This draft guidance is not final nor is it in effect at this time.

DATES: Submit either electronic or written comments on the draft guidance by February 28, 2019 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–2013–D–1446 for ''Self-Monitoring Blood Glucose Test Systems for Over-the-Counter Use.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the draft guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the draft guidance. Submit written requests for a single hard copy of the draft guidance document entitled ''Self-Monitoring Blood Glucose Test Systems for Over-the-Counter Use'' to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Leslie Landree, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4623, Silver Spring, MD 20993–0002, 301–796–6147.

SUPPLEMENTARY INFORMATION:

I. Background

On October 11, 2016, FDA published a final guidance entitled ''Self-Monitoring Blood Glucose Test Systems for Over-the-Counter Use.'' This guidance document described studies and information that FDA recommends be used when submitting 510(k)s for SMBGs that are for OTC home use by lay users. FDA is now proposing to make modifications to the final guidance based on feedback received from stakeholders, which the Agency believes will better align with the evolving understanding and development of these types of devices. When finalized, this draft guidance will replace the final guidance of the same title issued on October 11, 2016.

This draft guidance is not meant to address BGMS that are intended for prescription point-of-care use in professional healthcare settings (*e.g.,* hospitals, physician offices, and long term-care facilities). FDA addresses those device types in another guidance entitled, ''Blood Glucose Monitoring Test Systems for Prescription Point-of-Care Use.''

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Self-Monitoring Blood Glucose Test Systems for Over-the-Counter Use.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological

Health guidance documents is available at *https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* This draft guidance document is also available at *https://www.regulations.gov.* Persons unable to download an electronic copy of ''Self-Monitoring Blood Glucose Test Systems for Over-the-Counter Use'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number GUD 1756 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in the following FDA guidance and regulations have been approved by OMB as listed in the following table:

21 CFR part or guidance	Topic	OMB control no.
807, subpart E	Premarket Notification	0910–0120
''Requests for Feedback on Medical Device Submissions: The Pre-Submission Program and Meetings with Food and Drug Administration Staff''.	Q-Submissions	0910–0756
800, 801, and 809	Medical Device Labeling Regulations	0910–0485
820	Current Good Manufacturing Practice (CGMP); Quality System (QS) Regulation.	0910–0073

Dated: November 26, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–26028 Filed 11–29–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–4282]

Endocrinologic and Metabolic 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 Endocrinologic and Metabolic Drugs Advisory Committee (the 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 January 17, 2019, from 8 a.m. to 5 p.m.

ADDRESSES: FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Answers to commonly asked questions including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2018–N–4282. The docket will close on January 16, 2019. Submit either electronic or written comments on this public meeting by January 16, 2019. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 16, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 16, 2019. 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 January 3, 2019, 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–4282 for ''Endocrinologic and Metabolic 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 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 the 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: LaToya Bonner, 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: *EMDAC@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 210934 for sotagliflozin oral tablet, sponsored by Sanofi-Aventis U.S. LLC, for the proposed indication: Adjunct to insulin therapy to improve glycemic control in adults with type 1 diabetes mellitus.

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. All electronic and written submissions submitted to the Docket (see **ADDRESSES**) on or before January 3, 2019, will be provided to the Committee. Oral presentations from the public will be scheduled between approximately 1 p.m. to 2 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 December 27, 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 December 28, 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 accommodations due to a disability, please contact LaToya Bonner (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: November 26, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–25990 Filed 11–29–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2017–E–6603 and FDA–2017–E–6604]

Determination of Regulatory Review Period for Purposes of Patent Extension; KEVZARA

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for KEVZARA and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human biological product.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by January 29, 2019. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by May 29, 2019. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

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 January 29, 2019. The *https://www.regulations.gov*

electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 29, 2019. 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 Nos. FDA–2017–E–6603 and FDA–2017–E–6604 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; KEVZARA.'' 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 § 10.20 (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: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological product becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human biologic product KEVZARA (sarilumab). KEVZARA is indicated for treatment of adult patients with moderately to severely active rheumatoid arthritis who have had an inadequate response or intolerance to one or more disease-modifying antirheumatic drugs. Subsequent to this approval, the USPTO received patent term restoration applications for KEVZARA (U.S. Patent Nos. 7,582,298 and 8,568,721) from Regeneron Pharmaceuticals, Inc., and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated February 6, 2018 (revised), FDA advised the USPTO that this human biological product had undergone a regulatory review period and that the approval of KEVZARA represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for KEVZARA is 3,478 days. Of this time, 2,907 days occurred during the testing phase of the regulatory review period, while 571 days occurred during the

approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* November 15, 2007. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on November 15, 2007.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262):* October 30, 2015. FDA has verified the applicant's claim that the biologics license application (BLA) for KEVZARA (BLA 761037) was initially submitted on October 30, 2015.

3. *The date the application was approved:* May 22, 2017. FDA has verified the applicant's claim that BLA 761037 was approved on May 22, 2017.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 1,234 or 937 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: Must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: November 26, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–26033 Filed 11–29–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–E–3305]

Determination of Regulatory Review Period for Purposes of Patent Extension; PROVAYBLUE

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for PROVAYBLUE and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by January 29, 2019. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by May 29, 2019. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

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 January 29, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 29, 2019. 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–2016–E–3305 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; PROVAYBLUE.'' 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 § 10.20 (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: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product, PROVAYBLUE (methylene blue) indicated for the treatment of pediatric and adult patients with acquired methemoglobinemia. Subsequent to this approval, the USPTO received a patent term restoration application for PROVAYBLUE (U.S. Patent No. 8,765,942) from Provepharm S.A.S. and the USPTO requested FDA's assistance in determining the patent's eligibility for patent term restoration. In a letter dated February 6, 2018, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of PROVAYBLUE represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for PROVAYBLUE is 415 days. Of this time, 232 days occurred during the testing phase of the regulatory review period, while 183 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* February 20, 2015. FDA has verified the applicant's claim that the date the investigational new drug application became effective was February 20, 2015.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* October 9, 2015. FDA has verified the applicant's claim that the new drug application (NDA) for PROVAYBLUE (NDA 204630) was initially submitted on October 9, 2015.

3. *The date the application was approved:* April 8, 2016. FDA has verified the applicant's claim that NDA 204630 was approved on April 8, 2016.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 298 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: Must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: November 26, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–26035 Filed 11–29–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0597]

Agency Information Collection Activities; Proposed Collection; Comment Request; Oversight of Clinical Investigations: A Risk-Based Approach to Monitoring

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public

comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on information collection associated with oversight of clinical investigations, a risk-based approach to monitoring.

DATES: Submit either electronic or written comments on the collection of information by January 29, 2019.

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 January 29, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 29, 2019. 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–2011–D–0597 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Oversight of Clinical Investigations: A Risk-Based Approach to Monitoring.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Oversight of Clinical Investigations: A Risk-Based Approach to Monitoring—21 CFR Parts 312 and 812

OMB Control Number 0910–0733—Extension

This information collection supports reporting and recordkeeping found in Agency guidance. Under parts 312 and 812 (21 CFR parts 312 and 812), sponsors are required to provide

appropriate oversight of their clinical investigations to ensure adequate protection of the rights, welfare, and safety of human subjects and to ensure the quality and integrity of the resulting data submitted to FDA. As part of this oversight, sponsors of clinical investigations are required to monitor the conduct and progress of their clinical investigations. The regulations do not specify how sponsors are to conduct monitoring of clinical investigations and are, therefore, compatible with a range of approaches to monitoring.

Accordingly, we developed the guidance document entitled, ''Guidance for Industry—Oversight of Clinical Investigations: A Risk-Based Approach to Monitoring.'' The guidance is intended to assist sponsors of clinical investigations in developing strategies for risk-based monitoring and plans for clinical investigations of human drug and biological products, medical devices, and combinations thereof. The guidance describes strategies for monitoring activities performed by sponsors or by contract research organizations (CROs) that focus on the conduct, oversight, and reporting of findings of an investigation by clinical investigators. The guidance also recommends strategies that reflect a risk-based approach to monitoring that focuses on critical study parameters and relies on a combination of monitoring activities to oversee a study effectively. Finally, the guidance specifically encourages greater reliance on centralized monitoring methods where appropriate.

Information collections for reports and records associated with clinical investigations under parts 312 and 812 are currently approved under OMB control numbers 0910–0014 and 0910–0078 respectively. These reporting and recordkeeping provisions cover general elements. The guidance discusses other elements sponsors and investigators should consider and include in developing a monitoring plan. As explained in the guidance, documentation of monitoring should include sufficient detail to allow verification that the monitoring plan was followed. The plan should provide adequate information to those involved with monitoring to effectively carry out their duties. All sponsor and CRO personnel who may be involved with monitoring (including those who review appropriate action, determine appropriate action, or both) regarding potential issues identified through monitoring should review the monitoring plan.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

Activity	Number of recordkeepers	Number of records per recordkeeper	Total Annual Records	Average burden per recordkeeping	Total hours
Documentation included in comprehensive monitoring plan	88	1.5	132	4	528

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on a review of the information collection, we have made no adjustments to our burden estimate. We estimate 88 sponsors will develop 132 comprehensive monitoring plans in accordance with the guidance. We believe the associated burden for each plan is approximately 4 hours and includes the time necessary to develop, and amend as appropriate, the monitoring plan.

Dated: November 26, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–26032 Filed 11–29–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–D–1445]

Blood Glucose Monitoring Test Systems for Prescription Point-of-Care Use; Draft Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of the draft guidance for industry and FDA staff entitled ''Blood Glucose Monitoring Test Systems for Prescription Point-of-Care Use.'' This draft guidance document describes studies and criteria that FDA recommends be used when submitting premarket notifications (510(k)s) for blood glucose monitoring systems (BGMSs) that are for prescription point-of-care use. This draft guidance is not final nor is it in effect at this time.

DATES: Submit either electronic or written comments on the draft guidance by February 28, 2019 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–2013–D–1445 for ''Blood Glucose Monitoring Test Systems for Prescription Point-of-Care Use.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the draft guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the draft guidance. Submit written requests for a single hard copy of the draft guidance document entitled ''Blood Glucose Monitoring Test Systems for Prescription Point-of-Care Use'' to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Leslie Landree, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4623, Silver Spring, MD 20993–0002, 301–796–6147.

SUPPLEMENTARY INFORMATION:

I. Background

On October 11, 2016, FDA published a final guidance entitled, ''Blood Glucose Monitoring Test Systems for Prescription Point-of-Care Use.'' That guidance document described studies and information that FDA recommends be used when submitting 510(k)s for BGMSs that are for prescription point-of-care use. FDA is now proposing to make modifications to the guidance based on feedback received from stakeholders, which the Agency believes will better align with the evolving understanding and development of these types of devices. When finalized, this draft guidance will replace the final guidance of the same title issued on October 11, 2016.

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Blood Glucose Monitoring Test Systems for Prescription Point-of-Care Use.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* This draft guidance document is also available at *https://www.regulations.gov.* Persons unable to download an electronic copy of ''Blood Glucose Monitoring Test Systems for Prescription Point-of-Care Use'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number GUD 1755 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in the following FDA guidances and regulations have been approved by OMB as listed in the following table:

21 CFR part or guidance	Topic	OMB Control No.
807, subpart E	Premarket Notification	0910–0120
''Requests for Feedback on Medical Device Submissions: The Pre-Submission Program and Meetings with Food and Drug Administration Staff''.	Q-Submissions	0910–0756
800, 801, and 809	Medical Device Labeling Regulations	0910–0485
820	Current Good Manufacturing Practice (CGMP); Quality System (QS) Regulation.	0910–0073
Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices—Guidance for Industry and Food and Drug Administration Staff.	CLIA Waiver Applications	0910–0598

21 CFR part or guidance	Topic	OMB Control No.
Administrative Procedures for CLIA Categorization—Guidance for Industry and Food and Drug Administration Staff.	Administrative Procedures for Clinical Laboratory Improvement Amendments of 1988 Categorization (42 CFR 493.17).	0910–0607

Dated: November 26, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–26034 Filed 11–29–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–4116]

Bone, Reproductive and Urologic 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 Bone, Reproductive and Urologic 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 January 16, 2019, from 8:15 a.m. to 5 p.m.

ADDRESSES: FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Answers to commonly asked questions including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2018–N–4116. The docket will close on January 14, 2019. Submit either electronic or written comments on this public meeting by January 14, 2019. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 14, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 14, 2019. 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 December 31, 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–4116 for ''Bone, Reproductive and Urologic 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 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 the 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: Kalyani Bhatt, 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: *BRUDAC@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 biologics license application 761062, romosozumab injection, submitted by Amgen, for the proposed indication of treatment of osteoporosis in postmenopausal women at high risk for fracture, defined as a history of osteoporotic fracture, or multiple risk factors for fracture; or patients who have failed or are intolerant of other available osteoporosis therapy.

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. All electronic and written submissions submitted to the Docket (see **ADDRESSES**) on or before December 31, 2018, will be provided to the committee. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 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 December 20, 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 December 21, 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 accommodations due to a disability, please contact Kalyani Bhatt (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: November 26, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–26029 Filed 11–29–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–4227]

Joint Meeting of the Arthritis Advisory Committee and the Drug Safety and Risk Management 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 Arthritis Advisory Committee and the Drug Safety and Risk Management Advisory Committee. The general function of the committees 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 January 11, 2019, from 8 a.m. to 5 p.m.

ADDRESSES: College Park Marriott Hotel and Conference Center, General Vessey Ballroom, 3501 University Blvd. East, Hyattsville, MD 20783. The conference center's telephone number is 301–985–7300. Answers to commonly asked questions about FDA Advisory Committee meetings may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.* Information about the College Park Marriott Hotel and Conference Center can be accessed at: *https://www.marriott.com/hotels/travel/wasum-college-park-marriott-hotel-and-conference-center/.*

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2018–N–4227. The docket will close on January 10, 2019. Submit either electronic or written comments on this public meeting by January 10, 2019. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 10, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 10, 2019. 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 December 27, 2018, will be provided to the committees. 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–4227 for ''Joint Meeting of the Arthritis Advisory Committee and the Drug Safety and Risk Management 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 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 the 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: Yinghua S. Wang, 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: *AAC@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 committees will discuss supplemental new drug application (sNDA) 021–856, ULORIC (febuxostat) tablets, sponsored by Takeda Pharmaceuticals, which includes the results from the postmarketing safety trial required by FDA to evaluate the cardiovascular safety of febuxostat, entitled ''Cardiovascular Safety of Febuxostat and Allopurinol in Patients with Gout and Cardiovascular Morbidities (CARES).'' Febuxostat is a xanthine oxidase inhibitor indicated for the chronic management of hyperuricemia in patients with gout. The committees' discussion will include the results from the CARES trial, the benefit risk assessment of febuxostat, and potential regulatory actions.

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 committees. Written submissions may be made to the contact person on or before December 27, 2018. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 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 December 18, 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 December 19, 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 accommodations due to a disability, please contact Yinghua S. Wang (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: November 26, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–25991 Filed 11–29–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–4131]

Agency Information Collection Activities; Proposed Collection; Comment Request; Food and Drug Administration Adverse Event Reports; Electronic Submissions

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the use of the FDA Electronic Submission Gateway (ESG) and the Safety Reporting Portal (SRP) to collect adverse event reports and other safety information for FDA-regulated products.

DATES: Submit either electronic or written comments on the collection of information by January 29, 2019.

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 January 29, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 29, 2019. 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–2018–N–4131 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; FDA Adverse Event Reports; Electronic Submissions.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party.

Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

FDA Adverse Event Reports; Electronic Submissions—21 CFR 310.305, 314.80, 314.98, 314.540, 514.80, 600.80, 1271.350, and Part 803

OMB Control Number 0910–0645—Extension

The SRP and the ESG are the Agency's electronic systems for collecting, submitting, and processing adverse event reports, product problem reports, and other safety information for FDA-regulated products. To ensure the safety and identify any risks, harms, or other dangers to health for all FDA-regulated human and animal products, the Agency needs to be informed whenever an adverse event, product quality problem, or product use error occurs. This risk identification process is the first necessary step that allows the Agency to gather the information necessary to be able to evaluate the risk associated with the product and take whatever action is necessary to mitigate or eliminate the public's exposure to the risk.

Some adverse event reports are required to be submitted to FDA (mandatory reporting) and some adverse event reports are submitted voluntarily (voluntary reporting). Requirements regarding mandatory reporting of adverse events or product problems have been codified in 21 CFR parts 310, 314, 514, 600, 803, and 1271, specifically §§ 310.305, 314.80, 314.98, 314.540, 329.100, 514.80, 600.80, 803.30, 803.40, 803.50, 803.53, 803.56, and 1271.350(a) (21 CFR 310.305, 314.80, 314.98, 314.540, 329.100, 514.80, 600.80, 803.30, 803.40, 803.50, 803.53, 803.56, and 1271.350(a)). While adverse event reports submitted to FDA in paper format using Forms FDA 3500, 3500A, 1932, and 1932a are approved under OMB control numbers 0910–0284 and 0910–0291, this notice solicits comments on adverse event reports filed electronically via the SRP and the ESG, and currently approved under OMB control number 0910–0645.

II. The FDA Safety Reporting Portal Rational Questionnaires

FDA currently has OMB approval to receive several types of adverse event reports electronically via the SRP using rational questionnaires. In this notice, FDA seeks comments on the extension of OMB approval for these existing rational questionnaires and the proposed revision of the existing rational questionnaire for tobacco products.

A. Reportable Food Registry Reports

The Food and Drug Administration Amendments Act of 2007 (Pub. L. 110–085) (FDAAA) amended the Federal Food, Drug, and Cosmetic Act (FD&C Act) by creating section 417 (21 U.S.C. 350f), Reportable Food Registry (RFR). Section 417 of the FD&C Act defines ''reportable food'' as an article of food (other than infant formula) for which there is a ''reasonable probability that the use of, or exposure to, such article of food will cause serious adverse health consequences or death to humans or animals.'' (See section 417(a)(2) of the FD&C Act.) The Secretary of Health and Human Services (the Secretary) has delegated to the FDA Commissioner the responsibility for administering the FD&C Act, including section 417. The purpose of the RFR is to enable the Agency to track patterns of adulteration in food to support its efforts to target limited inspection resources to protect the public health. We designed the RFR report rational questionnaire to enable FDA to quickly identify, track, and remove from commerce an article of food (other than infant formula and dietary supplements) for which there is a reasonable probability that the use of, or exposure to, such article of food will cause serious adverse health consequences or death to humans or animals. FDA's Center for Food Safety and Applied Nutrition (CFSAN) uses the information collected to help ensure that such products are quickly and efficiently removed from the market to prevent foodborne illnesses. The data elements for RFR reports remain unchanged in this request for extension of OMB approval.

B. Reports Concerning Experience With Approved New Animal Drugs

Section 512(l) of the FD&C Act (21 U.S.C. 360b(l)) and § 514.80(b) of FDA's regulations require applicants of approved new animal drug applications (NADAs) and approved abbreviated new animal drug applications (ANADAs) to report adverse drug experiences and product/manufacturing defects to the Center for Veterinary Medicine (CVM). This continuous monitoring of approved NADAs and ANADAs affords the primary means by which FDA obtains information regarding potential problems with the safety and efficacy of marketed approved new animal drugs as well as potential product/manufacturing problems. Postapproval marketing surveillance is important because data previously submitted to FDA may no longer be adequate, as animal drug effects can change over time and less apparent effects may take years to manifest.

If an applicant must report adverse drug experiences and product/manufacturing defects and chooses to do so using the Agency's paper forms, the applicant is required to use Form FDA 1932, ''Veterinary Adverse Drug Reaction, Lack of Effectiveness, Product Defect Report.'' Periodic drug experience reports and special drug experience reports must be accompanied by a completed Form FDA 2301, ''Transmittal of Periodic Reports and Promotional Material for New Animal Drugs'' (see § 514.80(d)). Form FDA 1932a, ''Veterinary Adverse Drug Reaction, Lack of Effectiveness or Product Defect Report'' allows for voluntary reporting of adverse drug experiences or product/manufacturing defects by veterinarians and the general public. Collection of information using existing paper Forms FDA 2301, 1932, and 1932a is approved under OMB control number 0910–0284.

Alternatively, an applicant may choose to report adverse drug experiences and product/manufacturing defects electronically. The electronic submission data elements to report adverse drug experiences and product/manufacturing defects electronically remain unchanged in this request for extension of OMB approval.

C. Animal Food Adverse Event and Product Problem Reports

Section 1002(b) of FDAAA directed the Secretary to establish an early warning and surveillance system to

identify adulteration of the pet food supply and outbreaks of illness associated with pet food. As part of the effort to fulfill that directive, the Secretary tasked FDA with developing the instrument that would allow consumers to report voluntarily adverse events associated with pet food. We developed the Pet Food Early Warning System rational questionnaire as a user-friendly data collection tool, to make it easy for the public to report a safety problem with pet food. Subsequently, we developed a questionnaire for collecting voluntary adverse event reports associated with livestock food from interested parties such as livestock owners, managers, veterinary staff or other professionals, and concerned citizens. Information collected in these voluntary adverse event reports contribute to CVM's ability to identify adulteration of the livestock food supply and outbreaks of illness associated with livestock food. The Pet Food Early Warning System and the Livestock Food Reports are designed to identify adulteration of the animal food supply and outbreaks of illness associated with animal food to enable us to quickly identify, track, and remove from commerce such articles of food. We use the information collected to help ensure that such products are quickly and efficiently removed from the market to prevent foodborne illnesses. The electronic submission data elements to report adverse events associated with animal food remain unchanged in this request for extension of OMB approval.

D. Voluntary Tobacco Product Adverse Event and Product Problem Reports

As noted, this notice seeks comments on a revision to the existing rational questionnaire utilized by consumers and concerned citizens to report tobacco product adverse event or product problems.

FDA has broad legal authority under the FD&C Act to protect the public health, including protecting Americans from tobacco-related death and disease by regulating the manufacture, distribution, and marketing of tobacco products and by educating the public, especially young people, about tobacco products and the dangers their use poses to themselves and others. The Family Smoking Prevention and Tobacco Control Act (Pub. L. 111–31) amended the FD&C Act by creating a new section 909 (21 U.S.C. 387i, Records and Reports on Tobacco Products). Section 909(a) of the FD&C Act authorizes FDA to establish regulations with respect to mandatory adverse event reports associated with the use of a tobacco product. FDA collects voluntary adverse event reports associated with the use of tobacco products from interested parties such as healthcare providers, researchers, consumers, and other users of tobacco products. Information collected in voluntary adverse event reports contributes to the Center for Tobacco Product's (CTP's) ability to be informed of, and assess the real consequences of, tobacco product use.

The need for this collection of information derives from our responsibility to obtain current, timely, and policy-relevant information to carry out our statutory functions. FDA's Commissioner is authorized to undertake this collection as specified in section 1003(d)(2) of the FD&C Act (21 U.S.C. 393(d)(2)). FDA's CTP has been receiving adverse event and product problem reports through the Safety Reporting Portal since January 2014, when the SRP for tobacco products first became available to the public. CTP also receives adverse event and product problem reports via paper forms, as approved under OMB control number 0910–0291. We are revising the questionnaire with non-substantive changes. The changes are made to make the questions more understandable and specific. In some instances, alterations were made to the list of values to choose from by the end user to include values more pertinent to CTP's current and future data collection needs. In one instance, a question was added about the event location: ''In what setting(s) did this problem occur?'' In still other instances, questions were removed altogether to streamline the questionnaire and make it more user-friendly. All changes were made with the goal of providing FDA more pertinent information while minimizing the burden on the respondent. Finally, we note that respondents unable to submit reports using the electronic system will still be able to provide their information by paper form (by mail or Fax) or telephone.

CTP has two voluntary rational questionnaires on the SRP. The first is utilized by consumers and concerned citizens to report tobacco product adverse event or product problems. A second rational questionnaire is used by tobacco product investigators in clinical trials with investigational tobacco products. In addition to the information collected by the first rational questionnaire for tobacco products, the second rational questionnaire collects identifying information specific to the clinical trial or investigational product such as clinical protocol numbers or other identifying features to pinpoint under which test or protocol the adverse event occurred.

Both CTP voluntary rational questionnaires capture tobacco-specific adverse event and product problem information from reporting entities such as healthcare providers, researchers, consumers, and other users of tobacco products. To carry out its responsibilities, FDA needs to be informed when an adverse event, product problem, or error with use is suspected or identified. FDA uses tobacco-specific adverse event and product problem information to assess and evaluate the risk associated with the product and to take whatever action is necessary to reduce, mitigate, or eliminate the public's exposure to the risk through regulatory and public health interventions. The burden for CTP remains unchanged. We seek approval of the revised rational questionnaire in this request for extension of OMB approval.

E. Dietary Supplement Adverse Event Reports

The Dietary Supplement and Nonprescription Drug Consumer Protection Act (DSNDCPA) (Pub. L. 109–462, 120 Stat. 3469) amended the FD&C Act with respect to serious adverse event reporting and recordkeeping for dietary supplements and nonprescription drugs marketed without an approved application.

Section 761(b)(1) of the FD&C Act (21 U.S.C. 379aa–1(b)(1)) requires the manufacturer, packer, or distributor whose name (under section 403(e)(1) of the FD&C Act (21 U.S.C. 343(e)(1)) appears on the label of a dietary supplement marketed in the United States to submit to FDA all serious adverse event reports associated with the use of a dietary supplement, accompanied by a copy of the product label. The manufacturer, packer, or distributor of a dietary supplement is required by the DSNDCPA to use the MedWatch form (Form FDA 3500A) when submitting a serious adverse event report to FDA. In addition, under section 761(c)(2) of the FD&C Act, the submitter of the serious adverse event report (referred to in the statute as the ''responsible person'') is required to submit to FDA a followup report of any related new medical information the responsible person receives within 1 year of the initial report.

As required by section 3(d)(3) of the DSNDCPA, FDA issued guidance to describe the minimum data elements for serious adverse event reports for dietary supplements. The guidance document entitled ''Guidance for Industry: Questions and Answers Regarding

Adverse Event Reporting and Recordkeeping for Dietary Supplements as Required by the Dietary Supplement and Nonprescription Drug Consumer Protection Act,'' discusses how, when, and where to submit serious adverse event reports for dietary supplements and followup reports. The guidance also provides FDA's recommendation on records maintenance and access for serious and non-serious adverse event reports and related documents.

Reporting of serious adverse events for dietary supplements to FDA serves as an early warning sign of potential public health issues associated with such products. Without notification of all serious adverse events associated with dietary supplements, FDA would be unable to investigate and followup promptly, which in turn could cause delays in alerting the public when safety problems are found. In addition, the information received provides a reliable mechanism to track patterns of adulteration in food that supports efforts by FDA to target limited inspection resources to protect the public health. FDA uses the information collected to help ensure that such products are quickly and efficiently removed from the market to prevent foodborne illnesses.

Paper mandatory dietary supplement adverse event reports are submitted to FDA on the MedWatch form, Form FDA 3500A, and paper voluntary reports are submitted on Form FDA 3500. Forms FDA 3500 and 3500A are available as fillable PDF forms. Dietary supplement adverse event reports may be electronically submitted to the Agency via the SRP. This method of submission is voluntary. A manufacturer, packer, or distributor of a dietary supplement who is unable to or chooses not to submit reports using the electronic system will still be able to provide their information by paper MedWatch form, Form FDA 3500A (by mail or Fax). There is no change to the mandatory information previously required on the MedWatch form. CFSAN is making available the option to submit the same information via electronic means.

The reporting and recordkeeping requirements of the FD&C Act for dietary supplement adverse event reports and the recommendations of the guidance document were first approved in 2009 under OMB control number 0910–0635. OMB approved the extension of the 0910–0635 collection of information in March 2016. OMB approved the electronic submission of dietary supplement adverse event reports via the SRP under OMB control number 0910–0645 in June 2013. Burden hours are also reported under OMB control number 0910–0291, reflecting the submission of dietary supplement adverse event reports on the paper MedWatch form, Form FDA 3500A.

The electronic submission data elements to report adverse events associated with dietary supplement products remain unchanged in this request for extension of OMB approval.

F. Food, Infant Formula, and Cosmetic Adverse Event Reports

We continue to work on proposed new rational questionnaire functionality that will be used for food, infant formula, and cosmetic adverse event reports over the SRP. Currently, voluntary adverse event reports for such products are submitted on Form FDA 3500, which is available as a fillable PDF form. However, we have not developed rational questionnaires by which these reports may be electronically submitted to us via the SRP. In addition, MedWatch forms, although recently updated with field labels and descriptions to better clarify for reporters the range of reportable products, do not specifically include questions relevant for the analysis of adverse events related to food, infant formula, and cosmetics. The proposed food, infant formula, and cosmetics rational questionnaire functionality will operate in a manner similar to the dietary supplement rational questionnaire and will include specific questions relevant for the analysis of adverse events related to food, infant formula, and cosmetics. The electronic submission data elements to report adverse events associated with food, infant formula, and cosmetics products remain unchanged in this request for extension of OMB approval.

III. Information Collection Burden Estimate

Description of respondents: The respondents to this collection of information include all persons submitting mandatory or voluntary adverse event reports electronically to FDA via the ESG or the SRP regarding FDA-regulated products.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Voluntary Adverse Event Report via the SRP (Other than RFR Reports).	1,800	1	1,800	0.6 (36 minutes)	1,080
Mandatory Adverse Event Report via the SRP (Other than RFR Reports).	3,360	1	3,360	1	3,360
Mandatory Adverse Event Report via the ESG (Gateway-to-Gateway transmission).	3,007,000	1	3,007,000	0.6 (36 minutes)	1,804,200
Mandatory and Voluntary RFR Reports via the SRP	1,260	1	1,260	0.6 (36 minutes)	756
Total	.....	.....	3,013,420	.....	1,809,396

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The Agency's estimate of the number of respondents and the total annual responses in table 1 is based primarily on mandatory and voluntary adverse event reports electronically submitted to the Agency. The estimated total annual responses are based on initial reports. Followup reports, if any, are not counted as new reports. Based on its experience with adverse event reporting, FDA estimates that it will take a respondent 0.6 hour to submit a voluntary adverse event report via the SRP, 1 hour to submit a mandatory adverse event report via the SRP, and 0.6 hour to submit a mandatory adverse event report via the ESG (gateway-to-gateway transmission). Both mandatory and voluntary RFR reports must be submitted via the SRP. FDA estimates that it will take a respondent 0.6 hour to submit a RFR report, whether the submission is mandatory or voluntary.

The burden hours required to complete paper FDA reporting forms (Forms FDA 3500, 3500A, 1932, and 1932a) are reported under OMB control numbers 0910–0284 and 0910–0291. While FDA does not charge for the use of the ESG, the Agency requires respondents to obtain a public key infrastructure certificate to set up the account. This can be obtained in-house or outsourced by purchasing a public key certificate that is valid for 1 year to 3 years. The certificate typically costs from $20 to $30.

Our estimated burden for the information collection reflects an overall increase of 688,547 hours and a corresponding increase of 1,145,763 responses. We attribute this adjustment to an increase in the number of submissions we received over the last few years.

Dated: November 26, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–26031 Filed 11–29–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the Advisory Commission on Childhood Vaccines

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Advisory Commission on Childhood Vaccines (ACCV) has scheduled a public meeting. Information about the ACCV and the agenda for this meeting can be found on the ACCV website at: *http://www.hrsa.gov/advisorycommittees/childhoodvaccines/index.html.* This notice is being published less than 15 days prior to the meeting date due to unexpected administrative delays.

DATES: December 6, 2018, at 10:00 a.m. ET.

ADDRESSES: This meeting will be held by teleconference and Adobe Connect webinar. The public can join the meeting by:

1. (Audio Portion) Calling the conference phone number 800–988–0218 and providing the following information: Leader Name: Dr. Narayan Nair, Password: 9302948.

2. (Visual Portion) Connect to the ACCV Adobe Connect Meeting using the following URL: *https://hrsa.connectsolutions.com/accv/.* Participants should call and connect 15 minutes before the meeting starts for logistics to be set up. If you have never attended an Adobe Connect meeting, please test your connection using the following URL: *https://hrsa.connectsolutions.com/common/help/en/support/meeting_test.htm* Get a quick overview at the following URL: *http://www.adobe.com/go/connectpro_overview.*

FOR FURTHER INFORMATION CONTACT: Annie Herzog, Program Analyst, Division of Injury Compensation Programs (DICP), HRSA, 5600 Fishers Lane, 08N146B, Rockville, Maryland 20857; 301–443–6593; or *aherzog@hrsa.gov.*

SUPPLEMENTARY INFORMATION: The ACCV was established by section 2119 of the Public Health Service (PHS) Act (42 U.S.C. 300aa–19), as enacted by Public Law (Pub. L.) 99–660, and as subsequently amended, and advises the Secretary of HHS (the Secretary) on issues related to implementation of the National Vaccine Injury Compensation Program (VICP). During the December 6, 2018, meeting, agenda items will include, but are not limited to, updates from the DICP, Department of Justice (DOJ), National Vaccine Program Office (NVPO), Immunization Safety Office (Centers for Disease Control and Prevention), National Institute of Allergy and Infectious Diseases (National Institutes of Health) and Center for Biologics, Evaluation and Research (Food and Drug Administration). Agenda items are subject to change as priorities dictate. Refer to the ACCV website listed above for any updated information concerning the meeting to include a draft agenda and additional meeting materials that will be posted before the meeting.

Members of the public will have the opportunity to provide comments. Public participants may submit written statements in advance of the scheduled meeting. Oral comments will be honored in the order they are requested and may be limited as time allows. Requests to submit a written statement or make oral comments to the ACCV should be sent to Annie Herzog using the contact information above by Wednesday, December 5, 2018.

Individuals who need special assistance or another reasonable accommodation should notify Annie Herzog at the address and phone number listed above at least 3 business days before the meeting.

Amy P. McNulty,

Acting Director, Division of the Executive Secretariat.

[FR Doc. 2018–26080 Filed 11–29–18; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meetings Announcement for the Physician-Focused Payment Model Technical Advisory Committee Required by the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA); Correction

ACTION: Notice of public meetings; correction.

SUMMARY: The Department of Health and Human Services published a document in the **Federal Register** of February 05, 2018 detailing the 2018 PTAC meeting dates and the link that connects to the meeting registration website. The December meeting date has been shortened to a one day meeting and the registration link has been updated.

FOR FURTHER INFORMATION CONTACT: Sarah Selenich, Designated Federal Official, at the Office of Health Policy, Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, 200 Independence Ave. SW, Washington, DC 20201, (202) 690–6870.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of February 5, 2018, in FR Doc. 2018–02211, on page 5109, in the first column, correct the ''Dates'' caption to read:

DATES: The 2018 PTAC meetings will occur on the following dates:

- Monday–Tuesday, March 26–27, 2018, from 9:00 a.m. to 5:00 p.m. ET
- Thursday–Friday, June 14–15, 2018, from 9:00 a.m. to 5:00 p.m. ET
- Thursday–Friday, September 6–7, 2018, from 9:00 a.m. to 5:00 p.m. ET
- Monday, December 10, 2018, from 12:30 p.m. to 5:00 p.m. ET

Please note that times are subject to change. If the times change, registrants will be notified directly via email.

Correction

In the **Federal Register** of February 5, 2018, in FR Doc. 2018–02211, on page 5109, in the second column, correct the ''Meeting Registration'' caption to read:

Meeting Registration:

The public may attend the meetings in-person or participate by phone via

audio teleconference. Space is limited and registration is preferred in order to attend in-person or by phone. Registration may be completed online at *http://www.cvent.com/d/gbq2tg.*

The following information is submitted when registering:

Name:

Company/organization name:

Postal address:

Email address:

Persons wishing to attend a PTAC meeting must register by following the instructions in the ''Meeting Registration'' section of this notice. A confirmation email will be sent to registrants shortly after completing the registration process.

Dated: November 14, 2018.

Brenda Destro,

Deputy Assistant Secretary for Planning and Evaluation (HSP).

[FR Doc. 2018–25992 Filed 11–29–18; 8:45 am]

BILLING CODE 4150–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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 purpose of this meeting is to evaluate requests for preclinical development resources for potential new therapeutics for the treatment of cancer. The outcome of the evaluation will provide information to internal NCI committees that will decide whether NCI should support requests and make available contract resources for development of the potential therapeutic to improve the treatment of various forms of cancer. The research proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the proposed research projects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel, OCT2018 Cycle 30 NExT SEP Committee Meeting.

Date: December 12, 2018.

Time: 9:00 a.m. to 3:00 p.m.

Agenda: To evaluate the NCI Experimental Therapeutics Program Portfolio.

Place: National Institutes of Health, 9000 Rockville Pike, Building 1, Wilson Hall, Bethesda, MD 20892.

Contact Persons: Barbara Mroczkowski, Ph.D., Executive Secretary, Discovery Experimental Therapeutics Program, National Cancer Institute, NIH 31 Center Drive, Room 3A44, Bethesda, MD 20817, (301) 496–4291, *mroczkoskib@mail.nih.gov.*

Toby Hecht, Ph.D., Executive Secretary, Development Experimental Therapeutics Program, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 3W110, Rockville, MD 20850, (240) 276–5683, *toby.hecht2@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. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: November 26, 2018.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–26015 Filed 11–29–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Contract Review.

Date: December 14, 2018.

Time: 12:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7353, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *barnardm@extra.niddk.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. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: November 21, 2018.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–26017 Filed 11–29–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Vaccine Research Center Board of Scientific Counselors, NIAID.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute Of Allergy And Infectious Diseases, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Vaccine Research Center Board of Scientific Counselors, NIAID.

Date: December 12–13, 2018.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, 40 Convent Drive, Bethesda, MD 20892.

Contact Person: John R Mascola, MD, Deputy Director, Vaccine Research Center,

NIAID, NIH, 40 Convent Drive, Bethesda, MD 20892, (301) 496–1852, *jmascola@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.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: November 26, 2018.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–26014 Filed 11–29–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of an Exclusive Patent License: Agonist/Antagonist Compositions and Methods of Use

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Cancer Institute, an institute of the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an Exclusive Patent License to practice the inventions embodied in the Patents and Patent Applications listed in the Supplementary Information section of this notice to Bull Run Capital, Inc. located in Vancouver, BC, Canada.

DATES: Only written comments and/or applications for a license which are received by the National Cancer Institute's Technology Transfer Center on or before December 17, 2018 will be considered.

ADDRESSES: Requests for copies of the patent application, inquiries, and comments relating to the contemplated an Exclusive Patent License should be directed to: Jaime M. Greene, Senior Licensing and Patenting Manager, NCI Technology Transfer Center, 9609 Medical Center Drive, RM 1E530 MSC 9702, Bethesda, MD 20892–9702 (for business mail), Rockville, MD 20850–9702; Telephone: (240) 276–5530; Facsimile: (240) 276–5504; Email: *greenejaime@mail.nih.gov.*

SUPPLEMENTARY INFORMATION:

Intellectual Property

U.S. Provisional Patent Application No. 61/340,063, filed March 12, 2018, now abandoned, titled ''Agonist/Antagonist Compositions and Methods of Use'', HHS Ref. No.: E–048–2010–0–US–01;

PCT Patent Application Serial No. PCT/US2011/028132, filed March 11, 2011, now abandoned, HHS Reference Number E–048–2010–0–PCT–02 titled ''Agonist/antagonist compositions and methods of use'';

U.S. Patent 9,277,748 (Application No. 13/634,447) filed March 11, 2011, issued March 8, 2016, titled ''Agonist/antagonist compositions and methods of use'', HHS Ref. No.: E–048–2010–0–US–04;

Canada Patent Application Serial No. 2,792,878, filed March 11, 2011, HHS Reference Number E–048–2010–0–CA–03 titled ''Agonist/antagonist compositions and methods of use''; and

U.S. Patent Application Serial No 15/010,830, filed January 29, 2016, HHS Reference Number E–048–2010–0–US–05, titled ''Agonist/antagonist compositions and methods of use''.

The patent rights in these inventions have been assigned and/or exclusively licensed to the government of the United States of America.

The prospective exclusive license territory may be worldwide and the field of use may be limited to: ''Use of the TRVP1 antagonists BCTC, AMG9810, JYL–827, Capsazepine or IodoRTX combined with a TRVP1 agonist in a composition for the temporary incapacitation of a subject.''

This technology discloses novel compositions comprising a transient receptor potential cation channel subfamily V member 1 (TRPV1) receptor agonist and an antagonist in certain ratios which allow for the onset of agonist action followed by alleviation by antagonist action, and methods of use in personal defense and law enforcement.

Non-lethal means of temporarily incapacitating a person are needed for law enforcement and for personal protection. A common approach currently is to use pepper spray. Although current pepper sprays are effective, and relatively safe, for most individuals, they can be life threatening for people who suffer from asthma and have hypersensitive airways.

In order to reduce the length of time the pepper spray can cause the adverse effects that could result from extended exposure, inventors at NCI have created a composition comprising both an incapacitating pepper spray TRPV1 receptor agonist compound and a slower-acting TRPV1 receptor antagonist compound that reverses the effects of the agonist. The agonist/antagonist composition is intended to be used as an aerosol or spray, that, when administered, causes a painful stimulation and incapacitates a person for only a short period of time. This technology may fill a public health need by improving safety over currently available pepper sprays.

This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive license will be royalty bearing, and the prospective exclusive license may be granted unless within fifteen (15) days from the date of this published notice, the National Cancer Institute receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.

In response to this Notice, the public may file comments or objections. Comments and objections, other than those in the form of a license application, will not be treated confidentially, and may be made publicly available.

License applications submitted in response to this Notice will be presumed to contain business confidential information and any release of information in these license applications will be made only as required and upon a request under the Freedom of Information Act, 5 U.S.C. 552.

Dated: November 9, 2018.

Richard U. Rodriguez,

Associate Director, Technology Transfer Center, National Cancer Institute.

[FR Doc. 2018–26016 Filed 11–29–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2018–0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the

indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities. The flood hazard determinations modified by each LOMR will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: Each LOMR was finalized as in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *https://msc.fema.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP and are used to calculate the appropriate flood insurance premium rates for new buildings, and for the contents in those buildings. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov.*

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

David I. Maurstad,

Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Arizona:					
Maricopa (FEMA Docket No.: B–1831).	City of El Mirage (18–09–0120P).	The Honorable Lana Mook, Mayor, City of El Mirage, 10000 North El Mirage Road, El Mirage, AZ 85335.	City Hall, 14405 North Palm Street, El Mirage, AZ 85335.	Aug. 10, 2018	040041
Maricopa (FEMA Docket No.: B–1837).	City of Goodyear (18–09–0175P).	The Honorable Georgia Lord, Mayor, City of Goodyear, 190 North Litchfield Road, Goodyear, AZ 85338.	Engineering Department, 14455 West Van Buren Street, Goodyear, AZ 85338.	Sep. 14, 2018	040046
Maricopa (FEMA Docket No.: B–1831).	City of Surprise (18–09–0120P).	The Honorable Sharon Wolcott, Mayor, City of Surprise, 16000 North Civic Center Plaza, Surprise, AZ 85374.	Public Works Department, Engineering Development Services, 16000 North Civic Center Plaza, Surprise, AZ 85374.	Aug. 10, 2018	040053
Maricopa (FEMA Docket No.: B–1837).	City of Surprise (18–09–0588P).	The Honorable Sharon Wolcott, Mayor, City of Surprise, 16000 North Civic Center Plaza, Surprise, AZ 85374.	Public Works Department, Engineering Development Services, 16000 North Civic Center Plaza, Surprise, AZ 85374.	Sep. 21, 2018	040053
Mohave (FEMA Docket No.: B–1831).	Town of Colorado City (17–09–2669P).	The Honorable Joseph Allred, Mayor, Town of Colorado City, P.O. Box 70, Colorado City, AZ 86021.	Town Hall, 25 South Central, Colorado City, AZ 86401.	Aug. 13, 2018	040059
Mohave (FEMA Docket No.: B–1831).	Unincorporated Areas of Mohave County (17–09–2669P).	The Honorable Gary Watson, Chairman, Board of Supervisors, Mohave County, 700 West Beale Street, Kingman, AZ 86402.	Mohave County, Administration Building, 700 West Beale Street, Kingman, AZ 86402.	Aug. 13, 2018	040058
California:					
Lassen (FEMA Docket No.: B–1837).	Unincorporated Areas of Lassen County (18–09–0502P).	The Honorable Chris Gallagher, Chairman, Board of Supervisors, Lassen County, 221 South Roop Street, Suite 4, Susanville, CA 96130.	Lassen County Building Official, 707 Nevada Street, Susanville, CA 96130.	Sep. 12, 2018	060092
Riverside (FEMA Docket No.: B–1831).	City of Desert Hot Springs (18–09–0176P).	The Honorable Scott Matas, Mayor, City of Desert Hot Springs, 65950 Pierson Boulevard, Desert Hot Springs, CA 92240.	Planning Department, 65950 Pierson Boulevard, Desert Hot Springs, CA 92240.	Aug. 10, 2018	060251
San Diego (FEMA Docket No.: B–1833).	City of San Diego (17–09–1780P).	The Honorable Kevin L. Faulconer, Mayor, City of San Diego, 202 C Street, 11th Floor, San Diego, CA 92101.	Storm Water Division, 9370 Chesapeake Drive, Suite 100, MS 1900, San Diego, CA 92123.	Sep. 6, 2018	060295

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
San Diego (FEMA Docket No.: B–1833).	Unincorporated Areas of San Diego County (17–09–2820P).	The Honorable Kristin Gasper, Chair, Board of Supervisors, San Diego County, 1600 Pacific Highway, Room 335, San Diego, CA 92101.	San Diego County Department of Public Works, 5510 Overland Avenue, Suite 410, San Diego, CA 92123.	Sep. 5, 2018	060284
Sonoma (FEMA Docket No.: B–1837).	City of Petaluma (18–09–0524P).	The Honorable David Glass, Mayor, City of Petaluma, 11 English Street, Petaluma, CA 94952.	City Hall, 11 English Street, Petaluma, CA 94952.	Sep. 21, 2018	060379
Trinity (FEMA Docket No.: B–1837).	Unincorporated Areas of Trinity County (17–09–2611P).	The Honorable Keith Groves, Chairman, Board of Supervisors, Trinity County, P.O. Box 1613, Weaverville, CA 96093.	Trinity County Planning Department, 61 Airport Road, Weaverville, CA 96093.	Sep. 13, 2018	060401
Florida: St. Johns (FEMA Docket No.: B–1831).	Unincorporated Areas of St. Johns County (18–04–2271P).	The Honorable Henry Dean, Chairman, St. Johns County Board of Commissioners, St. Johns County Administration, 500 San Sebastian View, St. Augustine, FL 32084.	St. Johns County, Permitting Center, 4040 Lewis Speedway, St. Augustine, FL 32084.	Aug. 17, 2018	125147
Illinois:					
Cook (FEMA Docket No.: B–1833).	City of Des Plaines (18–05–1146P).	The Honorable Matthew J. Bogusz, Mayor, City of Des Plaines, 1420 Miner Street, Des Plaines, IL 60016.	Civic Center, 1420 Miner Street, 5th Floor, Des Plaines, IL 60016.	Aug. 24, 2018	170081
Cook (FEMA Docket No.: B–1826).	Unincorporated Areas of Cook County (17–05–3265P).	The Honorable Toni Preckwinkle, President, Cook County Board, 118 North Clark Street, Room 537, Chicago, IL 60602.	Cook County Building and Zoning Department, 69 West Washington Street, 21st Floor, Chicago, IL 60602.	Jul. 20, 2018	170054
Cook (FEMA Docket No.: B–1826).	Village of Northbrook (17–05–3265P).	The Honorable Sandra E. Frum, Village President, Village of Northbrook, 1225 Cedar Lane, Northbrook, IL 60062.	Public Works Department, Engineering Division, 655 Huehl Road, Northbrook, IL 60062.	Jul. 20, 2018	170132
Cook (FEMA Docket No.: B–1839).	Village of Orland Park (18–05–2733P).	The Honorable Keith Pekau, Village President, Village of Orland Park, 14700 South Ravinia Avenue, Orland Park, IL 60462.	Village Hall, 14700 South Ravinia Avenue, Orland Park, IL 60462.	Sept. 21, 2018	170140
Kane (FEMA Docket No.: B–1839).	Village of Gilberts (17–05–3110P).	The Honorable Rick Zirk, Village President, Village of Gilberts, 87 Galligan Road, Gilberts, IL 60136.	Village Hall, 87 Galligan Road, Gilberts, IL 60136.	Sept. 20, 2018	170326
Will (FEMA Docket No.: B–1833).	City of Naperville (18–05–2871P).	The Honorable Steve Chirico, Mayor, City of Naperville, 400 South Eagle Street, Naperville, IL 60540.	City Hall, 400 South Eagle Street, Naperville, IL 60540.	Aug. 30, 2018	170213
Indiana:					
Elkhart (FEMA Docket No.: B–1833).	City of Goshen (17–05–7171P).	The Honorable Jeremy P. Stutsman, Mayor, City of Goshen, Goshen City Hall, 202 South 5th Street, Goshen, IN 46528.	City Hall, 204 East Jefferson, Suite 4, Goshen, IN 46528.	Sep. 7, 2018	180058
Elkhart (FEMA Docket No.: B–1833).	Unincorporated Areas of Elkhart County (17–05–7171P).	The Honorable Mike Yoder, President, Elkhart County Board of Commissioners, Elkhart County Office Building, 117 North 2nd Street, Goshen, IN 46526.	Elkhart County Public Services, 4230 Elkhart Road, Elkhart, IN 46526.	Sep. 7, 2018	180056
Hamilton (FEMA Docket No.: B–1837).	City of Carmel (18–05–0387P).	The Honorable James Brainard, Mayor, City of Carmel City Hall, 1 Civic Square, Carmel, IN 46032.	Department of Community Services, 1 Civic Square, Carmel, IN 46032.	Jun. 27, 2018	180081
Marion (FEMA Docket No.: B–1837).	City of Indianapolis (18–05–0387P).	The Honorable Joe Hogsett, Mayor, City of Indianapolis, 2501 City-County Building, 200 East Washington Street, Indianapolis, IN 46204.	City Hall, 1200 Madison Avenue, Suite 100, Indianapolis, IN 46225.	Jun. 27, 2018	180159
Kansas:					
Riley (FEMA Docket No.: B–1837).	City of Manhattan (18–07–0921P).	The Honorable Linda Morse, Mayor, City of Manhattan, 1101 Poyntz Avenue, Manhattan, KS 66502.	City Hall, 1101 Poyntz Avenue, Manhattan, KS 66502.	Sep. 19, 2018	200300
Sedgwick (FEMA Docket No.: B–1833).	City of Wichita (17–07–1225P).	The Honorable Jeff Longwell, Mayor, City of Wichita, City Hall, 455 North Main Street, 1st Floor, Wichita, KS 67202.	Office of Storm Water Management, 455 North Main Street, 8th Floor, Wichita, KS 67202.	Aug. 30, 2018	200328
Minnesota:					
Dakota (FEMA Docket No.: B–1831).	City of Coates (18–05–2617P).	The Honorable Craig Franzmeier, Mayor, City of Coates, 3033 160th Street, East Rosemount, MN 55068.	City Clerk's Office, 15970 Comstock Avenue, Rosemount, MN 55068.	Aug. 10, 2018	270728
Dakota (FEMA Docket No.: B–1831).	Unincorporated Areas of Dakota County (18–05–2617P).	The Honorable Kathleen A. Gaylord, Chair, Dakota County Board of Commissioners, Dakota County Administration Center, 1590 Highway 55, Hastings, MN 55033.	Dakota County Administrator Center, 1590 Highway 55, Hastings, MN 55033.	Aug. 10, 2018	270101
Hennepin (FEMA Docket No.: B–1833).	City of Independence (17–05–0617P).	The Honorable Marvin Johnson, Mayor, City of Independence, City Hall, 1920 County Road 90, Independence, MN 55359.	City Hall, 1920 County Road, 90 Independence, MN 55359.	Aug. 27, 2018	270167
Hennepin (FEMA Docket No.: B–1833).	City of Minnetrista (17–05–0617P).	The Honorable Lisa Whalen, Mayor, City of Minnetrista, 7701 County Road 110, West Minnetrista, MN 55364.	City Hall, 7701 County Road 110, West Minnetrista, MN 55364.	Aug. 27, 2018	270175

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Missouri: St. Louis (FEMA Docket No.: B–1837).	City of Ladue (17–07–2658P).	The Honorable Nancy Spewak, Mayor, City of Ladue, 9345 Clayton Road, Ladue, MO 63124.	City Hall, 9345 Clayton Road, Ladue, MO 63124.	Sep. 14, 2018	290363
Nevada: Douglas (FEMA Docket No.: B–1831).	Unincorporated Areas of Douglas County (17–09–1559P).	The Honorable Steve Thaler, Chairman, Board of Commissioners, Douglas County, P.O. Box 218, Minden, NV 89423.	Douglas County Community Development, 1594 Esmeralda Avenue, Minden, NV 89423.	Aug. 23, 2018	320008
New York:					
Dutchess (FEMA Docket No.: B–1831).	Town of Washington (18–02–0573P).	The Honorable Gary E. Ciferri, Supervisor, Town of Washington, P.O. Box 667, Millbrook, NY 12545.	Washington Town Hall, 10 Reservoir Drive, Millbrook, NY 12545.	Sep. 28, 2018	361147
Dutchess (FEMA Docket No.: B–1831).	Village of Millbrook (18–02–0573P).	The Honorable Rod Brown, Mayor, Village of Millbrook, P.O. Box 349, Millbrook, NY 12545.	Village of Millbrook, 35 Merritt Avenue, Millbrook, NY 12545.	Sep. 28, 2018	360219
Nassau (FEMA Docket No.: B–1837).	City of Glen Cove (18–02–0451P).	The Honorable Tim Tenke, Mayor, City of Glen Cove, 9 Glen Street, Glen Cove, NY 11542.	City Hall, 9 Glen Street, Glen Cove, NY 11542.	Nov. 2, 2018	360465
Onondaga (FEMA Docket No.: B–1837).	Town of Lysander (18–02–0720P).	The Honorable Joseph P. Saraceni, Town Supervisor, Town of Lysander, 8220 Loop Road, Baldwinsville, NY 13027.	Town Hall, 8220 Loop Road, Baldwinsville, NY 13027.	Nov. 2, 2018	360583
Ohio:					
Champaign (FEMA Docket No.: B–1837).	City of Urbana (17–05–6915P).	The Honorable Bill Bean, Mayor, City of Urbana, 205 South Main Street, Urbana, OH 43078.	Municipal Building, 205 South Main Street, Urbana, OH 43078.	Sep. 13, 2018	390060
Champaign (FEMA Docket No.: B–1837).	Unincorporated Areas of Champaign County (17–05–6915P).	Mr. Bob E. Corbett, Commissioner, Champaign County, 205 South Main Street, Urbana, OH 43078.	Champaign County, Engineer Office, 428 Beech Street, Urbana, OH 43078.	Sep. 13, 2018	390055
Lake (FEMA Docket No.: B–1833).	City of Mentor (18–05–1123P).	The Honorable John A. Krueger, President of Council, City of Mentor, Mentor Municipal Center, 8500 Civic Center Boulevard, Mentor, OH 44060.	Municipal Center, 8500 Civic Center Boulevard, Mentor, OH 44060.	Sep. 7, 2018	390317
Madison (FEMA Docket No.: B–1837).	City of London (17–05–6148P).	The Honorable Patrick J. Closser, Mayor, City of London, 6 East 2nd Street, London, OH 43140.	City Building, 102½ South Main Street, London, OH 43140.	Sep. 6, 2018	390366
Warren (FEMA Docket No.: B–1831).	City of Springboro (18–05–0285P).	The Honorable John Agenbroad, Mayor, City of Springboro, 320 West Central Avenue, Springboro, OH 45066.	Springboro Municipal Building, 320 West Central Avenue, Springboro, OH 45066.	Aug. 10, 2018	390564
Pennsylvania:					
Montgomery (FEMA Docket No.: B–1837).	Township of Upper Dublin (17–03–1574P).	Mr. Ira S. Tackel, President, Upper Dublin Township Board of Commissioners, 801 Loch Alsh Avenue, Fort Washington, PA 19034.	Municipal Hall, 801 Loch Alsh Avenue, Fort Washington, PA 19034.	Sep. 17, 2018	420708
Montgomery (FEMA Docket No.: B–1837).	Township of Whitemarsh (17–03–1574P).	Ms. Amy R. Grossman, Chair, Whitemarsh Township Board of Supervisors, 616 Germantown Pike, Lafayette Hill, PA 19444.	Administrative Building, 616 Germantown Pike, Lafayette Hill, PA 19444.	Sep. 17, 2018	420712
Texas: Dallas (FEMA Docket No.: B–1831).	Town of Highland Park (18–06–0588P).	The Honorable Joel T. Williams, III, Mayor, Town of Highland Park, 4700 Drexel Drive, Highland Park, TX 75205.	Public Works Department, 4700 Drexel Drive, Highland Park, TX 75205.	Aug. 3, 2018	480178
Washington:					
Kittitas (FEMA Docket No.: B–1831).	City of Ellensburg (17–10–1541P).	The Honorable Bruce Tabb, Mayor, City of Ellensburg City Hall, 501 North Anderson Street, Ellensburg, WA 98926.	City Hall, 501 North Anderson Street, Ellensburg, WA 98926.	Aug. 17, 2018	530234
Kittitas (FEMA Docket No.: B–1831).	Unincorporated Areas of Kittitas County (17–10–1541P).	The Honorable Laura Osiadacz, Chairman, Board of Commissioners, Kittitas County, 205 West 5th Avenue, Suite 108, Ellensburg, WA 98926.	Kittitas County Community Development Services, 411 North Ruby Street, Suite 1, Ellensburg, WA 98926.	Aug. 17, 2018	530095
Wisconsin: Dodge (FEMA Docket No.: B–1837).	Unincorporated Areas of Dodge County (17–05–4613P).	The Honorable Russell Kottke, Chairman, Dodge County Board of Supervisors, Administrative Building, 127 East Oak Street, Juneau, WI 53039.	Dodge County Administrative Building, 127 East Oak Street, Juneau, WI 53039.	Jun. 21, 2018	550094

[FR Doc. 2018–26004 Filed 11–29–18; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2018–0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below.

The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report are used by insurance agents and others to calculate appropriate flood insurance premium rates for buildings and the contents of those buildings.

DATES: The date of February 15, 2019 has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at *https://msc.fema.gov* by the date indicated above.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov.* The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

David I. Maurstad,

Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

Community	Community map repository address
Yavapai County, Arizona and Incorporated Areas Docket No.: FEMA–B–1639	
Unincorporated Areas of Yavapai County	Yavapai County Flood Control District Office, 1120 Commerce Drive, Prescott, AZ 86305.
Barton County, Kansas and Incorporated Areas Docket No.: FEMA–B–1766	
City of Claflin	City Hall, 111 East Hamilton Street, Claflin, KS 67525.
City of Hoisington	City Hall, 109 East 1st Street, Hoisington, KS 67544.
Unincorporated Areas of Barton County	Barton County Courthouse, 1400 Main Street, Room 108, Great Bend, KS 67530.
Ste. Genevieve County, Missouri and Incorporated Areas Docket No.: FEMA–B–1759	
City of Bloomsdale	City Hall, 80 Mill Hill Road, Bloomsdale, MO 63627.
City of Ste. Genevieve	City Hall, 165 South 4th Street, Ste. Genevieve, MO 63670.
City of St. Mary	City Hall, 782 3rd Street, St. Mary, MO 63673.
Unincorporated Areas of Ste. Genevieve County	Ste. Genevieve County Courthouse, 55 South 3rd Street, Ste. Genevieve, MO 63670.

[FR Doc. 2018–26003 Filed 11–29–18; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4401–DR; Docket ID FEMA–2018–0001]

Virginia; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Virginia (FEMA–4401–DR), dated October 15, 2018, and related determinations.

DATES: This amendment was issued November 15, 2018.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the Commonwealth of Virginia is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of October 15, 2018.

The counties of Botetourt, Chesterfield, Franklin, Lunenburg, Mathews, Mecklenburg, Nottoway, Pulaski, and Roanoke and the independent cities of Bristol, Danville, and Martinsville for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Brock Long,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2018–26010 Filed 11–29–18; 8:45 am]

BILLING CODE 9111–11–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4401–DR; Docket ID FEMA–2018–0001]

Virginia; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Virginia (FEMA–4401–DR), dated October 15, 2018, and related determinations.

DATES: This amendment was issued November 14, 2018.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the Commonwealth of Virginia is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of October 15, 2018.

The counties of Craig, Floyd, Grayson, and Isle of Wight and the independent city of Hampton for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Brock Long,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2018–26009 Filed 11–29–18; 8:45 am]

BILLING CODE 9111–11–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R1–ES–2018–0095; FXES11140100000–190–FF01E00000]

Draft Environmental Impact Statement and Draft Habitat Conservation Plan; Receipt of an Application for an Incidental Take Permit for Marbled Murrelets, Bald Eagles, and Golden Eagles; Skookumchuck Wind Energy Project, Lewis and Thurston Counties, Washington

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: In accordance with the Endangered Species Act (ESA) and the National Environmental Policy Act, we, the U.S. Fish and Wildlife Service (Service), announce the availability of a draft habitat conservation plan (HCP) in support of an application from Skookumchuck Wind Energy Project, LLC, an affiliate of Renewable Energy Services (applicant), for an incidental take permit (ITP) for the marbled murrelet, listed as threatened under the ESA, and the bald eagle and golden eagle, both of which are protected under the Bald and Golden Eagle Protection Act. Incidental take is expected to result from the operation of 38 commercial wind turbines and associated infrastructure located near Centralia, Washington, in Lewis and Thurston Counties. Also available for review is the Service's draft environmental impact statement (DEIS), which was prepared in response to the application. We are seeking public comments on the draft HCP and DEIS.

DATES: We will accept hardcopy comments received or postmarked on or before January 14, 2019. Comments submitted online at *https://www.regulations.gov/* (see **ADDRESSES**) must be received by 11:59 p.m. Eastern Time on January 14, 2019.

Public Meetings: The Service will host two open house public meetings at the following times during the public comment and review period:

- Chehalis, WA: Wednesday, December 5, 2018, from 6 to 8 p.m.
- Lacey, WA: Monday, December 10, 2018, from 6 to 8 p.m.

ADDRESSES: *Obtaining Documents for Review:* The documents this notice announces, as well as any comments and other material that we receive, will be available for public inspection online in Docket No. FWS–R1–ES–2018–0095 at *http://www.regulations.gov/.*

Submitting Comments: You may submit comments by one of the following methods:

- *Online: http://www.regulations.gov.* Follow instructions for submitting comments on Docket No. FWS–R1–ES–2018–0095.
- *U.S. mail or hand-delivery:* U.S. Fish and Wildlife Service, c/o Tim Romanski, 510 Desmond Dr. SE, Suite 102, Lacey, WA 98503.
- *Public meetings:* You may also submit written comments during public meetings. The meetings will be held at the following locations:
- 100 SW Veterans Way, Chehalis, WA 98532
- 4220 6th Avenue SE, Room 194, Lacey, WA 98503

We will post all comments on *http://www.regulations.gov.* This generally means that we will post online any personal information that you provide (see Public Availability of Comments under **SUPPLEMENTARY INFORMATION**). We request that you send comments by only the methods described above.

Reviewing U.S. Environmental Protection Agency (EPA) comments on the draft HCP and DEIS: See EPA's Role in the EIS Process under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Tim Romanski, by telephone at 360–753–5823, or by email at *tim_romanski@fws.gov.* Hearing or speech impaired individuals may call the Federal Relay Service at 800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: The Service received an incidental take permit (ITP) application from the Skookumchuck Wind Energy Project, LLC (applicant) in accordance with the requirements of the Endangered Species Act, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The applicant prepared a draft habitat conservation plan (HCP) in support of the ITP application and is seeking authorization for take of the marbled murrelet (*Brachyamphus marmoratus*), listed as threatened under the ESA, and the bald eagle (*Haliaeetus leucocephalus*) and golden eagle (*Aquila chrysaetos*), which are not listed species under the ESA but are protected by the Bald and Golden Eagle Protection Act (BGEPA; 16 U.S.C. 668–668d). Hereafter, the marbled murrelet, bald eagle, and golden eagle are collectively referred to as the ''covered species.''

The ITP, if issued, would authorize incidental take of the covered species that may occur as a result of the operation and maintenance of the 38 commercial wind turbines over the 30-year permit term. This includes, without limitation, ITP coverage for covered species colliding with both stationary and operating project structures during the permit term. In contrast, the applicant does not seek ITP coverage for the construction phase of the wind project, which would include, without limitation, constructing roads and turbine pads, and erecting wind turbines. Nor does the applicant seek ITP coverage for the facility-decommissioning phase of the project. The applicant anticipates undertaking phased construction over a 9- to 12-month period beginning in mid-2019.

The draft HCP describes how impacts to covered species would be minimized and mitigated. The draft HCP also describes the covered species' life history and ecology, as well as biological goals and objectives of the HCP, the estimated take and its potential impact on covered species' populations, adaptive management, monitoring, and mitigation measures.

The Service prepared a draft environmental impact statement (DEIS) in response to the ITP application in accordance with the requirements of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). We are making the draft HCP and DEIS available for public review and comment.

Background

Skookumchuck Wind Energy Project, LLC, intends to initiate construction of a wind turbine facility in 2019, and commence wind turbine operations as soon as possible. Detailed descriptions of the project are found in section 2.0 of the HCP. The majority of the wind project, including all of the 38 turbines, is located in Lewis County, Washington, with some supporting infrastructure located in Thurston County, Washington. The wind turbines are proposed to be constructed on a prominent ridgeline on the Weyerhaeuser Vail Tree Farm, approximately 18 miles east of Centralia, Washington.

The project consists of a maximum of 38 wind turbines, with an expected output of 137 megawatts (MW); a maximum wind turbine height of 492 feet (from ground to vertical blade tip); a maximum rotor diameter of 446 feet; approximately 36.5 miles of existing roads that will be upgraded; approximately 3.9 miles of new road that will be constructed; 17 miles of buried medium-voltage collection cable that will transport power to a substation along the ridgeline; and 15 miles of transmission line that will transport power to the Tono Substation.

The applicant has proposed a conservation program to avoid, minimize, and mitigate for impacts to covered species. Avoidance and minimization measures to benefit the marbled murrelet include project design and planning efforts, and operational practices including seasonal curtailment of turbine blades, installation of transmission and distribution line flight diverters, shielding of artificial light sources, measures to reduce murrelet collisions with vehicles on the project site, and measures to prevent the artificial increase of potential nest predators in the project area. Mitigation measures intended to benefit the marbled murrelet include acquisition and management of conservation lands to promote the preservation and enhancement of suitable nesting habitat for the species, and funding the removal of abandoned or derelict fishing nets in the Salish Sea.

Avoidance and minimization measures to benefit the bald eagle and the golden eagle include project design and planning efforts, a mammal carrion reporting program to reduce scavenging by eagles on the project site, efforts that minimize creating cover for prey animals such as rabbits to reduce eagle use near the wind project, and 2 years of IdentiFlight® technology testing intended to reduce eagle collisions with operating turbine blades. Mitigation measures intended to benefit bald eagles and golden eagles consist of retrofitting power poles to reduce probability of collision and electrocution.

Proposed Action

We propose to issue a 30-year permit for incidental take of marbled murrelet, bald eagle, and golden eagle if the Skookumchuck Wind Energy Project HCP meets all section 10(a)(1)(B) permit issuance criteria and, with respect to bald eagles and golden eagles, all BGEPA permit issuance criteria identified in 50 CFR 22.26 . The permit would authorize take of each of the covered species incidental to the operation and maintenance of the wind energy project.

Endangered Species Act

Section 9 of the ESA and its implementing regulations prohibit ''take'' of fish and wildlife species listed as endangered. The ESA implementing regulations extend, under certain circumstances, the prohibition of take to threatened species (50 CFR 17.31). Under section 3 of the ESA, the term ''take'' means to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct'' (16 U.S.C. 1538). Under section 10(a) of the ESA, the Service may issue permits to authorize

incidental take of listed fish and wildlife species. ''Incidental take'' is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Section 10(a)(1)(B) of the ESA contains provisions for issuing ITPs to non-Federal entities for the take of endangered and threatened species, provided the following criteria are met:

1. The taking will be incidental;
2. The applicant will, to the maximum extent practicable, minimize and mitigate the impact of such taking;
3. The applicant will ensure that adequate funding for the plan will be provided;
4. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
5. The applicant will carry out any other measures that the Service may require as being necessary or appropriate for the purposes of the HCP.

Bald and Golden Eagle Protection Act

Though the applicant is requesting incidental take for bald and golden eagles under section 10(a)(1)(B) of the ESA, consistency with the requirements of BGEPA (16 U.S.C. 668–668d) is also necessary. The BGEPA prohibits take of eagles where ''take'' is defined as ''pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb'' and where ''disturb'' is further defined as ''to agitate or bother'' a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available: (1) Injury to an eagle; (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior; or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior (50 CFR 22.3).

Under 50 CFR 22.26, the Service has the authority to authorize take of bald and golden eagles (generally, disturbance, injury, or killing) that occurs incidental to an otherwise lawful activity. For the Service to issue such a permit, the following required determinations must be met (see 50 CFR 22.26(f)):

1. The taking will be compatible with the preservation of the bald or golden eagle (further defined by the Service to mean ''consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and the persistence of local populations throughout the geographic range of each species'');
2. The taking will protect an interest in a particular locality;
3. The taking will be associated with, but not the purpose of, the activity;
4. The taking will be avoided and minimized by the applicant to the extent practicable;
5. The applicant will have applied all appropriate and practical compensatory mitigation measures, when required pursuant to 50 CFR 22.26(c);
6. Issuance of the permit will not preclude issuance of another permit necessary to protect an interest of higher priority as set forth in 50 CFR 22.26(e)(7); and
7. Issuance of the permit will not interfere with ongoing civil or criminal action concerning unpermitted past eagle take at the project.

The Service can provide eagle take authorization through an ITP for an HCP, which confers take authorization under the BGEPA without the need for a separate permit, as long as the permit issuance criteria under both ESA and BGEPA will be met by the conservation measures included in the applicant's HCP. *See* 50 CFR 22.11(a).

National Environmental Policy Act

In compliance with NEPA (42 U.S.C. 4321 *et seq.*), the Service prepared a DEIS, in which we analyze the proposed action and a reasonable range of alternatives to the proposed action. Four alternatives are analyzed in the DEIS.

- *No-action Alternative (Options A and B):* No permit would be issued, and the applicant's HCP would not be implemented. The No Action consists of two options: Option A—No Project Operations and Option B—No Project. Option A assumes the applicant would construct the project before the Service makes a final permit decision, but would not operate the project without an ITP. Option A is included in the DEIS because the Applicant informed the Service that it may initiate and complete construction before the Service makes a decision on the ITP application. Option B assumes that the applicant would not construct the project without an ITP. Under this option, nothing would change from current conditions and no impacts would result from the project.
- *The Proposed Alternative:* Issuance of the requested permit and implementation of the conservation program described in the applicant's HCP.
- *Alternative 2:* Under the Modified Project Site Design Alternative, the project would not operate the five wind turbine generators (WTGs) closest to documented marbled murrelet nest locations for the duration of the ITP. The Service would issue an ITP authorizing the level of incidental take expected to result from operation and maintenance of the remaining 33 WTGs.
- *Alternative 3:* Under the Enhanced Curtailment Alternative, all 38 WTGs would operate under an expanded set of curtailment measures intended to minimize the potential for take of the Covered Species. The Service would issue an ITP authorizing the level of incidental take expected to result from operation and maintenance of the project in accordance with the additional curtailment measures.

The environmental consequences of each alternative were analyzed to determine if significant environmental impacts would occur.

EPA's Role in the EIS Process

The EPA is charged with reviewing all Federal agencies' EISs and commenting on the adequacy and acceptability of the environmental impacts of proposed actions in EISs. Therefore, EPA is publishing a notice in the **Federal Register** announcing this EIS, as required under section 309 of the Clean Air Act. The publication date of EPA's notice of availability is the official beginning of the public comment period. EPA's notices are published on Fridays.

EPA serves as the repository (EIS database) for EISs prepared by Federal agencies. All EISs must be filed with EPA. You may search for EPA comments on EISs, along with EISs themselves, at *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

Public Comments

You may submit your comments and materials by one of the methods in **ADDRESSES**. We will also accept written comments at the public meetings. We specifically request information on the following:

1. The identification and evaluation of archaeological and historic resources that the proposed project may affect;
2. The proposed adaptive management framework for marbled murrelets and for bald and golden eagles;
3. Potential impacts to the human environment that may occur during the construction or decommissioning phases of the project (*e.g.,* through collisions with construction equipment, stationary wind turbines, or associated infrastructure);
4. Biological information and relevant data concerning the covered species and other wildlife;
5. Information on bald eagle, golden eagle, and marbled murrelet collisions with both stationary and moving objects such as wind turbines in the terrestrial

environment, particularly in a forested environment;

6. Potential direct, indirect, and cumulative impacts that implementation of the proposed wind project and mitigation/minimization measures could have on the covered species; and other endangered or threatened species, and their associated ecological communities or habitats; and other aspects of the human environment;

7. Whether there are additional connected, similar, or reasonably foreseeable cumulative actions and their possible impacts on the human environment including, without limitation, marbled murrelet, bald eagle, and golden eagle, which were not identified in the DEIS;

8. Other possible reasonable alternatives to the proposed permit action that the Service should consider, including additional or alternative avoidance, minimization, and mitigation measures; and

9. Other information relevant to the proposed wind project and impacts to the human environment.

Public Availability of Comments

We will post on *http://regulations.gov* all public comments and information received electronically or via hardcopy. Written comments we receive become part of the administrative record associated with this action. 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 request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Reasonable Accommodations

Persons needing reasonable accommodations in order to attend and participate in the public meetings should contact the Service's Washington Fish and Wildlife Office, using one of the methods listed in **ADDRESSES** as soon as possible. In order to allow sufficient time to process requests, please make contact no later than one week before the public meetings. Information regarding this proposed action is available in alternative formats upon request.

Authority: We provide this notice in accordance with the requirements of section 10 of the ESA (16 U.S.C. 1531 *et seq.*) and NEPA regulations (40 CFR 1501.7, 40 CFR 1506.5, 1506.6, and 1508.22).

Katherine B. Hollar,

Acting Deputy Regional Director, Pacific Region, U.S. Fish and Wildlife Service.

[FR Doc. 2018–25969 Filed 11–29–18; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–FAC–2018–N135; FXFR13360900000–FF09F14000–189]

Aquatic Nuisance Species Task Force Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce a public meeting of the Aquatic Nuisance Species (ANS) Task Force, in accordance with the Federal Advisory Committee Act. The ANS Task Force's purpose is to develop and implement a program for U.S. waters to prevent introduction and dispersal of aquatic invasive species; to monitor, control, and study such species; and to disseminate related information.

DATES: The ANS Task Force will meet Wednesday and Thursday, December 12–13, 2018, from 8 a.m. to 5 p.m. each day. The meeting is open to the public; for security purposes, signup is required. For more information, contact the ANS Task Force Executive Secretary (see **FOR FURTHER INFORMATION CONTACT**). This notice is being published less than 15 days prior to the meeting date due to unexpected administrative delays.

ADDRESSES: *Meeting location:* The ANS Task Force meeting will take place at the U.S. Fish and Wildlife Headquarters, 5275 Leesburg Pike, Falls Church, VA 22041.

Comment submission: You may submit written comments in advance of the meeting by emailing them to the ANS Task Force Executive Secretary (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Susan Pasko, ANS Task Force Executive Secretary, by telephone at (703) 358–2466, or by email at *Susan_Pasko@fws.gov.*

Accessibility: The U.S. Fish and Wildlife Service is committed to providing access to this meeting for all participants. Please direct all requests for sign language interpreting services, closed captioning, or other accommodation needs to the ANS Task Force Executive Secretary, by using the contact information above or via TTY at 800–877–8339, by close of business on December 5, 2018.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), announce a public meeting of the Aquatic Nuisance Species (ANS) Task Force, in accordance with the Federal Advisory Committee Act (5 U.S.C. Appendix 2). The ANS Task Force was established by the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, as amended (NANPCA; 16 U.S.C. 4701 *et seq.*), is composed of 13 Federal and 15 ex-officio members, and is co-chaired by the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration. The ANS Task Force's purpose is to develop and implement a program for U.S. waters to prevent introduction and dispersal of aquatic invasive species; to monitor, control, and study such species; and to disseminate related information.

Meeting Agenda

- Discuss the content of the draft ANS Task Force Strategic Plan for 2019–2024.
- Review and discuss the draft ANS Task Force Report to Congress for 2016–2017.
- Respond to recommendations from the ANS Task Force regional panels.

The final agenda and other related meeting information will be posted on the Task Force website at *http://anstaskforce.gov.* Summary minutes of the meeting will be maintained by the Executive Secretary and will be available for public inspection within 90 days after the meeting at *http://anstaskforce.gov.*

Public Input

If you comment, before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 5 U.S.C. Appendix 2.

David Hoskins,

Co-Chair, Aquatic Nuisance Species Task Force, Assistant Director for Fish and Aquatic Conservation.

[FR Doc. 2018–26019 Filed 11–27–18; 11:15 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX18LR000F60100; OMB Control Number 1028–0062]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Industrial Minerals Surveys

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the U.S. Geological Survey is proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before December 31, 2018.

ADDRESSES: Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at *OIRA_Submission@omb.eop.gov;* or via facsimile to (202) 395–5806. Please provide a copy of your comments to U.S. Geological Survey, Information Collections Officer, 12201 Sunrise Valley Drive MS 159, Reston, VA 20192; or by email to *gs-info_collections@usgs.gov.* Please reference OMB Control Number 1028–0062 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Elizabeth S. Sangine by email at *escottsangine@usgs.gov,* or by telephone at 703–648–7720. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we 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.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on July 9, 2018, 83 FR 31767. We did not receive any public comments in response to that notice.

We are again 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 USGS to perform its duties, including whether the information is useful; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, usefulness, and clarity of the information to be collected; and (4) how to 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. 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.

Abstract: Respondents to these forms supply the USGS with domestic production and consumption data of industrial mineral commodities, some of which are considered strategic and critical to assist in determining National Defense Stockpile goals. These data and derived information will be published as chapters in Minerals Yearbooks, monthly Mineral Industry Surveys, annual Mineral Commodity Summaries, and special publications, for use by Government agencies, industry education programs, and the general public.

Title of Collection: Industrial Minerals Surveys.

OMB Control Number: 1028–0062.

Form Number: Various, 38 forms.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Business or Other-For-Profit Institutions: U.S. nonfuel minerals producers and consumers of industrial minerals. Public sector: State and local governments.

Total Estimated Number of Annual Responses: 17,533.

Total Estimated Number of Annual Burden Hours: 12,055 hours.

Total Estimated Number of Annual Respondents: 14,957.

Estimated Completion Time per Response: 10 minutes to 5 hours.

Respondent's Obligation: Voluntary.

Frequency of Collection: Monthly, Quarterly, Semiannually, or Annually.

Total Estimated Annual Nonhour Burden Cost: There are no ''nonhour cost'' burdens associated with this IC.

The authorities for this action are the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*), the National Materials and Minerals Policy, Research and Development Act of 1980 (30 U.S.C. 1601 *et seq.*), and the National Mining and Minerals Policy Act of 1970 (30 U.S.C. 21(a)).

Michael Magyar,

Associate Director, National Minerals Information Center.

[FR Doc. 2018–26053 Filed 11–29–18; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLUTW02000–L51010000–ER0000–LVRWJ18J5120–18X—UTU–90095]

Notice of Availability of the Draft Environmental Impact Statement for the Sevier Playa Potash Project, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act (NEPA) of 1969, as amended, the Federal Land Policy and Management Act of 1976, as amended, the Mineral Leasing Act of 1920, as amended, and Secretarial Order 3355, the Bureau of Land Management (BLM) is releasing the Draft Environmental Impact Statement (EIS) for Crystal Peak Minerals Inc.'s (CPM) Sevier Playa Potash Project (Project), and by this notice is announcing the opening of the comment period.

DATES: To ensure comments will be considered, the BLM must receive written comments on the Project Draft EIS within 45 days following the date the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**. The BLM will

announce future meetings or hearings and any other public involvement activities at least 15 days in advance through public notices, media releases, and/or mailings.

ADDRESSES: You may submit comments related to the Draft EIS for the Project by any of the following methods:

- *Email: blm_ut_fm_sevier_playa_potash_project@blm.gov.*
- *Fax:* (435) 743–3136.
- *Mail:* Bureau of Land Management Fillmore Field Office, Attn: Clara Stevens—Sevier Playa Potash Project Comments, 95 East 500 North, Fillmore, UT 84631.

Electronic versions of the Project Draft EIS, appendices, and supporting documents can be downloaded from ePlanning at *https://bit.ly/2CZPeWy.* Paper and digital copies of the Project Draft EIS and supporting documents are available for review at:

(1) The BLM Fillmore Field Office at the above address;

(2) The BLM West Desert District Office at 2370 South Decker Lake Blvd., West Valley City, UT;

(3) The Fillmore City Library at 75 West Center, Fillmore, UT; and

(4) The Delta City Library at 76 North 200 West, Delta, UT.

FOR FURTHER INFORMATION CONTACT: Clara Stevens, Project Manager, telephone (435) 743–3119; address 95 East 500 North, Fillmore, UT 84631; email *clsteven@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: On March 12, 2014, the BLM published a Notice of Intent to Prepare an EIS in the **Federal Register** (79 FR 14078).

The Project would be located in central Millard County in southwestern Utah. The Sevier Playa is a large terminal playa that is normally dry on the surface and contains subsurface potassium-bearing saline brines. The playa is approximately 26 miles long and averages 8 miles wide.

CPM holds or through agreement controls the rights to develop and operate potassium mineral leases on 117,814 acres of Federal lands administered by the BLM and an additional 6,409 acres of state lands. CPM proposes to exercise their lease rights by constructing and operating the Project, which would produce at its peak approximately 372,000 tons per year of potassium sulfate (K_2SO_4), also known as sulfate of potash (SOP), and related minerals over the 32-year lifetime of the Project.

The Project is a potash mine proposed on 124,223 acres of Federal and State mineral leases. The proposal includes mining facilities located on-lease with off-lease supporting infrastructure. On-lease facilities include evaporation ponds; a brine extraction system (trenches, wells, and conveyance canals); a recharge system (trenches, canals, and Sevier River diversion); a waste product storage area (purge brine and tailings); access roads, and processing facilities. The off-lease ROW facilities, proposed on approximately 4,135 acres, include power and communication lines, a natural gas pipeline, a rail loadout facility and rail spur; water supply wells; communication towers; preconcentration ponds; segments of recharge canals and the playa perimeter road; and access roads. Three gravel pits would also be developed.

Potassium-bearing brines would be extracted from trenches and wells on the Sevier Playa, and routed through a series of ponds, using solar evaporation to concentrate the brine. The preconcentration ponds would concentrate the brine causing halite (NaCl, table salt) and other non-commercial salts to precipitate. These salts would be stored in the preconcentration ponds. The saturated brine would be transferred to the production ponds for further evaporation, causing potassium-rich salts to precipitate. The production ponds would be harvested year-round, with the potassium-rich salts moved directly to a facility for processing into SOP. The SOP would be trucked to the rail loadout facility for distribution. Purge brine containing primarily magnesium chloride ($MgCl_2$) would be removed from the production ponds before harvesting begins and would be piped to an on-playa purge brine storage pond. Process by-products (solid tailings) from the processing facility would be trucked to the on-playa tailings storage area.

The Draft EIS analyzes CPM's Mining Plan, prepared for development of Federal potassium mineral leases acquired in 2011 and potash mineral leases acquired on State lands. These leases were amalgamated under BLM casefile number UTU–88387. In addition, the Draft EIS analyzes CPM's request for rights-of-way (ROWs) to construct various ancillary facilities on public lands in the vicinity of the mineral leases, but outside the lease boundary. CPM prepared a Plan of Development (POD) for the ROWs that they have requested. The Draft EIS also analyzes CPM's request to purchase mineral materials for gravel to support construction and operation of the Project. Although the BLM may only make decisions pertaining to public lands managed by the BLM, the EIS analyzes the complete Project including portions located on state and private lands.

This Draft EIS evaluates, in detail, the no action alternative, the proposed action, and five action alternatives. Alternative 1 would route a cross-country segment of the off-lease 69-kV power and communication line to an alignment along existing roads, including SR 257 and SR–257 Cutoff Road. Alternative 2 would route a cross-country segment of the off-lease 69-kV power and communication line to a more southern orientation along existing roads, including Crystal Peak Road and Crystal Peak Spur Road. Alternative 3 would route a segment of the off-lease natural gas pipeline entirely on BLM land to avoid crossing private lands. Alternative 4 would route a cross-country segment of the off-lease natural gas pipeline to a similar alignment as Alternative 2 along existing roads, including Crystal Peak Road and Crystal Peak Spur Road. Alternative 5 is an alternative method of diverting flows from the Sevier River into the recharge system. This alternative would relocate the on-lease Sevier River diversion facilities, including diversion channel, recharge canal, diversion culvert and sump, and perimeter and access roads slightly to the west, within the boundary of the playa.

Based on public scoping and internal review, the principal issues analyzed in the Draft EIS include: (1) Impacts to water resources and water quality including adverse effects to surface water and groundwater basins, as well as impacts to existing water rights holders; (2) adverse effects to air quality in the form of fugitive dust produced during construction and operation of the mine facilities; (3) impacts to cultural resources and historic properties, including rock art and subsurface features; (4) impacts to migratory bird populations; and (5) the socioeconomic effects of water right acquisition for recharge water. Analysis also includes impacts to the following resources: Visual, wildlife, access, range management, recreation, and soils.

The BLM published a Notice of Intent for the Project on March 12, 2014. Scoping was extended through August 31, 2015, due to Project delays. A public scoping meeting was held in Delta, Utah, on August 5, 2015. The public

was offered the opportunity to provide written comments throughout the scoping process.

In 2015, pursuant to Executive Order 13175, the BLM initiated government-to-government consultation with interested tribes, including the Confederated Tribes of the Goshute Reservation, the Hopi Tribe, the Kaibab Band of Paiute Indians, the Kanosh Band of Paiute Indians, the Navajo Nation, the Paiute Indian Tribe of Utah, the Skull Valley Band of Goshute, and the Ute Indian Tribe. Beginning in 2015, the BLM coordinated with the Utah State Historic Preservation Office and seven other consulting parties that requested to participate in the Section 106 process, to develop a Programmatic Agreement to outline a process to be used to avoid, mitigate, or treat adverse effects to historic properties.

In August 2015, the BLM invited agencies to participate as Cooperating Agencies in the Project. The following agencies accepted the invitation: The U.S. Department of Defense (Utah Test and Training Range), the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, the State of Utah, and Millard and Beaver Counties. These agencies and governments reviewed the Draft EIS before it was available to the public and their comments have been incorporated into the document.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6, 40 CFR 1506.10.

Anita Bilbao,

Associate State Director.

[FR Doc. 2018–26076 Filed 11–29–18; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[18XL LLIDI00000.L71220000.EO0000. LVTFDX402300 241A 4500129252]

Notice of Availability of the Draft Environmental Impact Statement for the Proposed Caldwell Canyon Mine Project, Caribou County, Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, the Bureau of Land Management (BLM) has prepared a Draft Environmental Impact Statement (EIS) for the proposed Caldwell Canyon Mine Project, and by this notice is announcing the opening of the comment period.

DATES: To ensure the BLM considers all comments, the BLM must receive written comments on the Draft EIS for the proposed Caldwell Canyon Mine Project within 45 days following the date the Environmental Protection Agency publishes this Notice of Availability in the **Federal Register**. The BLM will announce public comment meetings at least 15 days in advance through public notices, media release, and/or mailings. To assist the BLM in identifying issues and concerns related to this project and the Draft EIS, comments should be as specific as possible.

ADDRESSES: You may submit comments related to the Caldwell Canyon Mine Project Draft EIS by any of the following methods:

- *Website: https://bit.ly/2SaxWcO.*
- *Email: blm_id_caldwell_canyon_mine_eis@blm.gov.*
- *Mail:* Caldwell Canyon Mine EIS, c/o Tetra Tech, 2525 Palmer Street, Suite 2, Missoula, MT 59808.

Please reference ''Caldwell Canyon Mine Draft EIS'' on all correspondence. The BLM has made CD–ROM and print copies of the Caldwell Canyon Mine Draft EIS available in the BLM Pocatello Field Office at the following address: 4350 Cliffs Drive, Pocatello, ID 83204. In addition, the BLM has made an electronic copy of the Draft EIS available online at the BLM Land Use Planning and NEPA Register website: *http://bit.ly/2zuZ8Mn.*

FOR FURTHER INFORMATION CONTACT: For further information contact Bill Volk, Planning and NEPA Specialist, phone (208) 236–7503; address, BLM Pocatello Field Office, 4350 Cliffs Drive, Pocatello, ID 83204; email, *wvolk@blm.gov*; and fax, (208) 478–6376. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FRS) at (800) 877–8339 to contact Mr. Volk. The FRS is available 24 hours a day, 7 days a week, to leave a message or question for Mr. Volk. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM, as the Federal lease administrator, is the lead agency. The Idaho Department of Environmental Quality, Idaho Department of Lands, the U.S. Army Corps of Engineers, and the Idaho Governor's Office of Energy and Mineral Resources are cooperating agencies.

P4 Production, LLC (P4), a subsidiary of Bayer AG, developed and submitted a Mine and Reclamation Plan (M&RP), the Proposed Action, for the Caldwell Canyon Mine. The Proposed Action consists of mining Federal Phosphate Leases IDI–02, IDI–014080, and IDI–13738 and State of Idaho Mineral Lease E07959. Portions of the mine's waste rock would be placed into the nearby inactive Dry Valley Mine on Federal Phosphate Lease IDI–014184. P4 will request modifications to enlarge the phosphate lease boundaries for the Caldwell Canyon leases, and obtain authorization for a haul road across BLM public land as outlined in the Draft EIS. The BLM has fully evaluated alternatives to the Proposed Action, including a No Action Alternative, in the Draft EIS and addressed issues identified during scoping and analysis.

The BLM will make decisions to either approve, approve with modifications, or deny the Caldwell Canyon Mine M&RP and modification of the Dry Valley Mine M&RP. In addition, the BLM will determine whether to modify the lease boundaries, and whether to issue a right-of-way or phosphate use permit for a haul road on BLM lands. These decisions will consider public and agency input received on the Draft and Final EISs.

The BLM published a Notice of Intent (NOI) to prepare this EIS in the **Federal Register** on March 22, 2017, initiating a 30-day public scoping period for the Proposed Action during which the BLM accepted written comments. Public scoping identified concerns related to the following topics: The potential impacts to water quantity from dewatering; potential impacts to water quality from elevated levels of selenium and other constituents of concern; potential effects of increased noise on wildlife, safety, and socioeconomics; effects to tribal interests; cultural resources; wildlife; vegetation, visual quality; reclamation and financial assurance; and mitigation and monitoring of mine operations.

Before including your 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.

Authorities: 42 U.S.C. 4321 *et seq.;* 40 CFR 1500 through 1508; 43 CFR 46; 43 U.S.C. 1701; 43 CFR 3590.

Peter J. Ditton,

BLM Idaho State Director, Acting.

[FR Doc. 2018–26093 Filed 11–29–18; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Availability of the Western Energy Company's Rosebud Mine Area F Final Environmental Impact Statement; S1D1S SS08011000 SX064A000 190S180110; S2D2S SS08011000 SX064A000 19XS501520

AGENCY: Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act (NEPA) of 1969, as amended, the Office of Surface Mining Reclamation and Enforcement (OSMRE) has prepared a Final Environmental Impact Statement (EIS) for the Western Energy Company's Rosebud Mine Area F (Project) in southeastern Montana. This notice is announcing its availability. The Montana Department of Environmental Quality (DEQ) is a co-lead on this EIS process.

DATES: The OSMRE will not issue a final decision on the Proposed Action and Alternatives for a minimum of 30 days from the date that the U.S. Environmental Protection Agency (USEPA) publishes this notice in the **Federal Register**.

ADDRESSES: The Final EIS is available for review at: *https://www.wrcc.osmre.gov/initiatives/westernEnergy/documentLibrary.shtm.* Paper and computer compact disk (CD) copies of the Final EIS are available for review at the OSMRE Western Region Office, 1999 Broadway Street, Suite 3320, Denver, Colorado 80202. In addition, a paper and CD copy of the Final EIS are available for review at each of the following locations:

Rosebud County Library, 201 North 9th Avenue, Forsyth, MT 59327, Between the hours of 11:00 a.m. and 7:00 p.m. Monday through Thursday; 11:00 a.m. to 5:00 p.m. Friday; 10:00 a.m. to 1:00 p.m. Saturday (Closed Sunday).

Montana DEQ Headquarters (Lee Metcalf Building), 1520 East 6th Avenue, Helena, MT 59620, Between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday (Closed Saturday and Sunday).

BLM Miles City Field Office, 111 Garryowen Road, Miles City, MT 59301, Between the hours of 7:45 a.m. and 4:30 p.m. Monday through Friday (Closed Saturday and Sunday).

BLM State Office, Billings, MT, 5001 Southgate Drive, Billings, MT 59101, Between the hours of 8:00 a.m. and 4:00 p.m. Monday through Friday (Closed Saturday and Sunday).

FOR FURTHER INFORMATION CONTACT: Logan Sholar, OSMRE Project Coordinator; Telephone: 303–293–5036; Address: 1999 Broadway Street, Suite 3320, Denver, Colorado 80202–3050; email: *lsholar@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Project Purpose

The purpose of the Project is to consider continued operations at the Rosebud Mine by permitting and developing a new surface mine permit area, known as permit Area F. Western Energy submitted a permit application package to DEQ for the proposed 6,746-acre permit Area F (also referred to as the project area) at the Rosebud Mine, which is an existing 25,455-acre surface coal mine annually producing 8.0 to 10.25 million tons of low-sulfur subbituminous coal. DEQ is the regulatory authority for permitting actions involving federal coal in Montana. 30 CFR 926.10. If DEQ approves the permit and a Federal mining plan for the Project is approved as proposed, at the current rate of production, the operational life of the Rosebud Mine would be extended by 8 years. Mining operations in the project area, which would commence after all permits and approvals have been secured and a reclamation and performance bond has been posted, would last 19 years. Western Energy estimates that 70.8 million tons of recoverable coal reserves exist in the project area and would be removed during the 19-year operations period. As with other permit areas of the Rosebud Mine, all coal would be combusted locally at the Colstrip and Rosebud Power Plants.

Western Energy is required to obtain a surface coal mine operating permit from DEQ (pursuant to the Montana Strip and Underground Mine Reclamation Act (MSUMRA), Section 82–4–221 *et seq.,* Montana Code Annotated) and federal approval of the mining plan to mine leased federal coal in accordance with the Mineral Leasing Act of 1920 as Amended for the proposed project area to access additional coal reserves in Federal coal lease M82186 and in privately held leases G–002 and G–002–A.The OSMRE's purpose for the Project is to review the mining plan and make a recommendation to the Assistant Secretary for Land and Minerals Management (ASLM) in the form of a mining plan decision document to approve, disapprove, or approve with conditions, the proposed mining plan for the Project (30 CFR 746) . The ASLM will decide whether the mining plan is approved, disapproved, or approved with conditions.

The DEQ's purpose for the Project is to review and make a decision on Western Energy's surface mine operating permit application under MSUMRA and to review and make decisions on the following related permits: (1) An application for a new Montana Pollutant Discharge Elimination System (MPDES) permit, and (2) an application to modify Montana Air Quality Permit #1570*07 to include the project area. The Bureau of Land Management (BLM) is a cooperating agency on the Final EIS.

The Final EIS considers three alternatives and evaluates the direct, indirect, and cumulative effects of the Proposed Action and the other two alternatives on the environment.

OSMRE is complying with Section 106 of the National Historic Preservation Act (NHPA Section 106) (16 U.S.C. 470f), as provided in 36 CFR 800.2(d)(3), concurrently with the NEPA process, including public involvement requirements and consultation with the State Historic Preservation Officer and Historic Preservation Officers with Tribal nations. Native American Tribal consultations are ongoing and have been conducted in accordance with applicable laws, regulations, and U.S. Department of the Interior (DOI) policy. Federal, Tribal, State, and local agencies, along with other stakeholders that may be interested in or affected by the Federal agencies' decisions on the Project, are invited to submit comments on the Final EIS.

As part of its consideration of the proposed Project's impacts on threatened and endangered species, OSMRE conducted informal consultation as well as streamlined consultation per the final 4(d) rule for the northern long-eared bat with the U.S. Fish and Wildlife Service pursuant to Section 7 of the Endangered Species Act (ESA) (16 U.S.C. 1536), and its implementing regulations, as provided in 50 CFR 400. The Section 7 consultation considered direct and indirect impacts from the proposed Project, including mining and related operations in the project area and continued operation of the Colstrip and Rosebud Power Plants.

In addition to compliance with NEPA, NHPA Section 106, and ESA Section 7, all Federal actions will be in compliance with applicable requirements of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1021–1328), the Clean Water Act (33 U.S.C. 1251–1387), the Clean Air Act (42 U.S.C. 7401–7671q), and Executive Orders relating to environmental justice, tribal consultation, and other applicable laws and regulations.

II. Background on the Rosebud Mine

Coal has been mined at Colstrip, MT for more than 90 years. The Norther Pacific Railway established the city of Colstrip and its associated mine in the 1920s to access coal from the Fort Union Formation. Coal mining began in 1924, providing fuel for the railway's steam locomotive trains. During the initial 34 years of mining, 44 million tons of coal were mined. By 1958, diesel-powered locomotives replaced steam engines and mining ceased in the Colstrip area.

In 1959, the Montana Power Company purchased rights to the Rosebud Mine in the city of Colstrip with plans to build power generation facilities. The Rosebud Mine operation began production in 1968. In 2001, Westmoreland purchased the Rosebud Mine; its subsidiary, Western Energy, continues to operate the mine today. Although the Rosebud Mine has shipped coal by rail as recently as 2010, all coal currently produced by the mine is consumed locally at the Colstrip and Rosebud Power Plants.

III. Background on the Western Energy Proposed Permit Area F

Western Energy proposes to conduct surface coal mining and reclamation operations within the 6,746-acre proposed permit Area F of the Rosebud Mine. The project area would be adjacent to the western boundary of Area C, 12 miles west of Colstrip. Western Energy proposes to conduct surface coal mining operations on an approximately 2,159-acre portion of the project area, with a total disturbance footprint, including soil storage, scoria pits, and haul roads, of approximately 4,260 acres. The project area would, in conjunction with the mining of any reserves remaining within existing permit areas A, B, and C of the Rosebud Mine, supply low-sulfur coal to the Colstrip Power Plant (Units 3 and 4) at a rate of between 7.7 and 9.95 million tons annually. In addition, coal from the Rosebud Mine with higher sulfur content would be supplied to the Rosebud Power Plant at a rate of approximately 300,000 tons annually.

Approval of the proposed permit Area F is expected to require several other agency actions, including:

- Findings and recommendations by BLM with respect to Western Energy's Resource Recovery and Protection Plan and other requirements of Western Energy's lease.
- Approval by DEQ of Western Energy's Montana Air Quality Permit #1570–07 to allow expansion of the geographic extent of the mine to include the proposed permit Area F; and
- Approval by DEQ of a new MPDES permit.

IV. Alternatives

Alternatives carried forward in the Final EIS include the No Action Alternative (Alternative 1), the Proposed Action Alternative (Alternative 2), and the Proposed Action Plus Additional Environmental Protection Measures Alternative (Alternative 3). Several other alternatives were considered but dismissed from further consideration.

V. Revisions to the Draft EIS

In accordance with the CEQ's regulations for implementing NEPA and the DOI's NEPA regulations, OSMRE solicited public comments on the Draft EIS. OSMRE responses to comments are included in Appendix F of the FEIS. The agencies considered comments received from the public on the Draft EIS and incorporated them, as appropriate, into the FEIS. The changes between the Draft EIS and Final EIS are a result of responding to comments received during the public comment period and generally consist of revisions to the text to clarify the analysis of resource-specific potential impacts under each alternative. No new analyses were completed and no new or additional data were used to support the existing analyses.

In addition, the FEIS includes updates based on evolving regulatory guidance and completion of the NHPA Section 106 and ESA Section 7 consultation processes.

Authority: 40 CFR 1506.6, 40 CFR 1506.1

Dated: November 16, 2018.

David Berry,

Regional Director, Western Region.

[FR Doc. 2018–26042 Filed 11–29–18; 8:45 am]

BILLING CODE 4310–05–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–602 and 731–TA–1412 (Final)]

Steel Wheels From China; Scheduling of the Final Phase of Countervailing Duty and Antidumping Duty Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of antidumping and countervailing duty investigation Nos. 701–TA–602 and 731–TA–1412 (Final) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of steel wheels from China, provided for in subheadings 8708.70.45, 8708.70.60, and 8716.90.50 of the Harmonized Tariff Schedule of the United States, preliminarily determined by the Department of Commerce (''Commerce'') to be subsidized and sold at less-than-fair-value.

DATES: October 23, 2018.

FOR FURTHER INFORMATION CONTACT: Jordan Harriman (202–205–2610), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Scope.— For purposes of these investigations, Commerce has defined the subject merchandise as ''. . .certain on-the-road steel wheels, discs, and rims for tubeless tires, with a nominal rim diameter of 22.5 inches and 24.5 inches, regardless of width. Certain on-the-road steel wheels with a nominal wheel diameter of 22.5 inches and 24.5 inches are generally for Class 6, 7, and 8 commercial vehicles (as classified by the Federal Highway Administration

Gross Vehicle Weight Rating system), including tractors, semitrailers, dump trucks, garbage trucks, concrete mixers, and buses, and are the current standard wheel diameters for such applications. The standard widths of certain on-the-road steel wheels are 7.5 inches, 8.25 inches, and 9.0 inches, but all certain on-the-road steel wheels, regardless of width, are covered by the scope. While 22.5 inches and 24.5 inches are standard wheel sizes used by Class 6, 7, and 8 commercial vehicles, the scope covers sizes that may be adopted in the future for Class 6, 7, and 8 commercial vehicles. The scope includes certain on-the-road steel wheels with either a ''hub-piloted'' or ''stud-piloted'' mounting configuration, and includes rims and discs for such wheels, whether imported as an assembly or separately. The scope includes certain on-the-road steel wheels, discs, and rims, of carbon and/or alloy steel composition, whether cladded or not cladded, whether finished or not finished, and whether coated or uncoated. All on-the-road wheels sold in the United States are subject to the requirements of the National Highway Traffic Safety Administration and bear markings, such as the ''DOT'' symbol, indicating compliance with applicable motor vehicle standards. See 49 CFR 571.120. The scope includes certain on-the-road steel wheels imported with or without the required markings. Certain on-the-road steel wheels imported as an assembly with a tire mounted on the wheel and/or with a valve stem attached are included. However, if the certain on-the-road steel wheel is imported as an assembly with a tire mounted on the wheel and/or with a valve stem attached, the certain on-the-road steel wheel is covered by the scope, but the tire and/or valve stem is not covered by the scope. Excluded from the scope are: (1) Steel wheels for tube-type tires that require a removable side ring; (2) aluminum wheels; (3) wheels where steel represents less than fifty percent of the product by weight; and (4) steel wheels that do not meet National Highway Traffic Safety Administration requirements, other than the rim marking requirements found in 49 CFR 571.120S5.2.''

Background.—The final phase of these investigations is being scheduled pursuant to sections 705(b) and 731(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b) and 1673d(b)), as a result of affirmative preliminary determinations by the Commerce that certain benefits which constitute subsidies within the meaning of section 703 of the Act (19 U.S.C. 1671b) are being provided to manufacturers, producers, or exporters in China of steel wheels, and that such products are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. 1673b). The investigations were requested in petitions filed on March 27, 2018, by Accuride Corporation, Evansville, Indiana, and Maxion Wheels Akron LLC, Akron, Ohio.

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Participation in the investigations and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on December 21, 2018, and a public version will be issued thereafter, pursuant to section 207.22 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on Tuesday, January 8, 2019, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before January 3, 2019. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should participate in a prehearing conference to be held on January 7, 2019, at the U.S. International Trade Commission Building, if deemed necessary. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.23 of the Commission's rules; the deadline for filing is January 2, 2019. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.25 of the Commission's rules. The deadline for filing posthearing briefs is January 15, 2019. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before January 15, 2019. On January 31, 2019, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before February 4, 2019, but such final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on E-Filing,* available on the

Commission's website at *https://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing.

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (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.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

By order of the Commission.

Issued: November 26, 2018.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2018–26011 Filed 11–29–18; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–556 and 731–TA–1311 (Final) (Remand)]

Truck and Bus Tires 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 procedures it intends to follow to comply with the court-ordered remand of its final determinations in the antidumping and countervailing duty investigations of truck and bus tires (''TBTs'') 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, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207).

DATES: November 26, 2018.

FOR FURTHER INFORMATION CONTACT: Nate Comly (202–205–3174), 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 Nos. 701–TA–482–484 and 731–TA–1191–1194 (Final) may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—In March 2017, the Commission determined that an industry in the United States was not materially injured or threatened with material injury by reason of imports of TBTs from China that were sold in the United States at less than fair value and that were subsidized by the Government of China. *Truck and Bus Tires from China,* Inv. Nos. 701–TA–556 and 731–TA–1311 (Final), USITC Pub. 4673 (March 2017). Petitioner contested the Commission's determinations before the U.S. Court of International Trade (''CIT''). The CIT sustained certain challenged aspects of the Commission's negative determinations, but remanded for reconsideration of the Commission's analysis of price effects and likely prices effects, and of the nature of the countervailable subsidies for purposes of the threat of material injury analysis. *United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Int'l Union* v. *United States,* Slip Op. 18–151 (Ct. Int'l Trade, Nov. 1, 2018).

Participation in the remand proceedings.—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 file any additional appearances 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 investigations. 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 December 11, 2018. Comments must be limited to no more than ten (10) double-spaced and single-sided pages of textual material.

Parties are advised to consult 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 with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on E-Filing,* available on the Commission's website at *https://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing.

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, 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: November 26, 2018.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2018–26020 Filed 11–29–18; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–NEW]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Forensic Firearm Training Request for Non-ATF Employees—ATF Form 7110.15

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: The proposed information collection was previously published in the **Federal Register**, on September 21, 2018, allowing for a 60-day comment period. Comments are encouraged and will be accepted for an additional 30 days until December 31, 2018.

FOR FURTHER INFORMATION CONTACT: If you have additional comments, particularly with respect to the estimated public burden or associated response time, have suggestions, need a copy of the proposed information collection instrument with instructions, or desire any other additional information, please contact: Sheila Hopkins, National Laboratory Center either by mail at 6000 Ammendale Road, Ammendale, MD 20705, by email at *Sheila.hopkins@atf.gov,* or by telephone at 202–648–6061. Written comments and/or suggestions can also be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to *OIRA_submissions@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* New Collection.

(2) *The Title of the Form/Collection:* Forensic Firearm Training Request for Non-ATF Employees.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: ATF Form 7110.15.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Federal Government.

Other: State, Local, or Tribal Government.

Abstract: The Forensic Firearm Training Request for Non-ATF Employees (ATF F 7110.15) will be used to obtain information from Federal, State and local, and international law enforcement personnel to register, obtain course information, and/or evaluate ATF forensic firearms investigative techniques training. The information collected on the form will assist ATF to determine the applicant's eligibility to attend this training.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 75 respondents will utilize the form associated with this information collection (IC), and it will take each respondent approximately 6 minutes to complete the form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 7.5 hours, which is equal to 75 (# of respondents) * 1 (# of responses per respondents) * .1 (6 minutes).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: November 26, 2018.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2018–25988 Filed 11–29–18; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 2018–27]

Steve Fanto, M.D.; Decision and Order

On April 4, 2018, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause to Steve Fanto, M.D. (hereinafter, Respondent), of Scottsdale, Arizona. Order to Show Cause (hereinafter, OSC), at 1. The OSC proposes the revocation of Respondent's Certificate of Registration (hereinafter, COR) on the ground that he is without authority to handle controlled substances in Arizona, the State in which he is registered with the DEA. *Id.* The OSC cites the operative statutory provisions that spell out the requirements for registration upon which the DEA alleges that Respondent is deficient, and the DEA's alleged authority to revoke his registration. 21 U.S.C. 823(f) and 824(a)(3). *Id.* at 1–2.

Jurisdiction

This Agency has jurisdiction to decide this case based upon the OSC allegation that Respondent holds a DEA Certificate of Registration (No. BF3649312) at the registered address of 7320 Deer Valley Road, J100, Scottsdale, Arizona 85255. *Id.* at 1. That registration authorizes Respondent, as a practitioner, to dispense controlled substances in schedules II through V. Although Respondent's COR reflects an expiration date of September 30, 2017, the OSC alleges that Respondent's COR is current by virtue of his having submitted a timely application for renewal of this COR on September 21, 2017. *Id.*

Substantive Ground for Revocation of COR Alleged in OSC

The substantive ground for the proceeding, as alleged in the OSC, is that Respondent is ''prohibited from practicing medicine in the state in which . . . [he is] registered with the DEA.'' *Id.* at 2. Specifically, the OSC alleges that, according to Arizona Medical Board (hereinafter, AMB) records, Respondent ''engaged in medical practices (including the prescribing of controlled substances) that constitute[ ] 'significant deviations from the standard of care.' '' *Id.* at 1, quoting AMB Interim Consent Agreement for Practice Restriction (hereinafter, Interim Consent Agreement) (ellipse omitted). As a result, according to the OSC, Respondent entered into an Interim Consent Agreement whereby he is ''prohibited from engaging in the practice of medicine in the State of Arizona'' until he applies to the AMB and receives permission to do so. *Id.* at 1–2. Registrant signed the Interim Consent Agreement on July 11, 2017. *Id.* at 1. The OSC states that since Respondent is not licensed to dispense controlled substances in Arizona, his DEA COR must be revoked pursuant to 21 U.S.C. 823(f) and 824(a)(3). *Id.* at 2.

The OSC notified Respondent of his right to request a hearing on the allegations or to submit a written statement if he chooses to waive his right to a hearing. *Id.* at 2. The OSC explained the procedures for electing each option, the consequences for failing to elect one of those options, and the regulations that govern the rules for responding to the OSC (21 CFR 1301.43). *Id.* at 2. The OSC also notified Respondent of the opportunity to submit a corrective action plan, the specific procedures for filing a corrective action plan, and the statutory provision that governs such a plan. *Id.* at 2–3 (citing 21 U.S.C. 824(c)(2)(C)).

Adequacy of Service

In his April 30, 2018, Request for Extension/Hearing, Respondent acknowledged receipt of the OSC ''on or after April 4, 2018.'' [1] Request for Extension/Hearing, at 1. Since the OSC was issued on April 4, 2018 and Respondent admitted receiving the OSC ''on or after April 4, 2018,'' I find that the Government's service of the OSC was legally sufficient and that Respondent's request for a hearing was timely. OSC, at 1; Request for Extension/Hearing, at 1.

Respondent's Request for Extension of Time

Respondent argued in his Request for Extension/Hearing that he should be allowed an extension of time to request a hearing ''pending the resolution of . . . [AMB] actions regarding his Arizona medical license.'' Request for Extension/Hearing, at 1. The gravamen of his argument is that an extension should be allowed, because if Respondent is successful before the AMB, his medical license will be returned to him. *Id.* The request for extension asked in the alternative for a hearing if the request for extension of time is not granted.

CALJ Denial of Request for Extension of Time

The Office of Administrative Law Judges put the matter on the docket and assigned it to the Chief Administrative Law Judge, John J. Mulrooney, II (hereinafter, CALJ). On May 4, 2018, the CALJ denied the request for an extension of time, stating that ''[a]n extension of time that has the potential to exist in perpetuity, at least on the present record, will not serve the interests of justice.'' Order Denying the Respondent's Request for Extension and Directing the Filing of Government Evidence of Lack of State Authority Allegation and Briefing Schedule dated May 4, 2018 (hereinafter, Order Denying Extension), at 2. In the Order Denying Extension, the CALJ ordered the DEA to file evidence in support of its allegation that Respondent lacks State authority to handle controlled substances. *Id.* The CALJ further established a briefing schedule for any Government motion for summary disposition based upon its allegation that Respondent lacks State authority to handle controlled substances. *Id.*

Government Motion for Summary Disposition

On May 16, 2018, the Government filed a motion for summary disposition. The motion by the Government alleged, in pertinent part, that Respondent lacks authority to handle controlled substances in Arizona and, therefore, pursuant to 21 U.S.C. 823(f) and 824(a)(3), Respondent's DEA COR should be revoked. Government's Motion for Summary Disposition and Argument in Support of Finding that Respondent Lacks State Authorization to Handle Controlled Substances (hereinafter, Summary Disposition Motion), at 4.

Respondent's Motion for Extension of Time To File Response

By motion dated May 25, 2018, Respondent requested an extension of time until December 3, 2018 to respond to the Government's motion for summary disposition. The essence of Respondent's argument was that the AMB ''is expected to have acted on and reinstated . . . [Respondent's] authority to practice medicine by such date. Motion for Extension of Time to File Response to Government's Motion for Summary Disposition and Argument in Support of Finding that Respondent Lacks State Authorization to Handle Controlled Substances and Response to Government's Motion for Summary Disposition, at 1 (hereinafter, Respondent's Motion). Respondent alleged that he entered into the Interim Consent Agreement with the AMB, wherein he agreed to be prohibited from engaging in the practice of medicine in the State of Arizona until he applies to the Board and receives permission to do so, ''based on coercive assertions'' by the AMB at a time when he was unrepresented by counsel. *Id.* at 2.

CALJ Order Denying Respondent's Request for an Extension and Granting the Government's Motion for Summary Disposition

On May 31, 2018, the CALJ issued an Order (hereinafter, R.D.) denying Respondent's request for an extension and granting the Government's motion for summary disposition.

Findings of Fact

Respondent's DEA Registration

Respondent is the holder of DEA Certificate of Registration No. BF3649312, pursuant to which he is authorized to dispense controlled substances in schedules II through V as a practitioner, at the registered address of 7320 Deer Valley Road, J100, Scottsdale, Arizona 85255. Summary Disposition Motion, Attachment 1, at 1.

The Status of Respondent's State License

The AMB and Respondent entered into an Interim Consent Agreement. Summary Disposition Motion, Attachment 2. The effective date of the Interim Consent Agreement is July 12, 2017. *Id.* at 7, 10. According to its terms, Respondent ''elect[ed] to permanently waive any right to a hearing and appeal with respect to this Interim Consent Agreement for Practice Restriction'' and is ''prohibited from engaging in the practice of medicine in the State of Arizona . . . until he applies to the . . .

[1] Respondent's April 30, 2018, Request for Extension/Hearing is stamped ''received'' by the Office of Administrative Law Judges on May 1, 2018.

[AMB] and receives permission to do [so].'' *Id.* at 1, 7.

On May 8, 2018, a DEA Diversion Investigator (hereinafter, DI) contacted an AMB Investigator who informed the DI that Respondent's medical license remains under practice restriction. Summary Disposition Motion, Attachment 4, at 2. The DI averred that ''the result of DEA's investigation has shown that . . . [Respondent] remains currently prohibited from practicing medicine in the State of Arizona.'' *Id.* at 3.

There is no evidence in the record that the AMB lifted the Practice Restriction on Respondent's medical license. Further, according to the online records of the State of Arizona, of which I take official notice, I find that the Interim Consent Agreement is still in effect today.[2] Arizona Medical Board Licensee Search, *https://www.azmd.gov* (last visited November 19, 2018).

Accordingly, based on all of the evidence in the record before me, I find that Respondent currently is without authority to practice medicine in Arizona, the State in which he is registered.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the Controlled Substances Act (hereinafter, CSA), ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the State in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 Fed. Appx. 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess State authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the State in which he practices. *See, e.g., Hooper, supra,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Blanton, supra,* 43 FR at 27,617.

Section 32–1401(22) of the Arizona Revised Statutes, cited in the ''Interim Consent Agreement for Practice Restriction,'' in pertinent part, defines the ''practice of medicine'' as the diagnosis or treatment of any and all human diseases, injuries, ailments, infirmities, or deformities, whether they be physical or mental, ''by any means, methods, devices or instrumentalities.'' Ariz. Rev. Stat. Ann. § 32–1401(22) (Westlaw, current through the First Special and Second Regular Session of the Fifty-Third Legislature (2018)). ''Medicine'' means ''allopathic medicine as practiced by the recipient of a degree of doctor of medicine.'' Ariz. Rev. Stat. Ann. § 32–1401(19) (Westlaw, current through the First Special and Second Regular Session of the Fifty-Third Legislature (2018)). Under Arizona law, a ''doctor of medicine'' is a ''natural person holding a license, registration or permit to practice medicine pursuant to this chapter.'' Ariz. Rev. Stat. Ann. § 32–1401(10) (Westlaw, current through the First Special and Second Regular Session of the Fifty-Third Legislature (2018)). *See also* Ariz. Rev. Stat. Ann. § 32–1401(21) (Westlaw, current through the First Special and Second Regular Session of the Fifty-Third Legislature (2018)) (A physician is a ''doctor of medicine who is licensed pursuant to this chapter.''). Further, a physician who ''wishes to dispense a controlled substance . . . shall be currently licensed to practice medicine in Arizona.'' Ariz. Admin. Code § R4–16–301 (Westlaw, current through rules published in Arizona Administrative Register Volume 24, Issue 43, Oct. 26, 2018). ''Dispense,'' under Arizona law, means ''the delivery by a doctor of medicine of a prescription drug or device to a patient . . . and includes the prescribing, administering, packaging, labeling and security necessary to prepare and safeguard the drug or device for delivery.'' Ariz. Rev. Stat. Ann. § 32–1401(9) (Westlaw, current through the First Special and Second Regular Session of the Fifty-Third Legislature (2018)).

As already discussed, the AMB and Respondent entered into an ''Interim Consent Agreement for Practice Restriction.'' ''Restrict,'' in the context of this Interim Consent Agreement, means ''taking a disciplinary action that alters the physician's practice or professional activities if the board determines that there is evidence that the physician is or may be medically incompetent or guilty of unprofessional conduct.'' Ariz. Rev. Stat. Ann. § 32–1401(23) (Westlaw, current through the First Special and Second Regular Session of the Fifty-Third Legislature (2018)).

The conclusory language in Respondent's Motion that he imprudently entered into the Interim Consent Agreement based upon coercive assertions by the AMB at a time when he was unrepresented by counsel was not accompanied by specific facts indicating what was said that Respondent considered coercive. The legitimacy of the claim is undermined by the notable fact that Respondent did not submit any documentation indicating an effort by Respondent to bring the validity of the Interim Consent Agreement before the AMB, which, initially, would be the proper forum in which to raise that issue. Regardless, as pointed out by the CALJ citing long-standing Agency precedent, the controlling question is not the merits of Respondent's claim before the AMB, but rather, whether Respondent is currently authorized to handle controlled substances in the State of registration. R.D., at 3. In that regard, I adopt the following portion of the R.D. and agree with the CALJ's denial of Respondent's request for an extension of time/stay of proceedings. R.D., at 4.

[2] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Respondent may dispute my finding by filing a properly supported motion for reconsideration within 20 calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government; in the event Respondent files a motion, the Government shall have 20 calendar days to file a response.

Where a registrant has lost state authority to handle controlled substances, the Agency has repeatedly taken the position that ''revocation is warranted even where a practitioner's state authority has been summarily suspended and the State has yet to provide the practitioner with a hearing to challenge the State's action and at which he . . . may ultimately prevail.'' *Kamal Tiwari, M.D.,* 76 FR 71604, 71606 (2011) (citations omitted); *see also Anne Lazar Thorn, M.D.,* 62 FR 12847, 12848 (1997) (''[T]he controlling question is not whether a practitioner's license to practice medicine in the state is suspended or revoked; rather, it is whether the Respondent is currently authorized to handle controlled substances in the [state of registration].''). Even when the Respondent is actively engaged in appealing a state decision, the Agency has noted that ''[i]t is not DEA's policy to stay [administrative] proceedings . . . while registrants litigate in other forums.'' *Newcare Home Health Servs.,* 72 FR 42126, 42127 n.2 (2007). Agency precedent has consistently affirmed recommended decisions where a respondent's request for a stay due to state medical board proceedings were denied by the Administrative Law Judge. *See, e.g., Irwin August, D.O.,* 81 FR 3158, 3159 (2016); *Pedro E. Lopez, M.D.,* 80 FR 46324, 46325–26 (2015). The Agency has stated in recent final orders that a stay in administrative enforcement proceedings is ''unlikely to ever be justified'' due to ancillary proceedings involving the Respondent. *Grider Drug #1 & Grider Drug #2,* 77 FR 44070, 44104 n.97 (2012).

Even if the Agency's precedent were not fixed firmly against the granting of such a delay in principle, the Respondent here is unable to point to a reliably fixed date where state proceedings would reasonably be concluded. The Respondent's Motion includes a Declaration from the Respondent's counsel (Respondent's Board Counsel) in his Arizona Board proceedings. . . . [Respondent's Motion,] Attachment 1. In the Respondent's Board Counsel's declaration, the decisional timeframe is couched in the following tenuous terms:

As for when the [Arizona Board] *might* take action, *my best guess* is that it will be at its August 20, 2018 meeting, although *I would not be surprised* if [the Respondent's] matter is not heard until the October 22 meeting, which is the next regularly scheduled meeting of the [Arizona Board].

Id. at 2–3 (emphasis supplied). The Respondent's Board Counsel further explained that the state process involves the actions and recommendations of an internal committee, and avers that he and the Respondent ''are *hopeful* that [the internal committee] will make those recommendations and share them with us *in the not-too-distant future* and if that occurs then the matter *should be* heard at the August 20 meeting.'' *Id.* at 3 (emphasis supplied). While the candor of the Respondent's Board Counsel is commendable, the language strikes as too aspirational and amorphous to be particularly supportive of the delay sought by the Respondent here—even if the Agency's precedent were not squarely opposed to the relief—which it is.

R.D., at 3–4.

It is undisputed that Respondent is not currently authorized to practice medicine in Arizona due to the Interim Consent Agreement. Thus, according to Arizona law, Respondent does not have authority to handle controlled substances in Arizona, the State in which he is registered with the DEA. As already discussed, the practice restriction on Respondent's medical license is currently in effect. DEA has ''long and consistently interpreted the CSA as mandating the possession of authority under state law to handle controlled substances as a fundamental condition for obtaining and maintaining a registration.'' *Hooper, supra,* 76 FR at 71,371. That is the controlling question. *Thorn, supra,* 62 FR at 12,848. The CSA has consistently been interpreted to mean that ''DEA does not have statutory authority . . . to maintain a registration if the registrant is without state authority to handle controlled substances in the state in which he practices.'' *Yeates, supra,* 71 FR at 39,131. As succinctly explained by the CALJ, ''The DEA has long held that possession of authority under state law to dispense controlled substances is not only a prerequisite to obtaining a DEA registration, but also an essential condition for maintaining it.'' R.D., at 5 (citations omitted). I agree with the CALJ's conclusion that ''as a matter of law, a DEA registration may not be granted or maintained where an applicant/registrant no longer falls within the CSA's definition of a practitioner.'' *Id.* Very simply, since Respondent is not authorized to handle controlled substances in Arizona, he is not eligible for a DEA registration. As such, I will order that Respondent's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority thus vested in me by 21 U.S.C. 824(a), I order that DEA Certificate of Registration No. BF3649312 issued to Steve Fanto, M.D., be, and it hereby is, revoked. Pursuant to 28 CFR 0.100(b) and the authority thus vested in me by 21 U.S.C. 823(f), I further order that any pending application of Steve Fanto, M.D., to renew or modify this registration, as well as any other pending application by him for registration in the State of Arizona, be, and it hereby is, denied. This order is effective December 31, 2018.

Dated: November 19, 2018.

Uttam Dhillon,

Acting Administrator.

[FR Doc. 2018–26046 Filed 11–29–18; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 18–32]

Narciso A. Reyes, M.D.; Decision and Order

On April 19, 2018, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause to Narciso A. Reyes, M.D. (hereinafter, Respondent), of Luquillo, Puerto Rico. Order to Show Cause (hereinafter, OSC), at 1. The Show Cause Order proposes the revocation of Respondent's DEA Certificate of Registration on the grounds that he materially falsified applications he submitted to DEA and that he has been excluded from participation in a program pursuant to 42 U.S.C. 1320a–7(a). *Id.* (citing 21 U.S.C. 824(a)(1) and (5)). It also proposes the denial of ''any applications for renewal or modification of such registration and any applications for any other DEA registration.'' OSC, at 1 (citing 21 U.S.C. 824(a)(1) and (5)).

Regarding jurisdiction, the Show Cause Order alleges that Respondent holds DEA Certificate of Registration No. FR4900305 at the registered address of Calle Fernandez Garcia 306, Luquillo, Puerto Rico 00773, with a mailing address of P.O. Box 247, Luquillo, PR 00773. OSC, at 2. This registration, the OSC alleges, authorizes Respondent to dispense controlled substances in schedules II through V as a practitioner. *Id.* The Show Cause Order alleges that this registration expires on April 30, 2020. *Id.*

Regarding the substantive grounds for the proceeding, the Show Cause Order alleges that, on October 20, 2009, the U.S. Department of Health and Human Services, Office of Inspector General (hereinafter, HHS/OIG), mandatorily excluded Respondent from participating in all Federal health care programs due to his conviction in U.S. District Court for conspiracy to commit health care fraud. *Id.* at 2 (citing 42 U.S.C. 1320a–7(a)(1)). According to the OSC, Respondent's ''mandatory exclusion from Medicare, Medicaid and all Federal health care programs warrants revocation of . . . [his] registration.'' OSC, at 2 (citing 21 U.S.C. 824(a)(5)).

The Show Cause Order further alleges that Respondent provided false answers to two ''yes'' or ''no'' liability questions when he applied for a DEA registration on October 16, 2014 and when he filed a renewal application on April 17, 2017. OSC, at 2–3. Specifically, the Show

Cause Order alleges that Respondent twice answered that he had never been excluded from participation in a Medicare or state health care program when, in fact, he had been. *Id.* at 2–3. The Show Cause Order also alleges that Respondent twice answered that he had never surrendered (for cause) a Federal controlled substance registration when, in fact, he had. *Id.* at 3. According to the OSC, Respondent's answers to these liability questions are ''material falsifications'' that warrant revocation of his registration. *Id.*

The Show Cause Order notifies Respondent of his right to request a hearing on the allegations or to submit a written statement while waiving his right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 3–4 (citing 21 CFR 1301.43). The Show Cause Order also notifies Respondent of the opportunity to submit a corrective action plan. OSC, at 4–5 (citing 21 U.S.C. 824(c)(2)(C)).

Respondent timely requested a hearing on May 21, 2018.[1] Hearing Request, at 1. In his Hearing Request, Respondent states that, ''It was not my intention to fail to declare a material fact in the request for renewal . . . . I do not master the English language well and this may have contributed to these errors.'' *Id.* He also states in his Hearing Request that, ''My inclusion of the word N in the renewal request was in my estimate to indicate that it did not apply since I had reached an agreement with the US Attorney's Office in Puerto Rico. Clearly my mistake.'' *Id.*

The Office of Administrative Law Judges (hereinafter, OALJ) put the matter on the docket and assigned it to Administrative Law Judge Charles Wm. Dorman (hereinafter, ALJ). I adopt the following statement of procedural history from the ALJ's Order Granting the Government's Motion for Summary Disposition and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision dated June 22, 2018 (hereinafter, R.D.).

On May 31, 2018, the Government filed a Motion for Summary Disposition (''Government's Motion''). The Government's Motion argued that there is no issue of material fact in this case to warrant an adversarial hearing. The Government's Motion further requested that I summarily dispose of this matter without a hearing and recommend to the Acting Administrator that . . . [Respondent's] DEA registration be revoked. On the same day, I issued an Order affording . . . [Respondent] the opportunity to respond to the Government's Motion by June 14, 2018. I explained that if . . . [Respondent] disagreed with any of the Government's statements of undisputed material facts as outlined in its motion for summary disposition, he should provide copies of documentary evidence refuting the Government's statement(s). I further directed . . . [Respondent] to identify the material fact(s) which justify an evidentiary hearing in this case. . . . [Respondent] failed to respond to the Government's Motion by the deadline on June 14, 2018.

On June 15, 2018, the day after . . . [Respondent's] Response was due, chambers staff emailed . . . [Respondent's] counsel notifying him that the OALJ had not received a response from him and asking whether he intended to submit a late filing. . . . [Respondent's] counsel replied by email on June 17, 2018, with the following statement: ''There are no allegations on behalf of . . . [Respondent]. The documents are self [e]xplanatory.''

Then, on June 21, 2018, the OALJ received a filing from . . . [Respondent's] counsel titled ''Statement of Narciso A. Reyes, M.D.'' The filing states that . . . [Respondent] ''will not make any statement regarding this administrative action'' and that ''[t]he issue is hereby submitted for final ruling.''

R.D., at 2–3, 7.

The ALJ correctly concluded that Respondent's choice not to refute, challenge, or even address any of the Government's reliable and probative evidence and legal arguments ''strongly indicates that he no longer wishes to proceed to hearing.'' *Id.* at 10. After analyzing the Government's evidence and legal argument, the ALJ granted the Government's Motion for Summary Disposition and recommended that I revoke Respondent's registration and deny any pending applications for renewal or modification. *Id.* at 10, 18.

By letter dated July 16, 2018, the ALJ certified and transmitted the record to me for final Agency action. In that letter, the ALJ advised that neither party filed exceptions and that the time period to do so had expired.

I issue this Decision and Order based on the entire record before me. 21 CFR 1301.43(e). I make the following findings of fact.

Findings of Fact

Respondent's Criminal Conviction and Ensuing Mandatory Exclusion

On November 3, 2008, Respondent pled guilty in Federal District Court to one count of conspiracy to commit health care fraud. Government's Motion, GE–2 (Plea Agreement, *United States* v. *Reyes Carrillo*, No. 08–cr–168 (D. P.R. Nov. 3, 2008)), at 1. According to the facts submitted by the Assistant United States Attorney and explicitly adopted by Respondent, Respondent signed blank or previously completed false Certificates of Medical Necessity for durable medical equipment for Medicare beneficiaries whom he had never seen. *Id.* at 9. The Federal District Judge entered judgment against Respondent on March 13, 2009. Government's Motion, GE–3 (Judgment, *United States* v. *Reyes Carrillo*, No. 08–cr–168–03 (D. P.R. March 13, 2009)), at 1.

Based on Respondent's conviction for conspiracy to commit health care fraud, the HHS/OIG notified Respondent of his mandatory exclusion from participation in any capacity in Medicare, Medicaid, and all Federal health care programs for the minimum statutory period of five years effective October 20, 2009. Government's Motion, GE–4 (HHS/OIG Exclusion Letter), at 1 (citing 42 U.S.C. 1320a–7(a)); Government's Motion, GE–5 (HHS/OIG Exclusions Search Results: Verify), at 1. The HHS/OIG Exclusion Letter advised Respondent that reinstatement of eligibility to participate in these programs is not automatic. Government's Motion, GE–4, at 2. Respondent is still excluded from participation in these programs. Government's Motion, GE–5, at 1.

Respondent's DEA Registration History and Current Registration Status

On January 31, 2013, Respondent voluntarily surrendered for cause DEA registration No. BR3465944. Government's Motion, GE–8 (Respondent's DEA–104 Voluntary Surrender of Controlled Substances Privileges), at 1; Government's Motion, GE–9 (Certification of Registration History), at 1. Neither the DEA–104 nor any other evidence in the record explains the context of this voluntary surrender. DEA retired registration No. BR3465944 on February 4, 2013. Government's Motion, GE–9, at 1.

On October 16, 2014, Respondent submitted an application for a new DEA registration. Government's Motion, GE–10 (Respondent's DEA Form 224 submitted on October 16, 2014), at 1. The application Respondent completed includes ''yes'' or ''no'' liability questions that an applicant must answer to advance to the next page of the online DEA application. Government's Motion, GE–l (Certification of Registration Status), at 2; Government's Motion, GE–10, at 1.

The first liability question that Respondent answered on his online DEA application for a registration asks: ''Has the applicant ever been convicted

[1] Attached to the Government's Notice of Service of Order to Show Cause is a DEA–12 (Receipt for Cash or Other Items) that, according to the Government's allegations, Respondent executed when the Government served the OSC on April 23, 2018. Respondent did challenge the Government's service-related allegations. Thus, I find that Respondent's Hearing Request was timely since it was filed within 30 days of service of the OSC. 21 CFR 1301.43(a).

of a crime in connection with controlled substance(s) under state or federal law, or been excluded or directed to be excluded from participation in a medicare or state health care program, or [is] any such action pending?'' Government's Motion, GE–1, at 2; Government's Motion, GE–10, at 1. Respondent answered ''no'' to this question. Government's Motion, GE–1, at 2; Government's Motion, GE–10, at 1. The HHS/OIG Exclusion letter makes it clear that Respondent knew or should have known that his ''no'' response to this question was false. Government's Motion, GE–4, at 1–2.

The second liability question that Respondent answered on his online DEA application for a registration asks: ''Has the applicant ever surrendered (for cause) or had a federal controlled substance registration revoked, suspended, restricted or denied, or is any such action pending?'' Government's Motion, GE–l, at 2; Government's Motion, GE–10, at 1. Respondent answered ''no'' to this question. Government's Motion, GE–1, at 2; Government's Motion, GE–10, at 1. The DEA–104 Voluntary Surrender of Controlled Substances Privileges form that Respondent signed, however, makes it clear that Respondent knew or should have known that his ''no'' response to this question was false. Government's Motion, GE–8, at 1.

DEA approved Respondent's application and, on October 17, 2014, assigned DEA Certificate of Registration No. FR4900305 to him. Government's Motion, GE–1, at 1.

On April 17, 2017, Respondent submitted an online DEA renewal application for his DEA registration No. FR4900305. Government's Motion, GE–1, at 1; Government's Motion, GE–11 (Respondent's DEA Form 224A submitted on April 17, 2017), at 1. The online DEA renewal application Respondent submitted includes ''yes'' or ''no'' liability questions that an applicant must answer to advance to the next page of the online DEA renewal application. Government's Motion, GE–l, at 1; Government's Motion, GE–11, at 1.

The first liability question that Respondent answered on his online DEA renewal application asks: ''Has the applicant ever been convicted of a crime in connection with controlled substance(s) under state or federal law, or been excluded or directed to be excluded from participation in a medicare or state health care program, or [is] any such action pending?'' Government's Motion, GE–1, at 1; Government's Motion, GE–11, at 1. Respondent answered ''no'' to this question. Government's Motion, GE–1, at 1; Government's Motion, GE–11, at 1. Again, the HHS/OIG Exclusion letter makes it clear that Respondent knew or should have known that his ''no'' response to this question was false. Government's Motion, GE–4, at 1–2.

The second liability question that Respondent answered on his online DEA renewal application asks: ''Has the applicant ever surrendered (for cause) or had a federal controlled substance registration revoked, suspended, restricted or denied, or is any such action pending?'' Government's Motion, GE–l, at 1; Government's Motion, GE–11, at 1. Respondent answered ''no'' to this question. Government's Motion, GE–1, at 1; Government's Motion, GE–11, at 1. Again, the DEA–104 Voluntary Surrender of Controlled Substances Privileges form that Respondent signed makes it clear that Respondent knew or should have known that his ''no'' response to this question was false. Government's Motion, GE–8, at 1.

DEA approved Respondent's renewal application on April 19, 2017. Government's Motion, GE–1, at 1.

In sum, Respondent is currently registered as a practitioner in schedules II through V under DEA Certificate of Registration FR4900305 at Calle Fernandez Garcia 306, Luquillo, Puerto Rico 00773. Government's Motion, GE–1, at 1. Respondent's registration expires on April 30, 2020. *Id.*

Discussion

The Material Falsification Allegation

Pursuant to 21 U.S.C. 824(a)(1), the Attorney General may suspend or revoke a registration issued under section 823 of Title 21, ''upon a finding that the registrant . . . has materially falsified any application filed pursuant to or required by this subchapter.'' According to Agency precedent, the Government must show that a respondent ''knew or should have known'' that his response to a liability question was false. *Samuel S. Jackson, D.D.S.,* 72 FR 23,848, 23,852 (2007). Also according to Agency precedent, a respondent's claim that he misunderstood a liability question is not a defense. *Alvin Darby, M.D.,* 75 FR 26,993, 26,999 (2010).

According to the Supreme Court, Federal courts' ''most common formulation'' of the concept of ''materiality'' is that ''a concealment or misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed.'' *Kungys* v. *United States,* 485 U.S. 759, 770 (1988) (quoting *Weinstock* v. *United States,* 231 F.2d 699, 701–02 (D.C. Cir. 1956) (other citation omitted)). The Court explicitly addressed what has ''never been the test of materiality[—] that the misrepresentation or concealment would *more likely than not* have produced an erroneous decision, or even that it would *more likely than not* have triggered an investigation.'' *Kungys, supra,* 485 U.S. at 771 (emphasis in original). Instead, the Court articulated the specific test as ''whether the misrepresentation or concealment was predictably capable of affecting, *i.e.,* had a natural tendency to affect, the official decision.'' *Id.*

As already discussed, when Respondent submitted an online DEA application for a registration and an online DEA renewal application, he answered ''no'' to whether he had ever been excluded from participation in Medicare and to whether he had ever surrendered a registration for cause. As I already found above, Respondent's four answers were false and he ''knew or should have known'' that they were false.

I next determine the ''materiality'' of Respondent's four answers. 21 U.S.C. 824(a)(1). Concerning Respondent's false statements about his voluntary surrender of DEA registration No. BR3465944, the DEA–104 that Respondent executed does not indicate the underlying reason(s) for Respondent's ''alleged failure to comply with the Federal requirements pertaining to controlled substances.'' Government's Motion, GE–8, at 1. Further, as the ALJ noted, the DEA–104 reveals nothing about whether Respondent's ''alleged failure'' ''had a natural tendency to affect'' an Agency decision. R.D., at 13–14 (quoting *Michel P. Toret, M.D.,* 82 FR 60,041, 60,043 (2017) quoting *Kungys, supra,* 485 U.S. at 771). I found no evidence in the record concerning the materiality of Respondent's two false answers about his voluntary surrender. Thus, I agree with the ALJ that the record does not support a finding that Respondent's two false answers about his voluntary surrender of registration No. BR3465944 were ''materially'' false. 21 U.S.C. 824(a)(1).

Concerning Respondent's false statements regarding his mandatory exclusion, the Agency has never before considered the materiality of a respondent's false answers about his mandatory exclusion as that question is posed in this case. I find the ALJ's analysis persuasive: ''Considering that exclusion from a federal health care program under 42 U.S.C. 1320a–7(a) is an independent basis for revoking [a]

registration . . ., it is reasonable to conclude that information regarding an applicant's mandatory exclusion by HHS would be 'capable of influencing the [DEA's] decision.' '' R.D., at 13 (citations omitted). I agree with the ALJ. I find that Respondent's failure to disclose his mandatory exclusion from a Federal health care program is material. *Id.* Thus, I find that there is substantial evidence in the record that Respondent materially falsified a DEA registration application and a DEA registration renewal application concerning his mandatory exclusion. 21 U.S.C. 824(a)(1).

The Allegation of Mandatory Exclusion From a Federal Health Care Program

Pursuant to 21 U.S.C. 824(a)(5), the Attorney General may suspend or revoke a registration issued under section 823 of Title 21, ''upon a finding that the registrant . . . has been excluded . . . from participation in a program pursuant to section 1320a–7(a) of Title 42.'' Agency precedent makes clear that revocation under 21 U.S.C. 824(a)(5) may be appropriate regardless of whether or not the misconduct that led to the mandatory exclusion involved controlled substances. *KK Pharmacy,* 64 FR 49,507, 49,510 (1999) (collecting cases) (The Agency ''has previously held that misconduct which does not involve controlled substances may constitute grounds, under 21 U.S.C. 824(a)(5), for the revocation of a DEA Certificate of Registration.''); *Melvin N. Seglin, M.D.,* 63 FR 70,431, 70,433 (1998) (''[M]isconduct which does not involve controlled substances may constitute grounds for the revocation of a DEA registration pursuant to 21 U.S.C. 824(a)(5).''); *Stanley Dubin, D.D.S.,* 61 FR 60,727, 60,728 (1996) (Registration revoked and pending applications for renewal denied when registrant's ''actions cast substantial doubt on . . . [his] integrity.''); *George D. Osafo, M.D.,* 58 FR 37,508, 37,509 (1993) (Submission of fraudulent medical claims and larceny convictions indicated that registrant ''placed monetary gain above the welfare of his patients, and in so doing, endangered the public health and safety.'').

Under 42 U.S.C. 1320a–7(a)(1), the HHS OIG is required to exclude from participation in any Federal health care program any individual who has been convicted of a criminal offense ''related to the delivery of an item or service under . . . [42 U.S.C. 1395 *et seq.*] or under any State health care program.'' Based on the uncontroverted evidence in the record, as already discussed, I found that Respondent has been excluded from participation in any capacity in Medicare, Medicaid, and all Federal health care programs and that Respondent is still excluded from participation in these programs. Accordingly, I find that the evidence in the record satisfies the Government's *prima facie* burden to support the revocation of Respondent's registration under 21 U.S.C. 824(a)(5).

Sanction

Where, as here, the Government has met its *prima facie* burden, the burden shifts to Respondent to show why he can be entrusted with a registration. Respondent, however, did not submit evidence for the record. Instead, he stated that the documents are self-explanatory, that he ''will not make any statement regarding this administrative action,'' and that ''[t]he issue is hereby submitted for final ruling.'' R.D., at 7. Thus, the question now is whether revocation is the appropriate sanction under the facts I have found: Two separate violations whose statutory sanctions include revocation. 21 U.S.C. 824(a)(1) and (5).

I agree with the ALJ's analysis and conclude that revocation is independently the appropriate sanction for each of the separate violations the facts support. In particular, I agree with the ALJ's analysis that, even though the underlying misconduct which led to Respondent's conviction and mandatory exclusion did not involve controlled substances, it did involve the unlawful use of Respondent's prescribing authority. R.D., at 17. As the ALJ stated, ''This type of fraudulent behavior does not inspire confidence that . . . [Respondent] can be trusted with a prescription pad bearing a DEA registration number.'' *Id.* After all, if Respondent signed blank certificates of medical necessity for durable medical equipment that was not medically necessary, ''it is doubtful that DEA can expect . . . [Respondent] to honestly prescribe controlled substances for only legitimate medical purposes.'' *Id.*

Further, Respondent materially falsified two DEA applications. One such falsification, alone, is sufficient, without proof of any other misconduct, to revoke a registration. *Toret, supra,* 82 FR at 60,043. As the ALJ stated, ''[N]ot only has the Government proven two independent bases for revoking . . . [Respondent's] registration . . ., but . . . [Respondent] has not advanced any evidence that he 'can be trusted to responsibly discharge his obligations as a registrant.' '' R.D., at 17–18 (citation omitted).

Accordingly, based on the evidence in the record supporting two independent bases for revocation, I shall order that Respondent's DEA registration be revoked and that any pending application of Respondent to renew or to modify that registration be denied.

Order

Pursuant to 28 CFR 0.100(b) and the authority thus vested in me by 21 U.S.C. 824(a), I order that DEA Certificate of Registration No. FR4900305 issued to Narciso A. Reyes, M.D., be, and it hereby is, revoked. Pursuant to 28 CFR 0.100(b) and the authority thus vested in me by 21 U.S.C. 823(f), I further order that any pending application of Narciso A. Reyes, M.D., to renew or to modify this registration, be, and it hereby is, denied. This Order is effective December 31, 2018.

Dated: November 19, 2018.

Uttam Dhillon,

Acting Administrator.

[FR Doc. 2018–26047 Filed 11–29–18; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OJJDP) Docket No. 1752]

Meeting of the Coordinating Council on Juvenile Justice and Delinquency Prevention

AGENCY: Coordinating Council on Juvenile Justice and Delinquency Prevention, Office of Justice Programs, Department of Justice.

ACTION: Notice of meeting.

SUMMARY: The Coordinating Council on Juvenile Justice and Delinquency Prevention announces its next meeting.

DATES: Wednesday, December 19, 2018 at 10 a.m. EST.

ADDRESSES: The meeting will take place in the third floor main conference room at the U.S. Department of Justice, Office of Justice Programs, 810 7th St. NW, Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: Visit the website for the Coordinating Council at *www.juvenilecouncil.gov* or contact Jeff Slowikowski, Designated Federal Official (DFO), OJJDP, by telephone at (202) 616–3646, email at *jeff.slowikowski@usdoj.gov,* or fax at (202) 353–9093; or Sarah Wisniewski, Senior Program Manager/Federal Contractor, by telephone (202) 305–9017, email at *sarah.wisniewski@usdoj.gov,* or fax at (866) 854–6619. Please note that the above phone/fax numbers are not toll free.

SUPPLEMENTARY INFORMATION: The Coordinating Council on Juvenile Justice and Delinquency Prevention

(''Council''), established by statute in the Juvenile and Delinquency Prevention Act of 1974 section 206(a) (42 U.S.C. 5616(a)), will meet to carry out its advisory functions. Information regarding this meeting will be available on the Council's web page at *www.juvenilecouncil.gov.* The meeting is open to the public, and available via online video conference, but prior registration is required (see below). In addition, meeting documents will be viewable via this website including meeting announcements, agendas, minutes and reports.

Although designated agency representatives may attend in lieu of members, the Council's formal membership consists of the following secretaries and/or agency officials; Attorney General (Chair), Administrator of the Office of Juvenile Justice and Delinquency Prevention (Vice Chair), Secretary of Health and Human Services (HHS), Secretary of Labor (DOL), Secretary of Education (DOE), Secretary of Housing and Urban Development (HUD), Director of the Office of National Drug Control Policy, Chief Executive Officer of the Corporation for National and Community Service and the Assistant Secretary of Homeland Security for the U.S. Immigration and Customs Enforcement. Nine additional members are appointed by the Speaker of the U.S. House of Representatives, the U.S. Senate Majority Leader and the President of the United States. Further agencies that take part in Council activities include, the Departments of Agriculture, Defense, Interior and the Substance and Mental Health Services Administration of HHS.

Council meeting agendas are available on *www.juvenilecouncil.gov*. Agendas will generally include: (a) Opening remarks and introductions; (b) Presentations and discussion of agency work; and (c) Council member announcements.

For security purposes and because space is limited, members of the public who wish to attend must register in advance of the meeting online at *www.juvenilecouncil.gov,* no later than Friday December 14, 2018. Should issues arise with online registration, or to register by fax or email, the public should contact Sarah Wisniewski, Senior Program Manager/Federal Contractor (see above for contact information). If submitting registrations via fax or email, attendees should include all of the following: Name, Title, Organization/Affiliation, Full Address, Phone Number, Fax and Email. The meeting will also be available to join online via Webex, a video conferencing platform. Registration for this is also found online at *www.juvenilecouncil.gov*.

Note: Photo identification will be required to attend the meeting at the OJP 810 7th Street Building.

Interested parties may submit written comments and questions in advance to Jeff Slowikowski (DFO) for the Council, at the contact information above. If faxing, please follow up with Sarah Wisniewski, Senior Program Manager/Federal Contractor (contact information above) in order to assure receipt of submissions. All comments and questions should be submitted no later than 5:00 p.m. EST on Friday December 14, 2018. The Council will limit public statements if they are found to be duplicative. Written questions submitted by the public while in attendance will also be considered by the Council.

Jeffrey Slowikowski,

Senior Advisor, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 2018–26096 Filed 11–29–18; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Form ETA–9142–B–CAA–2, Attestation for Employers Seeking To Employ H–2B Nonimmigrant Workers Under Section 205 of Division M of the Consolidated Appropriations Act, 2018 Public Law 115–141

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL or Department) is submitting the Employment and Training Administration (ETA) sponsored Information Collection Request (ICR), titled, ''Attestation for Employers Seeking to Employ H–2B Nonimmigrant Workers Under Section 205 of Division M of the Consolidated Appropriations Act, 2018 Public Law 115–141 (March 23, 2018),'' to the Office of Management and Budget (OMB) for review and approval for continued 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 it receives on or before December 31, 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_201811-1205-003* (this link will only become active on the day following publication of this notice); by contacting Michel Smyth at 202–693–4129/TTY 202–693–8064 (these are not toll-free numbers); or by 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: 202–395–6881 (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 sending an email to: *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks approval under the PRA for revisions to the Attestation for Employers Seeking to Employ H–2B Nonimmigrant Workers Under Section 205 of Division M of the Consolidated Appropriations Act, 2018 Public Law 115–141 (March 23, 2018) information collection. On March 23, 2018, the President signed the Consolidated Appropriations Act, 2018. Division M, Section 205 of the Act authorized the Secretary of Homeland Security, in consultation with the Secretary of Labor, to increase the number of H–2B visas available to U.S. employers, notwithstanding the otherwise established statutory numerical limitation. This collection of information was required by the regulations that went into effect on May 31, 2018, implementing Section 205. The Secretary of Homeland Security increased the H–2B cap for Fiscal Year 2018 by up to 15,000 additional visas for American businesses that were likely to suffer irreparable harm (that is, permanent and severe financial loss) without the ability to employ before the end of FY 2018 the H–2B workers requested on their petition.

The exigency created by the Consolidated Appropriations Act to meet the high demand by American businesses for H–2B workers, and the short period of time remaining in the fiscal year for U.S. employers to avoid the economic harm this legislation was intended to prevent, required initial clearance of this information collection using expedited processes. As a result, initial clearance for this information collection was sought using Paperwork Reduction Act emergency procedures outlined in regulations at 5 CFR 1320.13, and the Department received a six-month approval. Subsequently, the Department has sought public comment to revise this information collection through the notice and comment process. Specifically, the Department proposes: to revise this collection to eliminate the now expired provisions for completing and submitting Form ETA–9142–B–CAA–2, *Attestation for Employers Seeking to Employ H–2B Nonimmigrant Workers Under Section 205 of Division M of the Consolidated Appropriations Act, 2018 Public Law 115–141* (March 23, 2018). In accordance with the applicable regulations, the ICR would continue to require employers to retain the required supporting documentation for three years from the date the certification was issued.

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 Department obtains OMB approval for this information collection under Control Number 1205–0531. The current approval is scheduled to expire on November 30, 2018; however, the DOL notes that remaining 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 August 30, 2018, 83 FR 44305.

• 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 the publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0531. 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 the Collection: Attestation for Employers Seeking to Employ H–2B Nonimmigrant Workers Under Section 205 of Division M of the Consolidated Appropriations Act, 2018 Public Law 115–141 (March 23, 2018).

OMB Control Number: 1205–0531.

Affected Public: Private Sector (businesses or other for-profits and not-for-profit institutions) and State, Local, and Tribal Governments.

Total Estimated Annual Respondents: 5,177.

Total Estimated Annual Responses: 5,177.

Total Estimated Average Time per Response: 1 hour.

Total Estimated Annual Time Burden: 5,177 hours.

Total Estimated Annual Other Cost Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: November 26, 2018.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2018–26078 Filed 11–29–18; 8:45 am]

BILLING CODE 4510–FP–P

LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket 14–CRB–0010–CD/SD (2010–13)]

Distribution of Cable Royalty Funds; Distribution of Satellite Royalty Funds

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final distribution determination.

SUMMARY: The Copyright Royalty Judges (Judges) announce the final distribution of cable and satellite royalty funds for the years 2010, 2011, 2012, and 2013. The determination is a result of agreement among the participants that claim shares of the cable and satellite royalty funds to be allocated to the Program Suppliers Claimant category. The Judges issued their allocation determination relating to cable royalty funds for the relevant years to the participants on October 18, 2018. Allocation of satellite royalty funds is not yet determined.

DATES: *Applicable date:* November 30, 2018.

ADDRESSES: The final distribution order is also published in eCRB at *https://app.crb.gov/.*

Docket: For access to the docket to read submitted background documents, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at *https://app.crb.gov/* and search for docket number 14–CRB–0010–CD/SD (2010–13).

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Specialist, by telephone at (202) 707–7658 or email at *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: The Copyright Royalty Judges (Judges) received a joint motion of MPAA-represented Program Suppliers (MPAA) and Multigroup Claimants (MGC) for entry of a consent order adopting the distribution shares proposed by the MPAA and ordering a final distribution in conformity with those agreed shares of cable and satellite television royalty funds to be allocated to the Program Suppliers category for the 2010–13 cable and satellite royalty years.

The Judges find that the parties' agreement as to the final percentage distribution has ended any remaining controversy with regard to the subject funds over which the Judges have jurisdiction and that neither party now has a significant interest related to this proceeding as to the 2010–13 cable and satellite royalty funds. Accordingly, good cause exists for entry of a final distribution determination relating to the subject funds.

Distribution of funds allocated to all other program categories, except the Devotional Programming category, was without controversy. Parties to the controversy relating to the Devotional category resolved that controversy by agreement and the Judges entered a final order with regard to the Devotional

category on July 18, 2018. *See* 83 FR 38326. Resolution of the present controversy means that when category allocation is final for both cable and satellite royalty deposits, the Judges may order distribution of the subject funds and close the proceeding.

The Judges therefore *order* that the royalty shares proposed in the MPAA's Written Direct Statements (Dec. 29, 2017) are adopted for the 2010–13 cable and satellite royalty years and that final distribution of the cable and satellite royalty funds allocated to the Program Suppliers category shall be in accordance with the following relative shares.

PROGRAM SUPPLIERS CATEGORY

	MPAA (%)	MGC (%)
Cable Royalty Year:		
2010	99.37	0.63
2011	99.47	0.53
2012	99.45	0.55
2013	99.50	0.50
Satellite Royalty Year:		
2010	99.52	0.48
2011	99.82	0.18
2012	99.82	0.18
2013	99.89	0.11

The Judges *further order* that, as the parties have presented this as an agreed determination, they have waived their rights to seek rehearing.

The Judges *further order* that this final distribution determination is without prejudice to the parties' right to appeal the Judges' interlocutory ruling in this consolidated proceeding with regard to both cable and satellite claims issues.

Upon issuance of this final determination, the Register of Copyrights (''Register'') shall have 60 days to conduct a statutory review. The Librarian of Congress shall review and cause this final determination, and any correction thereto by the Register, to be published in the **Federal Register** no later than the conclusion of the 60-day review period.

October 1, 2018.

So ordered.

Suzanne M. Barnett,
Chief United States Copyright Royalty Judge.

David R. Strickler,
United States Copyright Royalty Judge.

Jesse M. Feder,
United States Copyright Royalty Judge.

Dated: November 8, 2018.

Suzanne M. Barnett,

Chief United States Copyright Royalty Judge.

Approved by:

Carla B. Hayden,

Librarian of Congress.

[FR Doc. 2018–26092 Filed 11–29–18; 8:45 am]

BILLING CODE 1410–72–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (18–096)]

NASA International Space Station Advisory Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the National Aeronautics and Space Administration announces a meeting of the NASA International Space Station (ISS) Advisory Committee. The purpose of the meeting is to review all aspects related to the safety and operational readiness of the ISS, and to assess the possibilities for using the ISS for future space exploration.

DATES: Friday, December 21, 2018, 2–3 p.m., Eastern Time.

ADDRESSES: NASA Headquarters, Glennan Conference Room (1Q39), 300 E Street SW, Washington, DC 20546. Note: 1Q39 is located on the first floor of NASA Headquarters.

FOR FURTHER INFORMATION CONTACT: Mr. Patrick Finley, Designated Federal Officer, Office of International and Interagency Relations, (202) 358–5684, NASA Headquarters, Washington, DC 20546–0001.

SUPPLEMENTARY INFORMATION: This meeting will be open to the public up to the seating capacity of the room. This meeting is also accessible via teleconference. To participate telephonically, please contact Mr. Finley by telephone at (202) 358–5684 before 4:30 p.m., Eastern Time, on December 18, 2018. You will need to provide your name, affiliation, and phone number. Attendees will be requested to sign a register and to comply with NASA security requirements, including the presentation of a valid picture ID to Security before access to NASA Headquarters. Foreign nationals attending this meeting will be required to provide a copy of their passport and visa in addition to providing the following information no less than 10 working days prior to the meeting: Full name; gender; date/place of birth; citizenship; visa information (number, type, expiration date); passport information (number, country, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee; and home address to Mr. Finley via email at *patrick.t.finley@nasa.gov* or by telephone at (202) 358–5684. U.S. citizens and permanent residents (green card holders) are requested to submit their name and affiliation no less than 3 working days prior to the meeting to Mr. Finley. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2018–26044 Filed 11–29–18; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Alan T. Waterman Award Committee; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

NAME AND COMMITTEE CODE: Alan T. Waterman Award Committee (#1172).

DATE AND TIME: January 16, 2019; 9 a.m. to 2 p.m.

PLACE: National Science Foundation, 2415 Eisenhower Avenue, Suite W19000, Alexandria, Virginia 22314.

TYPE OF MEETING: Closed.

CONTACT PERSON: Sherrie B. Green, Program Manager, OD/OIA, Suite W17126, National Science Foundation, 2415 Eisenhower Ave., Alexandria, VA 22314; Telephone: (703) 292–8040.

PURPOSE OF MEETING: To provide advice and recommendations in the selection of the Alan T. Waterman Award recipient.

AGENDA: To review and evaluate nominations as part of the selection process for awards.

REASON FOR CLOSING: The nominations being reviewed include information of a personal nature where disclosure would constitute unwarranted invasions of personal privacy. These matters are exempt under 5 U.S.C. 552b(c), (6) of the Government in the Sunshine Act.

Dated: November 27, 2018.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2018–26030 Filed 11–29–18; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review; Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces its intent to hold proposal review meetings throughout the year. The purpose of these meetings is to provide advice and recommendations concerning proposals submitted to the NSF for financial support. The agenda for each of these meetings is to review and evaluate proposals as part of the selection process for awards. The review and evaluation may also include assessment of the progress of awarded proposals. These meetings will primarily take place at NSF's headquarters, 2415 Eisenhower Avenue, Alexandria, VA 22314.

These meetings will be closed to the public. The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act. NSF will continue to review the agenda and merits of each meeting for overall compliance of the Federal Advisory Committee Act.

These closed proposal review meetings will not be announced on an individual basis in the **Federal Register**. NSF intends to publish a notice similar to this on a quarterly basis. For an advance listing of the closed proposal review meetings that include the names of the proposal review panel and the time, date, place, and any information on changes, corrections, or cancellations, please visit the NSF website: *https://www.nsf.gov/events/advisory.jsp.* This information may also be requested by telephoning, 703/292–8687.

Dated: November 26, 2018.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2018–25987 Filed 11–29–18; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2018–0219]

Performance Review Boards for Senior Executive Service; Revision

AGENCY: Nuclear Regulatory Commission.

ACTION: Appointments; revision.

SUMMARY: On October 19, 2018, the U.S. Nuclear Regulatory Commission (NRC) announced appointments to the NRC Performance Review Board (PRB) responsible for making recommendations on performance appraisal ratings and performance awards for NRC Senior Executives and Senior Level System employees and appointments to the NRC PRB Panel responsible for making recommendations to the appointing and awarding authorities for NRC PRB members. Since then, the NRC has made revisions to the list of PRB member appointees.

DATES: November 30, 2018.

ADDRESSES: Please refer to Docket ID NRC–2018–0219 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0219. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.*
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Miriam L. Cohen, Executive Resources Board, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–287–0747, email: *Miriam.Cohen@nrc.gov.*

SUPPLEMENTARY INFORMATION: On October 19, 2018 (83 FR 53118), the NRC announced appointments to the NRC PRB membership. The following revision has been made to the list of NRC PRB members. Catherine A. Haney, Regional Administrator, Region II, will replace Frederick D. Brown, Director, Office of New Reactors. The revised list of NRC PRB members that are responsible for making recommendations to the appointing and awarding authorities on performance appraisal ratings and performance awards for Senior Executives and Senior Level System employees read as follows:

Margaret M. Doane, Executive Director for Operations;

Marian L. Zobler, General Counsel;

Daniel H. Dorman, Deputy Executive Director for Materials, Waste, Research, State, Tribal, Compliance, Administration, and Human Capital Programs, Office of the Executive Director for Operations;

Michael R. Johnson, Deputy Executive Director for Reactor and Preparedness Programs, Office of the Executive Director for Operations;

Marc L. Dapas, Director, Office of Nuclear Material Safety and Safeguards;

Catherine A. Haney, Regional Administrator, Region II;

Brian E. Holian, Director, Office of Nuclear Security and Incident Response;

Nader L. Mamish, Director, Office of International Programs;

Mary C. Muessle, Director, Office of Administration;

K. Steven West, Regional Administrator, Region III; and

Maureen E. Wylie, Chief Financial Officer.

The following individuals will serve as members of the NRC PRB Panel that was established to review appraisals and make recommendations to the appointing and awarding authorities for NRC PRB members:

Anne T. Boland, Director, Office of Enforcement;

Brooke P. Clark, Deputy General Counsel for Hearings and Administration; and

Andrea D. Veil, Executive Director, Advisory Committee on Reactor Safeguards.

All appointments are made pursuant to Section 4314 of Chapter 43 of Title 5 of the United States Code.

Dated at Rockville, Maryland, on November 20, 2018.

For the Nuclear Regulatory Commission.

Miriam L. Cohen,

Secretary, Executive Resources Board.

[FR Doc. 2018–26018 Filed 11–29–18; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84652; File No. SR–CboeBYX–2018–024]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Modification of Certain Routing Fees

November 26, 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 November 13, 2018, Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (the ''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

Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to modify certain Routing Fees.

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule to amend pricing for orders routed to Cboe EDGA Exchange, Inc., (''EDGA''), which yield fee codes AA, BJ, and RA.[3] Particularly, as of November 1, 2018, EDGA implemented pricing changes for transactions that add and remove liquidity.[4] The filing generally proposes that orders that add liquidity will be assessed a fee of $0.00300 per share and orders that remove liquidity will be provided a rebate of $0.00240 per share. Based on the changes in pricing at EDGA, the Exchange proposes the pricing changes described below.

First, the Exchange notes that orders routed to EDGA using ALLB routing strategy (which yield fee code AA) and orders routed to EDGA using a Destination Specific, TRIM or TRIM2 routing strategy (which yield fee code BJ) are currently assessed $0.00030 per share. The Exchange proposes to eliminate this fee and instead provide a rebate of $0.00240 per share for these orders. Next, the Exchange notes that orders routed to EDGA that add liquidity (which yield fee code RA) are assessed $0.00030 per share. The Exchange proposes to increase the rate from $0.00030 per share to $0.00300 per share.

2. Statutory Basis

The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

The Exchange believes the proposed changes are reasonable because they reflect a pass-through of the pricing changes by EDGA described above. The Exchange further believes the proposed fee change is non-discriminatory because it applies uniformly to all Members. The Exchange lastly notes that routing through the Exchange is voluntary and that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues or providers of routing services if they deem fee levels to be excessive.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposed routing fee changes will not impose an undue burden on competition because the Exchange will uniformly assess the affected routing fees on all Members. Additionally, Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value or if they view the proposed fee as excessive. The Exchange also notes the proposed changes to the EDGA-related routing fees are meant to pass through the fees and rebates associated with executing orders on that market, and is therefore not designed to have any significant impact on competition. Further, excessive fees for participation would serve to impair an exchange's ability to compete for order flow and members rather than burdening competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[5] and paragraph (f) of Rule 19b–4[6] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes on November 1, 2018 (SR–CboeBYX–2018–023). On business date November 13, 2018, the Exchange withdrew that filing and submitted this filing.

[4] *See* SR–CboeEDGA–2018–017.

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f).

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–CboeBYX–2018–024 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–CboeBYX–2018–024. 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 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–CboeBYX–2018–024 and should be submitted on or before December 21, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–25999 Filed 11–29–18; 8:45 am]

BILLING CODE 8011–01–P

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84651; File No. SR–PEARL–2018–19]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Withdrawal of a Proposed Rule Change To Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members

November 26, 2018.

On September 18, 2018, MIAX PEARL, LLC (''MIAX PEARL'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the MIAX PEARL Fee Schedule to increase certain connectivity fees. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] On October 10, 2018 the proposed rule change was published for comment in the **Federal Register** and, pursuant to Section 19(b)(3)(C) of the Act, the Commission: (1) Temporarily suspended the proposed rule change; and (2) instituted proceedings to determine whether to approve or disapprove the proposal.[4]

The Commission received one comment letter on the proposal.[5] On November 23, 2018, the Exchange withdrew the proposed rule change (SR–PEARL–2018–19).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–25995 Filed 11–29–18; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 84358 (October 3, 2018), 83 FR 51022.

[5] *See* Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, and Ellen Greene, Managing Director, The Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission, dated October 15, 2018.

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84647; File No. SR–NYSEArca–2018–84]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 6.4–O, Series of Options Open for Trading

November 26, 2018.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 19, 2018, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 6.4–O. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend Rule 6.4–O, Series of Options Open for Trading, to permit the listing and trading of up to ten expiration months for long term options on the SPDR® S&P

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

500® Exchange-Traded Fund (the ''SPY ETF'').

Rule 6.4–O(d) provides that the Exchange may list, with respect to any class of stock or Exchange-Traded Fund Share options series, options having from twelve up to thirty-nine months from the time they are listed until expiration (''LEAPS''). Under the current Rule, the Exchange may list up to six LEAPS expiration months.[4] The Exchange proposes to amend Rule 6.4–O(d) to permit up to ten LEAPS expiration months for options on the SPY ETF.[5] This proposal, which is substantially the same as a recent rule amendment submitted by Nasdaq PHLX LLC (''PHLX'') and driven by customer demand,[6] would add liquidity to the SPY ETF options market by allowing market participants to hedge risks relating to SPY ETF positions over a potentially longer time period with a known and limited cost.

The SPY ETF options market today is characterized by its tremendous daily and annual liquidity. As a consequence the Exchange believes that the listing of additional SPY ETF LEAPS expiration months would be well received by investors. This proposal to expand the number of permitted SPY ETF LEAPS would not apply to LEAPS on any other class of stock or Exchange-Traded Fund Share options.[7]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[8] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5),[9] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by offering market participants additional LEAPS on SPY options for their investment and risk management purposes. The proposal is intended simply to provide additional trading opportunities which have been requested by customers, thereby facilitating transactions in options and contributing to the protection of investors and the maintenance of fair and orderly markets. The proposed rule change responds to the continuing needs of market participants, particularly portfolio managers and other institutional customers, by providing protection from long-term market moves and by offering an alternative to hedging portfolios with futures positions or off-exchange customized derivative instruments.

The Exchange believes that the addition today of four additional expiration months for SPY ETF LEAPS does not represent a proliferation of expiration months, but is instead a very modest expansion of LEAPS options in response to stated customer demand. Significantly, the proposal would feature new LEAPS expiration months in only a single class of options—the SPY ETF—that are very liquid and heavily traded, as discussed above. Additionally, the Exchange notes that ten expiration months are already permitted for stock index LEAPS options on the Exchange as well as on other markets.[10] Further, the Exchange has the necessary systems capacity to support the new SPY ETF LEAPS expiration months.

The Exchange notes that this proposal is substantially the same as a recent rule amendment submitted by PHLX.[11]

The Exchange respectfully requests that the Commission waive the 30-day operative delay so that the proposed rule change may become effective and operative upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act[12] and paragraph (f)(6) of Rule 19b–4 thereunder.[13] The Exchange believes that waiving the operative delay would be consistent with the protection of investors and the public interest because the proposed rule change would allow the Exchange to implement the modified rule, which aligns with the rules of another options exchange, without delay.[14]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposal merely provides investors additional investment and risk management opportunities by providing flexibility to the Exchange to list additional long term options expiration series, expanding the number of SPY ETF LEAPS offered on the Exchange from six expiration months to ten expiration months.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[15] and Rule 19b–4(f)(6) thereunder.[16]

A proposed rule change filed under Rule 19b–4(f)(6)[17] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[18] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative upon filing. The Exchange's proposal would eliminate an internal inconsistency in the Exchange's rules and also conform the Exchange's rules relating to the permitted number

[4] Strike price interval, bid/ask differential and continuity rules shall not apply to equity options or Exchange-Traded Fund Shares options until the time to expiration is less than nine months. *See* Rule 6.4–O(d).

[5] *See* proposed Rule 6.4–O(d) (providing in relevant part, that ''[t]he Exchange may open for trading up to ten expiration months for options on the [SPY ETF] and up to six extended far term expiration months for options on any Exchange-Trade Fund Share or equity option class'').

[6] *See also* Securities Exchange Act Release No. 84449 (October 18, 2018), 83 FR 53699 (October 24, 2018) (SR–Phlx–2018–64) (''PHLX Rule Change''). Rule 5.19–O(b)(1) likewise provides for up to ten expirations months in LEAPS on index options. Thus, the Exchange proposes to delete reference [sic] to index options in proposed Rule 6.4–O to enhance internal consistency and reduced [sic] as relates to the number of expiration months (*i.e.,* ten) allowed for index options. *See* proposed Rule 6.4–O(d).

[7] Historically, SPY is the largest and most actively traded ETF in the United States as measured by its assets under management and the value of shares traded.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *See* Rule 5.19–O(b)(1) and PHLX Rule 1101A(b)(iii).

[11] *See* PHLX Rule Change, *supra* note 6.

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] *See* Phlx Rule Change, *supra* note 6.

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[17] *Id.*

[18] 17 CFR 240.19b–4(f)(6)(iii).

of SPY ETF LEAPS expiration months to those of PHLX.[19] Accordingly, the Commission believes that the proposal raises no new or novel regulatory issues, and waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission therefore waives the 30-day operative delay and designates the proposal operative upon filing.[20]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2018–84 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2018–84. 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 the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2018–84 and should be submitted on or before December 21, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–25994 Filed 11–29–18; 8:45 am]

BILLING CODE 8011–01–P

[19] *See supra,* note 6.

[20] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84646; File No. SR–FINRA–2018–039]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change Relating to FINRA Rule 4570 (Custodian of Books and Records)

November 26, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''SEA,'' ''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 15, 2018, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend FINRA Rule 4570 (Custodian of Books and Records) to: (1) Provide a member that is filing a Form BDW (Uniform Request for Broker-Dealer Withdrawal) the option of designating another FINRA member as the custodian of its books and records on the form; (2) clarify the obligations of the designated custodian; and (3) require the designated custodian to consent to act in such a capacity.

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

SEA Rule 17a–4 (Records to be Preserved by Certain Exchange Members, Brokers and Dealers)[3] requires broker-dealers to retain their books and records for specified retention periods.[4] Pursuant to SEA Rule 17a–4(g),[5] a firm that stops doing business as a registered broker-dealer has a continuing obligation to retain its required books and records for the remainder of the specified retention periods. Form BDW requires that a firm that is withdrawing its registration identify and provide the contact information of the person who will have custody of the firm's books and records after the firm has discontinued its business operations. Form BDW also requires that the firm provide the address where the books and records will be located, if different than the custodian's address. In addition, the Form BDW provides that the firm and person signing the form on behalf of the firm must certify that the firm's books and records will be preserved and made available for inspection.

FINRA Rule 4570 currently requires a member to designate as the custodian of its required books and records on the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.17a–4.

[4] *See also* FINRA Rule 4511 (General Requirements).

[5] 17 CFR 240.17a–4(g).

Form BDW a person who is associated with the member at the time the Form BDW is filed.[6] The rule is intended to enhance the ability of FINRA to obtain a firm's required books and records upon dissolution of the firm.[7]

Permitting Another Member To Act as the Designated Custodian

FINRA understands that some members have had difficulty in identifying and designating an associated person as the books and records custodian on their Form BDWs when they are in the process of winding down. These members have indicated that other members are willing to function as custodians for purposes of FINRA Rule 4570, but they cannot do so currently because of the limitations in the rule.

To provide greater flexibility to members, FINRA is proposing to amend Rule 4570 to provide a member that is filing a Form BDW the option of designating another FINRA member as the custodian of its books and records on the Form BDW. The proposed rule change would not require members to designate another FINRA member as the custodian of their books and records, but would give them the option to do so, at their discretion. Firms would continue to have the option of designating an associated person as the custodian of their books and records. Further, the proposed rule change would preserve FINRA's ability to obtain the books and records of a former member because FINRA would continue to have jurisdiction over, and the ability to obtain information from, the member that has agreed to act as custodian.

Clarifying the Obligations of the Designated Custodian

In addition to permitting another member to act as the designated custodian, FINRA is proposing to amend Rule 4570 to clarify the obligations of the designated custodian. Specifically, the proposed rule change would clarify that the custodian designated on the Form BDW, which would be either an associated person or another member, must preserve the books and records on behalf of the member that filed the Form BDW for the remainder of the applicable retention periods and make them available for inspection by FINRA upon request. For example, if a custodian receives a record from a firm that is going out of business that had an original retention period of six years, four years of which have already passed, the custodian must retain that record for the remaining two years and provide it to FINRA upon request.

Further, the proposed rule change would clarify that a custodian is required to preserve and produce a former member's books and records in the same manner in which they were received. This provision is intended to ensure that the custodian does not alter the records after taking possession of them. However, the proposed rule change would provide that a custodian would not be precluded from converting the books and records in its possession into another format acceptable under the Exchange Act (*e.g.,* convert from paper format to an electronic storage media), so long as such records are not altered or deleted during the conversion process.

In addition, the proposed rule change would provide that where a member is acting as custodian, such member would not be required to verify the completeness or accuracy of the books and records that it receives. This exception is limited to members that are acting as custodians because their function is more akin to that of a recordkeeping service. However, FINRA believes that an associated person who is acting as custodian of a member's books and records is in a position to verify the completeness and accuracy of the member's books and records based on his or her existing relationship with the member.

Finally, FINRA is proposing to amend Rule 4570 to require that where a FINRA member has agreed to act as custodian of the books and records of another member that has filed a Form BDW, the member acting as custodian must: (1) Treat such books and records as if they were its own books and records; and (2) arrange upon its dissolution for such books and records to continue to be retained for the remainder of the applicable retention periods under FINRA and Exchange Act rules in the same manner as its own books and records consistent with Rule 4570. FINRA believes that by clarifying the obligations of the custodian, the proposed rule change would facilitate compliance with the obligations under SEA Rule 17a–4(g) and Form BDW.

Requiring the Consent of the Designated Custodian

FINRA has become aware of situations where the person named as the custodian on the Form BDW was not aware that the member was designating the person as a custodian. To address this issue, the proposed rule change would require a member to obtain the affirmative, written or verbal, consent of the custodian of books and records identified on the firm's Form BDW. In addition, the proposed rule change would require a member that is withdrawing its registration to inform its custodian of the obligations under FINRA and Exchange Act rules, including FINRA Rule 4570, prior to obtaining the custodian's consent.

The proposed rule change would also require the designated custodian to represent to FINRA, in a method prescribed by FINRA, that the custodian: (1) Has consented to act in the capacity of a custodian; (2) understands the responsibilities of a custodian; and (3) agrees to provide the books and records of the member for which it is acting as custodian to FINRA upon request during the course of the required retention periods.

The proposed rule change would impact all members, including members that have elected to be treated as capital acquisition brokers (''CABs'') and are subject to the CAB Rules. CAB Rule 457 subjects all CABs to FINRA Rule 4570. Accordingly, the proposed rule change to FINRA Rule 4570 would also impact CABs.

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date will be no later than 120 days following publication of the *Regulatory Notice* announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[8] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change would facilitate compliance with FINRA and SEC recordkeeping requirements. Specifically, the proposed rule change

[6] For purposes of Rule 4570, an associated person is a natural person. *See* FINRA By-Laws, Article I, paragraph (rr).

[7] FINRA has jurisdiction over, and has the ability to obtain information from, a former associated person of a member for generally two years after: (1) The effective date of the person's termination of registration; (2) the effective date of revocation or cancellation of the person's registration; or (3) in the case of an unregistered person, the date upon which such person ceased to be associated with the member. *See* FINRA By-Laws, Article V, Section 4 (Retention of Jurisdiction) and FINRA Rule 8210 (Provision of Information and Testimony and Inspection and Copying of Books).

[8] 15 U.S.C. 78*o*–3(b)(6).

would provide a member the flexibility to select another member as its custodian, which would enhance FINRA's ability to obtain the member's required books and records upon the member's dissolution. This is because FINRA's jurisdiction over former associated persons is more limited than its jurisdiction over current members. The proposed rule change would also clarify the obligations of the designated custodian and require the designated custodian's consent, which would enhance the ability of designated custodians to carry out their recordkeeping responsibilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to further analyze the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits, and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet its regulatory objective.

Regulatory Need

FINRA Rule 4570 is intended to ensure that a firm's books and records are properly retained and accessible for the remainder of the applicable retention periods after the firm withdraws its registration with FINRA. However, certain aspects of the rule as currently written limit a firm's ability to identify a willing custodian and reduce the likelihood that books and records are properly retained and accessible following a firm's termination of registration.

Economic Baseline

The economic baseline for the proposed rule change is the number of firms that withdraw from the industry and thus file a Form BDW, and would therefore have to identify a custodian. In the past five years, approximately 1,100 firms filed a Form BDW, terminating their registration with FINRA. The firms had a median age of 14 years, and a median firm size of five associated persons and $240,000 in total assets, at the time they filed their Form BDW. The number of firms filing a Form BDW annually has largely remained constant over the last five years.[9]

Economic Impact

The proposed rule change would primarily affect firms filing a Form BDW, customers of those firms, designated custodians, and investors generally.

Benefits

Currently, firms that file a Form BDW may only designate an associated person as the custodian of their books and records. By allowing such firms to designate another member as their custodian, the proposed rule change may reduce search costs associated with identifying a willing custodian. Search costs can be significant for firms filing a Form BDW as there are many other obligations that must also be addressed as a firm prepares to leave the industry. These obligations can make it difficult for a firm to identify an associated person who is willing, and able, to carry out the custodial responsibilities as the firm is in the process of winding down.

FINRA believes that introducing-only firms with established relationships with clearing firms may be most likely to benefit from the additional flexibility provided in the proposed rule change.[10] The clearing firm will already have possession of at least part of the introducing firm's books and records and, if willing to act in such a capacity, could therefore more easily maintain custody of all of the introducing firm's records along with its own books and records. The value of this flexibility would depend upon the willingness of the clearing firm to take on these custodial obligations after the introducing firm has left the industry. Any factor impacting the provision of clearing services more generally would likely also impact the likelihood that a clearing firm would be willing to take on the custodial responsibilities. Currently, there are approximately 1,479 active introducing-only firms and 112 active clearing firms.[11]

FINRA also believes that if a firm that is filing a Form BDW chooses another member as its custodian, it would enhance the ability of FINRA to obtain the books and records of the firm. This is because FINRA's jurisdiction over former associated persons is more limited than its jurisdiction over current members.[12] As noted below, FINRA's ability to obtain the books and records of a former firm more easily and readily would also benefit customers of the firm and investors more generally.

FINRA has become aware of situations where a document request was made to a custodian only to find that the custodian had stopped paying for the document storage or otherwise no longer had access to the books and records of the former firm. This makes books and records unavailable for use by FINRA staff, may inhibit the ability of FINRA staff to conduct its work and could lead to the imposition of sanctions on the custodian. Further, without access to the books and records of a former firm, customers who bring a claim against the firm may be limited in their ability to obtain restitution. Finally, FINRA and other regulators may be more limited in their ability to pursue a disciplinary action against the former firm or an associated person of the firm, possibly increasing risk to investors generally. By clarifying custodians' obligations, the proposed rule change aims to improve custodians' understanding of the time and monetary commitment and the potential sanctions that could be imposed on them should they not comply with their obligations.

Further, FINRA has come across instances where the custodian was unaware that they were named as the custodian of a former firm's books and records and did not have access to them. By requiring the custodian's affirmative consent and representation to FINRA, the proposed rule change would eliminate such situations. Similar to the benefits associated with clarifying the obligations of custodians, the custodian's consent and representation to FINRA would also increase the likelihood that a former firm's books and records would be properly retained and accessible.

Costs

The costs associated with the proposed rule change would likely depend on whether the designated custodian is an associated person or another member. The proposed rule change would give a firm that is filing a Form BDW the additional option of designating another member, rather than

[9] Annually since 2013, FINRA has received a low of 212 withdrawal requests (2014) and a high of 234 withdrawal requests (2013), and an average of 220 withdrawal requests per year.

[10] Note that there are many firms that use clearing firms for some but not all of their transactions. The value of the additional flexibility decreases as the percentage of an introducing firm's records with any one clearing firm decreases.

[11] Of the 1,100 firms that withdrew from the industry over the last five years, we can affirmatively identify that 432 (39%) were introducing-only firms.

[12] FINRA has jurisdiction over, and has the ability to obtain information from, a former associated person generally for two years. *See* FINRA By-Laws, Article V, Section 4 (Retention of Jurisdiction) and FINRA Rule 8210 (Provision of Information and Testimony and Inspection and Copying of Books).

an associated person, as its custodian. Therefore, the expansion of the categories of eligible custodians should impose no new burdens on firms that continue to designate associated persons as their custodians. Introducing firms that designate their clearing firms as custodians, subject to their consent, may incur additional costs associated with clearing services.

Firms that designate members as their custodians, subject to their consent, may incur costs associated with record-keeping services provided by such members. For instance, a member that agrees to act as custodian is likely to incur operational and technology costs associated with integrating the former member's books and records into its record-keeping systems. Moreover, the proposed rule change could result in a change in how custodianship of books and records by firms leaving the industry is paid for and managed. For instance, clearing firms might adapt their business models to integrate the costs of custodial services into clearing agreements at the outset of the clearing relationship. This would potentially lead to an industry-wide increase in the costs of clearing agreements, regardless of any custodial undertaking by the clearing firms. However, considering the small number of firms that file Form BDW per year, FINRA believes that this is a low probability outcome.[13] Further, the competitive dynamics of procuring clearing services may preclude this outcome, as firms that raise their fees may lose clients.

The clarification of a custodian's obligations does not add any new direct burdens, but it could make it harder for firms to identify a custodian willing to agree to the obligations. Likewise, the affirmative consent requirement and the requirement to provide a representation to FINRA may make it more difficult for firms to find a willing custodian. However, given the importance to FINRA and investors of proper custody of books and records, FINRA believes that these additional burdens are warranted.

Alternatives Considered

FINRA considered whether to amend Rule 4570 to require a firm that is going out of business to be only able to designate another member as its custodian. While such a requirement would further enhance FINRA's ability to obtain the books and records of former firms, FINRA determined that a firm that is leaving the industry and that is experiencing financial or operational difficulties may find it difficult to find another member that is willing to act as custodian. Further, FINRA continues to evaluate the viability that FINRA make itself available as an alternative custodian for members' records after withdrawal.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2018–039 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2018–039. 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2018–039 and should be submitted on or before December 21, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–26000 Filed 11–29–18; 8:45 am]

BILLING CODE 8011–01–P

[13] On average, 220 firms have filed a Form BDW each year over the last five years. This represents about five percent of all active firms.

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84648; File No. SR–NYSEArca–2018–85]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Certificate of Incorporation, Bylaws and Rule 3.3

November 26, 2018.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 20, 2018, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its certificate of incorporation, bylaws and Rule 3.3(a)(1)(B) to (1) harmonize certain provisions thereunder with similar provisions in the governing documents of the Exchange's national securities exchange affiliates and parent companies; and (2) make clarifying and updating changes. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Certificate of Incorporation of the Exchange (''Exchange Certificate''), Amended and Restated Bylaws of the Exchange (''Exchange Bylaws''), and Rule 3.3(a)(1)(B) to (1) harmonize certain provisions thereunder with similar provisions in the governing documents of the Exchange's national securities exchange affiliates [4] and parent companies; and (2) make clarifying and updating changes.

The Exchange is owned by the Holding Member, which in turn is indirectly wholly owned by NYSE Holdings LLC (''NYSE Holdings''). NYSE Holdings is a wholly owned subsidiary of Intercontinental Holdings, Inc. (''ICE Holdings''), which is in turn wholly owned by the Intercontinental Exchange, Inc. (''ICE'').[5]

The Exchange operates as a separate self-regulatory organization and has rules, membership rosters and listings distinct from the rules, membership rosters and listings of the other NYSE Group Exchanges. At the same time, however, the Exchange believes it is important for each of the NYSE Group Exchanges to have a consistent approach to corporate governance in certain matters, to simplify complexity and create greater consistency among the NYSE Group Exchanges.[6]

Because the Exchange is a Delaware non-stock corporation, most of the proposed changes are based on the governing documents of CHX and NYSE National, which are Delaware corporations, as the most comparable NYSE Group Exchanges.[7] The proposed Exchange Certificate and Exchange Bylaws reflect the expectation that the Exchange will continue to be operated with a governance structure substantially similar to that of other NYSE Group Exchanges, primarily CHX and NYSE National.

The changes described herein would become operative upon the Exchange Certificate becoming effective pursuant to its filing with the Secretary of State of the State of Delaware.

The proposed amendments described below are primarily based on the Second Amended and Restated Certificate of Incorporation of Chicago Stock Exchange, Inc. (''NYSE Chicago Certificate''); Second Amended and Restated By-Laws of NYSE Chicago, Inc. (''NYSE Chicago Bylaws'') [8]; Amended and Restated Certificate of Incorporation of NYSE National, Inc. (''NYSE National Certificate''); Fifth Amended and Restated Bylaws of NYSE National, Inc. (''NYSE National Bylaws'') [9]; and Sixth Amended and Restated Certificate of Incorporation of NYSE Group, Inc. (''NYSE Group Certificate). In addition, the amendments to the indemnification provisions are based on the Eighth Amended and Restated Bylaws of Intercontinental Exchange, Inc. (''ICE Bylaws'') and the Sixth Amended and Restated Bylaws of Intercontinental Exchange Holdings, Inc. (''ICE Holdings Bylaws'').

Proposed Amendments to the Exchange Certificate

The Exchange proposes to amend the Exchange Certificate as follows.

Title and Introductory Paragraphs

The Exchange proposes to amend the title to reflect that the proposed Exchange Certificate is the ''Amended and Restated Certificate of Incorporation of NYSE Arca, Inc.'' [10] In addition, it proposes to adopt introductory paragraphs stating the Exchange's name and stating that the Exchange Certificate was adopted and amended in accordance with specific provisions of the General Corporation Law of the State of Delaware (''DGCL''). The introductory paragraphs are substantially similar to the introductory paragraphs of the NYSE Chicago Certificate.

Article 1

In a non-substantive change, the Exchange proposes to replace ''NYSE ARCA, INC.'' with ''NYSE Arca, Inc.'' in Article 1, to reflect that the legal name of the Exchange is not entirely in capital letters. Proposed Article 1 is substantially similar to Article 1 of the NYSE Chicago Certificate and Article

[4] The Exchange has four registered national securities exchange affiliates: NYSE National, Inc. (''NYSE National''), New York Stock Exchange LLC (''NYSE''), NYSE America [sic] LLC (''NYSE American''), and Chicago Stock Exchange, Inc. (''CHX'' and together with the Exchange, NYSE National, NYSE American, and NYSE, the ''NYSE Group Exchanges''). CHX has filed to change its name to NYSE Chicago, Inc. *See* Exchange Act Release No. 84494 (October 26, 2018), 83 FR 54953 (November 1, 2018) (SR–CHX–2018–05) (''NYSE Chicago Release'') (notice of filing and immediate effectiveness of proposal to reflect name changes of the Exchange and its direct parent company and to amend certain corporate governance provisions). The rule changes set forth in the NYSE Chicago Release will become operative upon the Second Amended and Restated Certificate of Incorporation of Chicago Stock Exchange, Inc. (''NYSE Chicago Certificate'') becoming effective pursuant to its filing with the Secretary of State of the State of Delaware.

[5] *See* Exchange Act Release No. 82638 (February 6, 2018), 83 FR 6072 (February 12, 2018) (SR–NYSE Arca–2018–09) (notice of filing and immediate effectiveness of proposed rule change to amend certain of the governing documents of the Exchange's intermediate parent companies).

[6] *See* NYSE Chicago Release, *supra* note 4, at 54953.

[7] The other NYSE Group Exchanges, NYSE and NYSE American, are limited liability companies organized under New York and Delaware limited liability company law, respectively.

[8] The NYSE Chicago Certificate and NYSE Chicago Bylaws will become operative when the NYSE Chicago Certificate becomes effective pursuant to its filing with the Secretary of State of the State of Delaware. *Id.*

[9] The Exchange notes that, concurrent with this filing, NYSE National is filing changes to the NYSE National Certificate and Bylaws. *See* SR–NYSENat–2018–24. References to such documents in this filing are to the NYSE National Certificate and Bylaws currently in effect. The Exchange governing documents use ''member,'' ''Exchange'' and ''Board'' instead of ''stockholder,'' ''Corporation,'' and ''Board of Directors,'' which are used by CHX and NYSE National in their governing documents. When comparing a proposed change to the provision it is based on, the below descriptions do not note when such terms differ, as they are not substantive differences.

[10] *See* Exhibit B [sic] to Amendment No. 2, SR–PCX–2006–24 (March 6, 2006); *see also* Exchange Act Release No. 53615 (April 7, 2006), 71 FR 19226 (April 13, 2006) (SR–PCX–2006–24) (notice of filing and immediate effectiveness of proposed rule change and Amendments No. 1 and 2 thereto to change the names of the Pacific Exchange, Inc., PCX Equities, Inc., PCX Holdings, Inc., and the Archipelago Exchange, L.L.C.).

FIRST of the NYSE National Certificate, provided that the Exchange Certificate provision defines ''Exchange.''

Article 2 and Certificate of Change of Registered Agent and/or Registered Office

In a non-substantive change, the Exchange proposes to update the address of the registered office and name of the registered agent, as previously filed. The Exchange also proposes to delete the ''Certificate of Change of Registered Agent and/or Registered Office.'' [11]

Article 9

Article 9 permits the Exchange to enter into a compromise with its creditors in certain circumstances. The Exchange proposes to amend current Article 9 to be consistent with the relevant provision of the DGCL, including the use of ''corporation'' instead of ''Exchange.'' [12] The proposed article would be substantially similar to Article TENTH of the NYSE Chicago Certificate and Article TENTH of the NYSE National Certificate.

Article 10

In a non-substantive change, the Exchange proposes to correct a reference to ''this Article 11'' to reference Article 10.

Article 12

Article 12 addresses indemnification. The Exchange proposes to delete Article 12 in its entirety, as the indemnification provision is set forth in Article VII, Section 7.01 of the Exchange Bylaws, making this provision redundant. Subsequent articles would be renumbered accordingly. NYSE Chicago made a similar change, deleting Article EIGHTH(a) of its Certificate.[13]

Article 13

Current Article 13 (proposed Article 12) states that the approval of a majority of the members of the Board and a majority of the existing Corporate Members shall be required to amend or repeal any provision of the Exchange Certificate, and that any change to the Exchange Certificate or Bylaws that is required to be approved by or filed with the Commission before it may become effective shall not become effective until the required Commission procedures have been satisfied.

The Exchange proposes to amend the provision to state that the Exchange reserves the right to amend the Exchange Certificate and to change or repeal any provision thereof, provided that any amendment must be approved by a majority of the members of the Board present at the relevant meeting and by a majority of the existing Corporate Members. In addition, the Exchange proposes to add a sentence providing that before any amendment to, alteration or repeal of any provision of the Exchange Certificate shall be effective, those changes shall be submitted to the Board and, if required, the proposed changes shall not become effective until filed with or filed with and approved by the Commission, as the case may be. The revised provision would read as follows (deletions bracketed; new text italicized):

The approval of either a majority of the Board of Directors or the affirmative vote of a majority of the existing Corporate Members, shall be required to adopt, amend or repeal any provision of the bylaws of the Exchange. The [approval of]*Exchange reserves the right to amend this certificate of incorporation, and to change or repeal any provision of the certificate of incorporation, and all rights conferred upon Corporate Members by such certificate of incorporation are granted subject to this reservation; provided, however, that any amendment to this certificate of incorporation must be approved by* a majority of *the members of* the Board of Directors *who are present at the meeting at which the amendment is proposed* and *by* a majority of the existing Corporate Members [shall be required to amend or repeal any provision of this Certificate of Incorporation]. Any change to the Certificate of Incorporation or bylaws that is required to be approved by or filed with the United States Securities and Exchange Commission (the ''Commission'') before it may become effective shall not become effective until the procedures of the Commission necessary to make it effective shall have been satisfied. *Before any amendment to, or repeal of, any provision of this Certificate of Incorporation shall be effective, those changes shall be submitted to the Board of Directors of the Exchange and if such amendment or repeal must be filed with or filed with and approved by the Commission, then the proposed changes to this Certificate of Incorporation shall not become effective until filed with or filed with and approved by the Commission, as the case may be.*

The proposed new text would be substantially similar to Article ELEVENTH of the NYSE Chicago Certificate. In addition, the proposed final sentence is consistent with the final sentence of Article ELEVENTH of the NYSE National Certificate.

Article 14

Article 14 sets forth the name and mailing address of each of the incorporators. In a non-substantive change, the Exchange proposes to delete current Article 14 in its entirety, as it is obsolete.[14] Neither NYSE Chicago nor NYSE National have a similar provision in their respective certificates.[15]

Proposed Article 13 and Signature Block

In an administrative change, the Exchange proposes to add a statement in proposed Article 13 setting forth the date and time that the Exchange Certificate shall be effective, as well as to add a signature block with the date of execution. The proposed change would be consistent with Article XIV and signature block of the NYSE Group Certificate.

Proposed Amendments to the Exchange Bylaws

The Exchange proposes to amend the Exchange Bylaws as follows.

Article I (Offices)

Article I contains a provision stating that the Exchange shall have a registered office in Delaware as required by law, and elsewhere as determined by the Board. The Exchange proposes to (a) amend the title and number to the provision in Article I, and (b) add a sentence that states that the Exchange's Delaware registered agent shall be such person or entity determined by the Board. The proposed title and final sentence would be consistent with the final sentence of Article I, Section 1 of the NYSE Chicago Bylaws and of Article II, Section 2.1 of the NYSE National Bylaws.[16]

Article II (Members)

The Exchange proposes to delete Sections 2.02, 2.04, and 2.05, which are marked ''Reserved,'' and renumber the remaining sections of Article II accordingly.

Proposed Article 2.03 (Dividends; Regulatory Fees and Penalties: Current Section 2.06 states that ''revenues received by the Exchange from regulatory fees or regulatory penalties will be applied to fund the legal,

[11] *See* Exchange Act Release No. 82924 (March 22, 2018), 83 FR 13163 (March 27, 2018) (SR–NYSEArca–2018–18).

[12] *See* Del. Code tit. 8, § 102(b)(2)(ii).

[13] *See* NYSE Chicago Release, *supra* note 4, at 54956.

[14] *See* Del. Code tit. 8, § 242(a)(7)(a).

[15] The Exchange notes that the certificates of incorporation of NYSE Group, ICE Holdings and ICE also do not have similar provisions.

[16] *See* NYSE Chicago Release, *supra* note 4, at 54957.

regulatory and surveillance operations of the Exchange and will not be used to pay dividends.''

The Exchange proposes to maintain the substance of current Section 2.06, renumbering it as Article 2.03, but substantially conforming the provision to the governing documents of the other NYSE Group Exchanges.[17] The proposed language would expand the scope of the provision to include regulatory assets and fines as well as fees or penalties collected by the Exchange's regulatory staff, and would add a prohibition on the payment of distributions to other entities. The Exchange would also revise the title and add subparagraphs. Proposed Section 2.03 provides as follows (deletions bracketed; new text italicized):

(b) Any [revenues received by the Exchange from]*regulatory assets or any* regulatory fees*, fines* or [regulatory] penalties *collected by the Exchange's regulatory staff* will be applied to fund the legal, regulatory and surveillance operations of the Exchange*, and the Exchange shall not distribute such assets, fees, fines or penalties* [and will not be used] to pay dividends *or be distributed to any other entity.* For purposes of this Section, regulatory penalties shall include restitution and disgorgement of funds intended for customers.

Article III (Board of Directors)

Section 3.03 (Vacancies): Section 3.03 provides that any vacancy on the Board may be filled by the Chairman of the Board, subject to the approval by a majority of the directors.

In an administrative change, the Exchange proposes to add text stating that (a) such approval must be made by a majority of the directors then in office, as opposed to total number of seats on the Board; and (b) the Holding Member may also fill any vacancy, and those vacancies resulting from removal from office by a vote of the Holding Member for cause may be filled by a vote of the Holding Member at the same meeting at which such removal occurs. The first sentence of the amended paragraph would be as follows (additions italicized):

Whenever between meetings of the Exchange any vacancy exists on the Board of Directors by reason of death, resignation, removal or increase in the authorized number of directors or otherwise, it may be filled *(i)* by the Chairman of the Board, subject to approval by a majority of the Board of Directors *then in office, or (ii) by action taken by the Holding Member, and those vacancies resulting from removal from office by a vote of the Holding Member for cause may be filled by a vote of the Holding Member at the same meeting at which such removal occurs.*

The change would be consistent with clause (ii) of Article II, Section 5 of the NYSE Chicago Bylaws, which was amended at the time of its acquisition by ICE.[18]

Section 3.04 (Place of Meetings): Section 3.04 provides that any meeting of the Board may be held within or without the State of Delaware.

In an administrative change, the Exchange proposes to amend the provision to state that the meeting shall be at the place designated in the notice of the meeting, but that if no designation is made, the meeting will be at the principal office of the Exchange. The change would be consistent with the first sentence of NYSE National Bylaws Article III, Section 3.8 and NYSE Chicago Bylaws, Article II, Section 7.[19]

Sections 3.07 (Quorum): Section 3.07 (Quorum) provides that the presence of a majority of the number of directors on the Board is necessary to constitute a quorum, and adds that, if less than a quorum is present at a Board meeting, the directors present may adjourn the meeting to another time or place until a quorum is present.

The Exchange proposes to revise the quorum requirement to state that ''Except as otherwise required by law, at all meetings of the Board, the presence of a majority of the number of directors then in office shall constitute a quorum for the transaction of business.'' In addition, it proposes to replace the sentence regarding procedures if less than a quorum is present with the statement that, if a quorum is not present, ''a majority of the directors present at the meeting may adjourn the meeting, without notice other than announcement at the meeting, until a quorum shall be present.''

Changing the quorum requirement to a majority of the directors then in office would be consistent with the quorum provisions of the other NYSE Group Exchanges.[20] The proposed text is substantially similar to the second and fourth sentences of NYSE Chicago Bylaws Article II, Section 10. [21]

Section 3.08 (Vote): Pursuant to Section 3.08, the act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the Board, except as may be otherwise specifically provided by law, the Exchange Certificate, the Exchange Bylaws or the Rules.

The Exchange proposes to add a sentence stating that each director shall be entitled to one vote. The revised provision is substantially similar to the first and third sentences of NYSE Chicago Bylaws Article II, Section 10. [22]

Section 3.09 (Action in Lieu of a Meeting): Section 3.09 provides that, unless otherwise restricted by the Exchange Certificate, Exchange By-Laws, or Exchange Rules, action may be taken without a meeting if certain procedural requirements are met.

In an administrative change, the Exchange proposes to replace ''Unless otherwise restricted by'' with ''Unless otherwise provided by law.'' The proposed change would allow the provision to be consistent with both applicable law and the Exchange governing documents and rules, should applicable law set forth specific requirements that differ from such documents. The change would be consistent with NYSE Chicago Bylaws Article II, Section 13.

Article V (Officers)

Section 5.01 (General): Section 5.01 provides that officers of the Exchange must include a Secretary and may include a President, Chief Executive Officer (''CEO'') and, upon the CEO's recommendation, any other officers deemed desirable for the conduct of business. In addition, it states that any two or more offices may be held by the same person.

In an administrative change, the Exchange proposes to amend Section 5.01 to provide that the Board shall elect officers of the Exchange as it deems appropriate. The statement that two or more offices may be held by the same person would be revised to exclude the Chief Regulatory Officer and the Secretary from holding the office of CEO or President. The revised provision would be substantially similar to Article VI, Section 6.1 of the NYSE National

[17] *See* NYSE Chicago Bylaws, Article IX, Section 5; NYSE National Bylaws, Article X, Section 10.4; NYSE Operating Agreement, Article IV, Section 4.05; and NYSE American Operating Agreement, Article IV, Section 4.05.

[18] *See* Exchange Act Release No. 83635 (July 13, 2018), 83 FR 34182 (July 19, 2018) (SR–CHX–2018–004), and Partial Amendment No. 2 to SR–CHX–2018–004 (June 11, 2018).

[19] The remaining text of the NYSE National and NYSE Chicago provisions address conference call meetings, which are covered in Article III, Section 3.10 of the Exchange Bylaws.

[20] *See* NYSE Chicago Bylaws Article II, Section 10; NYSE National Bylaws Article III, Section 3.11; NYSE Operating Agreement, Article II, Section 2.03(d); and NYSE American Operating Agreement, Article II, Section 2.03(d). *See also* DCGL Section 141(b).

[21] *See* NYSE Chicago Release, *supra* note 4, at 54958–54959.

[22] *See id. See also* NYSE National Bylaws Article III, Section 3.11.

Bylaws and Article V, Section 1 of the NYSE Chicago Bylaws.[23]

Section 5.02 (Privileges): In a non-substantive change, the Exchange proposes to revise the name of Section 5.02 to ''Powers and Duties,'' as it is more indicative of the content of the Section, which sets forth the powers and duties of officers. The Exchange does not propose to amend the text of Section 5.02. The revised title would be the same as the title of Article VI, Section 6.4 of the NYSE National Bylaws and Article V, Section 3 of the NYSE Chicago Bylaws.

Section 5.03 (Term of Office; Removal and Vacancy): The first sentence of Section 5.03 provides that ''[e]ach officer shall hold office until his or her successor is elected and qualified or until his or her earlier resignation or removal.''

The Exchange proposes to add death and retirement as events that would cause an officer to no longer hold office. The proposed change would be consistent with Article V, Section 2(a) of the NYSE Chicago Bylaws.[24]

Section 5.04 (Chief Executive Officer): The second sentence of Section 5.04 states that ''[s]ubject to the control of the Board of Directors, the Chief Executive Officer, or such other officer or officers as may be designated by the Board, shall have general executive charge, management and control of the properties, business and operations of the Exchange with all such powers as may be reasonably incident to such responsibilities; may agree upon and execute all leases, contracts, evidences of indebtedness and other obligations in the name of the Exchange; and shall have such other powers and duties as designated in accordance with these Bylaws and as from time to time may be assigned by the Board of Directors.''

The Exchange proposes to delete the second sentence of Section 5.04, as Section 5.02 already provides that the any officer of the Exchange, including the CEO, shall, unless otherwise ordered by the Board, have such powers and duties as generally pertain to their office as well as such powers and duties as from time to time may be conferred by the Board. The Exchange notes that Article VI of the NYSE National Bylaws similarly does not have a separate provision regarding the powers of its chief executive officer.[25]

Article VI (Miscellaneous)

Section 6.05 (Affiliate Transaction): Section 6.05 sets forth a list of transactions that the Exchange may not enter into with any affiliate of the Exchange unless such transaction shall have been first approved by a majority vote of the disinterested directors of the Exchange who are also public directors, and sets our related definitions and requirements.

The Exchange proposes to delete Section 6.05 in its entirety. Section 6.05 of the Exchange Bylaws dates to the demutualization of the Exchange (then ''Pacific Exchange, Inc.''), when its ownership structure was materially different.[26] The Exchange believes that Section 6.05 is no longer necessary given the corporate structure of ICE and the Exchange, as reflected by the fact that no other NYSE Group Exchange has a similar provision in its governing documents.[27]

Article VII (Indemnification)

Section 7.01 (Indemnification): Section 7.01 sets forth provisions related to indemnification by the Exchange. As a wholly-owned subsidiary of ICE, the Exchange believes it appropriate to harmonize the Exchange's indemnification provisions with those of ICE and the Exchange's intermediate holding company, ICE Holdings.[28] The same change was made to Article VI of the NYSE Chicago Bylaws.[29]

Accordingly, the Exchange proposes to delete the text of Section 7.01 (Indemnification) in its entirety and replace it with proposed text that is substantially similar to the CHX, ICE and ICE Holdings provisions, with the exception of changes to be consistent with the Exchange Bylaws' terminology.[30] The proposed text follows:

(a) The Exchange shall, to the fullest extent permitted by law, as those laws may be amended and supplemented from time to time, indemnify any director or officer made, or threatened to be made, a party to any action, suit or proceeding, whether criminal, civil, administrative or investigative, by reason of being a director or officer of the Exchange or a predecessor corporation or, at the Exchange's request, a director, officer, partner, member, employee or agent of another corporation or other entity; provided, however, that the Exchange shall indemnify any director or officer in connection with a proceeding initiated by such person only if such proceeding was authorized in advance by the Board of Directors of the Exchange. The indemnification provided for in this Section 7.01 shall: (i) Not be deemed exclusive of any other rights to which those indemnified may be entitled under any bylaw, agreement or vote of stockholders or disinterested directors or otherwise, both as to action in their official capacities and as to action in another capacity while holding such office; (ii) continue as to a person who has ceased to be a director or officer; and (iii) inure to the benefit of the heirs, executors and administrators of an indemnified person.

(b) Expenses incurred by any such person in defending a civil or criminal action, suit or proceeding by reason of the fact that he is or was a director or officer of the Exchange (or was serving at the Exchange's request as a director, officer, partner, member, employee or agent of another corporation or other entity) shall be paid by the Exchange in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that he or she is not entitled to be indemnified by the Exchange as authorized by law. Notwithstanding the foregoing, the Exchange shall not be required to advance such expenses to a person who is a party to an action, suit or proceeding brought by the Exchange and approved by a majority of the Board of Directors of the Exchange that alleges willful misappropriation of corporate assets by such person, disclosure of confidential information in violation of such person's fiduciary or contractual

[23] *See* NYSE Chicago Release, *supra* note 4, at 54962.

[24] *See id.*

[25] *See also* NYSE Operating Agreement, Article II, Section 2.04(c); and NYSE American Operating Agreement, Article II, Section 2.04(c);

[26] *See* Exchange Act Release No. 49718 (May 17, 2004), 69 FR 29611 (May 24, 2004) (SR–PCX–2004–08) (order approving proposed rule change and notice of filing and order granting accelerated approval of Amendment No. 1 thereto relating to the demutualization of the Pacific Exchange, Inc.); *see also* Article VI, Section 6.05 of Exhibit E to SR–PCX–2004–08 (February 10, 2004).

[27] The Exchange notes that it has not found a similar provision in the bylaws of other incorporated self-regulatory organizations. *See* Tenth Amended and Restated Bylaws of CBOE Exchange, Inc. [sic]; Ninth Amended and Restated Bylaws of CBOE EDGA Exchange, Inc.; Ninth Amended and Restated Bylaws of CBOE EDGX Exchange, Inc.; Eighth Amended And Restated Bylaws of CBOE BYX Exchange, Inc.; and By-Laws Of Nasdaq BX, Inc. *See also* By-Laws of The Nasdaq Stock Market LLC; By-Laws Of Nasdaq ISE, LLC; and the Second Amended and Restated Operating Agreement of Investors' Exchange LLC.

[28] *See* ICE Bylaws, Article X, Section 10.6, and ICE Holdings Bylaws, Article X, Section 10.6.

[29] *See* NYSE Chicago Release, *supra* note 4, at 54962–54963. The Exchange understands that NYSE, NYSE American, and NYSE National propose to file similar changes to their respective indemnification provisions.

[30] For example, proposed Section 7.01 uses ''officer'' instead of ''Senior Officers,'' ''Exchange'' instead of ''Corporation,'' and ''Section 7.01'' instead of ''Section 10.6.''

obligations to the Exchange or any other willful and deliberate breach in bad faith of such person's duty to the Exchange or its stockholders.

(c) The foregoing provisions of this Section 7.01 shall be deemed to be a contract between the Exchange and each director or officer who serves in such capacity at any time while this bylaw is in effect, and any repeal or modification thereof shall not affect any rights or obligations then existing with respect to any state of facts then or theretofore existing or any action, suit or proceeding theretofore or thereafter brought based in whole or in part upon any such state of facts. The rights provided to any person by this bylaw shall be enforceable against the Exchange by such person, who shall be presumed to have relied upon it in serving or continuing to serve as a director or officer or in such other capacity as provided above.

(d) The Board of Directors in its discretion shall have power on behalf of the Exchange to indemnify any person, other than a director or officer, made or threatened to be made a party to any action, suit or proceeding, whether criminal, civil, administrative or investigative, by reason of the fact that such person, or his or her testator or intestate, is or was an officer, employee or agent of the Exchange or, at the Exchange's request, is or was serving as a director, officer, partner, member, employee or agent of another corporation or other entity.

(e) To assure indemnification under this Section 7.01 of all directors, officers, employees and agents who are determined by the Exchange or otherwise to be or to have been ''fiduciaries'' of any employee benefit plan of the Exchange that may exist from time to time, Section 145 of the Delaware General Corporation Law shall, for the purposes of this Section 7.01, be interpreted as follows: An ''other enterprise'' shall be deemed to include such an employee benefit plan, including without limitation, any plan of the Exchange that is governed by the Act of Congress entitled ''Employee Retirement Income Security Act of 1974,'' as amended from time to time; the Exchange shall be deemed to have requested a person to serve an employee benefit plan where the performance by such person of his duties to the Exchange also imposes duties on, or otherwise involves services by, such person to the plan or participants or beneficiaries of the plan; excise taxes assessed on a person with respect to an employee benefit plan pursuant to such Act of Congress shall be deemed ''fines.''

Article IX (Amendment)

In a conforming change, the Exchange proposes to add a section number before the word ''Amendment.''

Proposed Amendments to Rule 3.3(a)(1)(B)

Rule 3.3(a)(1)(B) establishes the composition of the Exchange Regulatory Oversight Committee (''ROC''), and is substantially the same as the related provisions in the governing documents of the other NYSE Group Exchanges.[31] Among other things, the provision states that ''[t]he Board may, on affirmative vote of a majority of directors, at any time remove a member of the ROC for cause.'' The Exchange proposes to add language clarifying that the majority affirmative vote requirement is based on the ''directors then in office,'' as opposed to total number of seats on the Board. The change would be consistent with Article IV, Section 6 of the NYSE Chicago Bylaws.[32]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,[33] in general, and furthers the objectives of Section 6(b)(1) [34] in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,[35] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that the proposed amendments to the Exchange Bylaws, Certificate and Rule 3.3(a) would enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange, because such amendments would add or expand upon existing provisions to protect and maintain the independence and integrity of the Exchange and its regulatory function and reinforce the notion that the Exchange is not solely a commercial enterprise, but a national securities exchange subject to the obligations imposed by the Exchange Act. Such provisions include ensuring that regulatory assets, fees, fines, and penalties may only be used to fund legal, regulatory and surveillance operations; and providing that any amendments to the Exchange Certificate must be submitted to the Board and, as applicable, shall not be effective until filed with or filed with and approved by the Commission. The Exchange believes that such provisions are consistent with and will facilitate a governance structure that will provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Exchange Act with respect to the Exchange. The Exchange also believes that such amendments would act to insulate the Exchange's regulatory functions from its market and other commercial interests so that the Exchange can carry out its regulatory obligations and that, in general, the Exchange is administered in a way that is equitable to all those who trade on its market or through its facilities. Therefore, the Exchange believes that the proposed rule change would prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors and the public interest.

The Exchange believes that the proposed amendments to harmonize certain provisions of the Exchange Bylaws, Certificate and Rule 3.3(a) with similar provisions of the governing documents of other NYSE Group Exchanges, ICE and ICE Holdings would contribute to the orderly operation of the Exchange and would enable the

[31] *See* NYSE National Bylaws, Article V, Section 5.6; NYSE Operating Agreement, Article II, Section 2.03(h)(ii); NYSE American Operating Agreement, Article II, Section 2.03(h)(ii); and NYSE Chicago Bylaws, Article IV, Section 6.

[32] *See* NYSE Chicago Release, *supra* note 4, at 54961. The Exchange understands that NYSE, NYSE American, and NYSE National propose to file similar changes to their respective ROC provisions.

[33] 15 U.S.C. 78f(b).

[34] 15 U.S.C. 78f(b)(1).

[35] 15 U.S.C. 78f(b)(5).

Exchange to be so organized as to have the capacity to carry out the purposes of the Exchange Act and comply with the provisions of the Exchange Act by its members and persons associated with members. For example, the proposed changes would create greater conformity between the Exchange's provisions relating to officers, committees, and indemnification and those of its affiliates, particularly NYSE National and CHX. The Exchange believes that such conformity would streamline the NYSE Group Exchanges' corporate processes, create more equivalent governance processes among them, and also provide clarity to the Exchange's members, which is beneficial to both investors and the public interest. At the same time, the Exchange will continue to operate as a separate self-regulatory organization and to have rules, membership rosters and listings distinct from the rules, membership rosters and listings of the other NYSE Group Exchanges.

The Exchange also believes that the greater consistency among the governing documents of the NYSE Group Exchanges, ICE and ICE Holdings would promote the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest. Indeed, the proposed amendments would make the corporate requirements and administrative processes relating to the Board, Board committees, officers, and other corporate matters more similar to those of the NYSE Group Exchanges, in particular NYSE National and CHX, which have been established as fair and designed to protect investors and the public interest.[36]

The Exchange believes that the deletion of Article VI, Section 6.05 of the Exchange Bylaws would be consistent with the orderly operation of the Exchange and would enable the Exchange to be so organized as to have the capacity to carry out the purposes of the Exchange Act and comply with the provisions of the Exchange Act by its members and persons associated with members. Section 6.05 does not relate to the operations of the Exchange's markets, but rather to potential transactions with affiliates of the Exchange. Section 6.05 dates to the demutualization of the Exchange, when its ownership structure was materially different.[37] The Exchange believes that Section 6.05 is no longer necessary given the corporate structure of ICE and the Exchange, as reflected by the fact that no other NYSE Group Exchange has a similar provision in its governing documents.[38] For the same reasons, the Exchange believes that the proposed deletion would be consistent with the promotion of the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest.

The proposed amendments to clarify the meaning of certain provisions of the Exchange Bylaws, Certificate and Rule 3.3(a), to better comport certain provisions with the DGCL and to effect non-substantive changes would facilitate the Exchange's continued compliance with the Exchange Certificate and Bylaws and applicable law, which would further enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. Such amendments would also remove impediments to and perfects the mechanism of a free and open market by removing confusion that may result from corporate governance provisions that are either unclear or inconsistent with the governing law.

The Exchange also believes that the proposed amendments would remove impediments to and perfect the mechanism of a free and open market by ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the governing documents. The Exchange further believes that the proposed amendments would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency and clarity, thereby reducing potential confusion.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with the corporate governance and administration of the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[39] and Rule 19b–4(f)(6) thereunder.[40] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[41] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2018–85 on the subject line.

[36] *See* NYSE Chicago Release, *supra* note 4; Exchange Act Release Nos. 83303 (May 22, 2018), 83 FR 24517 (May 29, 2018) (SR–CHX–2018–004); and 79902 (January 30, 2017), 82 FR 9258 (February 3, 2017) (SR–NSX–2016–16) (order approving proposed rule change in connection with proposed acquisition of the Exchange by NYSE Group, Inc.).

[37] *See* note 26, *supra*.

[38] *See* note 27, *supra*.

[39] 15 U.S.C. 78s(b)(3)(A)(iii).

[40] 17 CFR 240.19b–4(f)(6).

[41] 15 U.S.C. 78s(b)(2)(B).

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2018–85. 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 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 ubmissions should refer to File Number SR–NYSEArca–2018–85 and should be submitted on or before December 21, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

Eduardo A. Aleman,

Assistant Secretary.

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[42] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84653; File No. SR–CboeBZX–2018–083]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To the Modification of Certain Routing Fees

November 26, 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 November 13, 2018, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''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

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to modify certain Routing Fees.

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule to amend pricing for orders routed to Cboe EDGA Exchange, Inc., (''EDGA''), which yield fee codes AA, BJ, and RA.[3] Particularly, as of November 1, 2018, EDGA implemented pricing changes for transactions that add and remove liquidity.[4] The filing generally proposes that orders that add liquidity will be assessed a fee of $0.00300 per share and orders that remove liquidity will be provided a rebate of $0.00240 per share. Based on the changes in pricing at EDGA, the Exchange proposes the pricing changes described below.

First, the Exchange notes that orders routed to EDGA using ALLB routing strategy (which yield fee code AA) and orders routed to EDGA using a TRIM or TRIM2 routing strategy (which yield fee code BJ) are currently assessed $0.00030 per share. The Exchange proposes to eliminate this fee and instead provide a rebate of $0.00240 per share for these orders. Next, the Exchange notes that orders routed to EDGA that add liquidity (which yield fee code RA) are assessed $0.00030 per share. The Exchange proposes to increase the rate from $0.00030 per share to $0.00300 per share.

2. Statutory Basis

The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

The Exchange believes the proposed changes are reasonable because they reflect a pass-through of the pricing changes by EDGA described above. The Exchange further believes the proposed fee change is non-discriminatory because it applies uniformly to all Members. The Exchange lastly notes that routing through the Exchange is voluntary and that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues or providers of routing services if they deem fee levels to be excessive.

[3] The Exchange initially filed the proposed fee changes on November 1, 2018 (SR-CboeBZX–2018–080). On business date November 13, 2018, the Exchange withdrew that filing and submitted this filing.

[4] *See* SR-CboeEDGA–2018–017.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposed routing fee changes will not impose an undue burden on competition because the Exchange will uniformly assess the affected routing fees on all Members. Additionally, Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value or if they view the proposed fee as excessive. The Exchange also notes the proposed changes to the EDGA-related routing fees are meant to pass through the fees and rebates associated with executing orders on that market, and is therefore not designed to have any significant impact on competition. Further, excessive fees for participation would serve to impair an exchange's ability to compete for order flow and members rather than burdening competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [5] and paragraph (f) of Rule 19b–4 [6] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov. Please include File Number SR-CboeBZX–2018–083 on the subject line.*

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeBZX–2018–083. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet 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–CboeBZX–2018–083 and should be submitted on or before December 21, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–26002 Filed 11–29–18; 8:45 am]

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[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84645; File No. SR–Phlx–2018–73]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Provisions for Excluding Days for Purposes of Pricing Tiers

November 26, 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 November 14, 2018, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's provisions for excluding a day from its volume calculations for purposes of determining pricing tiers.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqphlx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

provisions for excluding a day from its volume calculations for purposes of determining pricing tiers, as further discussed below.

Background

To avoid penalizing members when aberrant low volume days result from systems or other issues at the Exchange, or where the Exchange closes early for holiday observance, the Exchange currently has language in its Pricing Schedule allowing it to exclude certain days from its average daily volume (''ADV'') calculations or calculations that are based on a percentage of industry volume. Currently, Section 1(b) of the Exchange's Pricing Schedule provides that for Phlx options, any day that the market is not open for the entire trading day or the Exchange instructs members in writing to route their orders to other markets may be excluded from the ADV calculation or calculation based on a percentage of industry volume; provided that the Exchange will only remove the day for members that would have a lower ADV or percentage of industry volume with the day included. If a day is removed from a calculation based on a percentage of monthly industry volume, volume executed that day will be removed from both the numerator and the denominator of the calculation.[3] The proviso language in Section 1(b) (hereinafter, the ''better of rule'') ensures that members would only have the day removed when doing so is beneficial for the member. As such, the Exchange only applies the better of rule to ADV calculations and calculations based on a percentage of industry volume, and not for other volume-based pricing where members would not benefit from having the day excluded (*e.g.,* straight volume accumulations).

In a recent review of the rule, the Exchange determined that it would be beneficial to further expand upon and provide additional detail regarding how the Exchange applies this rule.

Proposal

The Exchange first proposes to delete the lead-in ''For Phlx Options'' in Section 1(b) of Options 7, and retitle this section as ''Removal of Days for Purposes of Pricing Tiers.'' The fees for Phlx options and PSX equities are no longer included in the same pricing schedule, and the Exchange therefore believes that the current clarifying lead-in is no longer necessary.[4] The Exchange also proposes to adopt the following language to replace current rule text in Section 1(b):

(1)(A) Any day that the Exchange announces in advance that it will not be open for trading will be excluded from the options tier calculations set forth in its Pricing Schedule; and (B) any day with a scheduled early market close (''Scheduled Early Close'') may be excluded from the options tier calculations only pursuant to paragraph (3) below.

(2) The Exchange may exclude the following days (''Unanticipated Events'') from the options tier calculations only pursuant to paragraph (3) below, specifically any day that: (A) the market is not open for the entire trading day, (B) the Exchange instructs members in writing to route their orders to other markets, (C) the Exchange is inaccessible to members during the 30-minute period before the opening of trade due to an Exchange system disruption, or (D) the Exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours.

(3) If a day is to be excluded as a result of paragraph (1)(B) or (2) above, the Exchange will exclude the day from any member's monthly options tier calculations as follows:

(A) the Exchange may exclude from the ADV calculation any Scheduled Early Close or Unanticipated Event;

(B) the Exchange may exclude from the calculation based on a percentage of industry volume any Scheduled Early Close or Unanticipated Event; and

(C) the Exchange may exclude from any other applicable options tier calculation provided for in its Schedule of Fees (together with (3)(A) and (3)(B), ''Tier Calculations'') any Scheduled Early Close or Unanticipated Event; provided, in each case, that the Exchange will only remove the day for members that would have a lower Tier Calculation with the day included. If a day is removed from a calculation based on a percentage of monthly industry volume, volume executed that day will be removed from both the numerator and the denominator of the calculation.

The proposed rule change: (i) Expands upon the existing scenarios where the Exchange may remove a day to adopt two additional situations related to Exchange systems disruptions, (ii) categorizes the scenarios into days that are known in advance (*i.e.,* days in proposed paragraph (1), including Scheduled Early Closes) and days that are not (*i.e.,* Unanticipated Events in proposed paragraph (2)), (iii) clarifies how each scenario would apply to the options tier calculations in the Pricing Schedule, (iv) adds a ''catch-all'' provision for other volume based options tier calculations set forth in its Pricing Schedule, but are not specified within paragraphs (3)(A) and (3)(B), to clarify how the Exchange would exclude days for other such Tier Calculations going forward, and (v) generally adds more detail to clarify the application of the better of rule. As it relates to Unanticipated Events, the Exchange will inform all members if any such day will be excluded from its Tier Calculations through a publicly published alert. The Exchange notes that it is not proposing any changes to the existing rebates or to the current tier calculation thresholds required to achieve each rebate tier.

Exchange Systems Disruptions

The Exchange proposes to adopt two additional scenarios as ''Unanticipated Events'' that the Exchange may determine to exclude from its Tier Calculations. First, the Exchange proposes to exclude days where the Exchange is inaccessible to members during the 30-minute period before the opening of trade (*i.e.,* between 9:00 a.m. to 9:30 a.m. Eastern Time) due to an Exchange system disruption, even if the Exchange does not instruct members to route away to other markets. As discussed above, the Exchange's current ability to remove days from its calculations of ADV and industry volume percentages is limited to days where the market is not open for the entire trading day, and where the Exchange instructs members to route away to other markets. This allows the Exchange to exclude days, for example, where the Exchange honors a market-wide trading halt declared by another market, closes early for holiday observance, or instructs members to route away to other markets because of a systems issue in the morning, which ultimately does not carry over into the trading day. The Exchange notes, however, that it may not always instruct members to route away. For instance, the Exchange may be inaccessible to members in the morning due to a systems disruption but the Exchange resolves the issue shortly before 9:30 a.m. and as a result, the Exchange does not instruct members to route away. In such cases, the Exchange is not permitted to exclude the day from its ADV calculation or calculation based on a percentage of industry volume. The Exchange generally experiences a high

[3] The Exchange removes the day from both the numerator and denominator to ensure that members benefit from this rule as removing the day from the numerator only (*i.e.,* the member's volume) without removing it from the denominator (*i.e.,* industry volume) would penalize the member.

[4] *See* Securities Exchange Act Release No. 84495 (October 29, 2018), 83 FR 55210 (November 2, 2018) (SR–Phlx–2018–66).

volume of member participation within the 30-minute window leading up to the opening of trade from members who submit eligible interest be included in the Exchange's opening process. As a result, days where members are precluded from submitting eligible interest during this 30-minute time period due to an Exchange systems disruption, even if the issue is ultimately resolved by the Exchange before the market opens (and members therefore are not instructed to route away), are likely to have lower trading volume. Including such days in calculations of ADV or percentage of industry volume will therefore make it more difficult for members to achieve particular pricing tiers for that month. Accordingly, excluding such days from the monthly tier calculations will diminish the likelihood of a cost increase occurring because a member is not able to reach a pricing tier on that date that it would reach on other trading days during the month.

Second, the Exchange proposes to exclude days where there is an Exchange system disruption that lasts for more than 60 minutes during regular trading hours (*i.e.,* 9:30 a.m. to 4:00 p.m. Eastern Time), even if such disruption would not be categorized as a complete outage of the Exchange's system. Such a disruption may occur where a certain options series traded on the Exchange is unavailable for trading due to an Exchange systems issue, or where the Exchange may be able to perform certain functions with respect to accepting and processing orders, but may have a failure to another significant process, such as routing to other market centers, that would lead members who rely on such processes to avoid using the Exchange until the Exchange's entire system was operational. The Exchange believes that certain system disruptions that are not complete system outages could preclude some members from submitting orders to the Exchange. The Exchange notes that this proposal is consistent with the rules of other options exchanges.[5]

The Exchange believes that the two scenarios proposed above are reasonable and equitable because the intent of the current rule has always been to avoid penalizing members that might otherwise qualify for certain tiered pricing but that because of aberrant low volume days resulting, for instance, from Exchange systems disruptions, did not participate on the Exchange to the extent they might have otherwise participated.

In addition, to avoid penalizing members that step up and trade on a day with artificially low volume, the Exchange currently only removes days for members that would have a lower ADV calculation or calculation based on a percentage of industry volume with the day included (*i.e.,* the better of rule). The Exchange believes that applying the better of rule to the proposed system disruption-related scenarios would be similarly helpful as it would ensure that members that continue to execute a large volume of contracts on such days are not inadvertently disadvantaged when the Exchange removes a systems disruption-related day from its calculations of ADV or industry volume percentages.

The Exchange also proposes that if a systems disruption-related day is removed from a calculation based on a percentage of monthly industry volume, volume executed that day will be removed from both the numerator and denominator of the calculation. Removing the day from both the numerator and denominator of the calculation will ensure that members benefit from this rule as removing the day from the numerator only (*i.e.,* the member's volume) without removing it from the denominator (*i.e.,* industry volume) would penalize the member. The Exchange takes the same approach for removing days from such calculations under the current rule.

Categories of Excluded Days

In light of the foregoing proposal to adopt two additional situations that the Exchange may exclude from its pricing tier calculations, the Exchange seeks to restructure the existing rule by separating out the different scenarios between days that are known in paragraph (1) and days that are not in paragraph (2), and define the latter as Unanticipated Events.

For planned days, the Exchange proposes to further distinguish between days that the Exchange announces in advance that it will not be open for trading in paragraph (1)(A) (*e.g.,* Thanksgiving), and Scheduled Early Closes in paragraph (1)(B) (*e.g.,* the trading day after Thanksgiving). The Exchange notes that it currently considers Scheduled Early Closes as a subset of days that the market is not open for the entire trading day. The Exchange believes it would be more clear to distinguish Scheduled Early Closes in paragraph (1) as a day that is planned for in advance, and separately consider days that are not open for the entire trading day as Unanticipated Events in paragraph (2)(A). As proposed, (2)(A) would continue to cover unplanned days where the Exchange declares a trading halt in all securities or honors a market-wide trading halt declared by another market. The other scenarios that will be categorized as Unanticipated Events in paragraph (2) are the two systems-related disruptions proposed above, and days that the Exchange instructs members in writing to route their orders to other markets, which is an existing scenario covered under the current rule as described above.

Exclusion of Days by Tier Calculation

The Exchange proposes to further amend the existing rule to specify how the days in paragraphs (1) and (2) will be excluded from its tier calculations. As discussed above, the Exchange currently removes the days set forth in paragraphs (1)(B), (2)(A), and (2)(B) from its calculations of ADV and industry volume percentages only for members that would have a lower ADV or percentage of industry volume with the day included. The Exchange is not changing how it currently excludes these days from these calculations. And as further discussed above, the Exchange is proposing to adopt the same principle-based approach for excluding the system disruption-related days in paragraphs (2)(C) and (2)(D). As such, proposed paragraph (3) will specify for the ADV calculation and calculation based on a percentage of industry volume that the Exchange may exclude any Scheduled Early Close or Unanticipated Event, subject, in each case, to the better of rule.

As it relates to days where the Exchange announces in advance that it will not be open for trading, the Exchange notes that it will exclude those days from all options tier calculations set forth in its Pricing Schedule. This is also the case today since no trading activity occurs on those days, and the Exchange is only clarifying its current practice within the proposed rule text in paragraph (1)(A).

Catch-All Provision

The proposal also adds a ''catch-all'' provision in paragraph (3)(C) that would apply to other applicable options tier calculations that are set forth in its Pricing Schedule (''Tier Calculations''), but are not specified within paragraphs (3)(A) and (3)(B) (*i.e.,* not an ADV calculation or calculation based on a percentage of industry volume). This

[5] *See, e.g.,* BATS BZX Options Exchange Fee Schedule (defining an ''Exchange System Disruption'' as any day that the exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours); and NYSE Arca Options Fee Schedule (defining an ''Exchange System Disruption'' as a disruption affects an Exchange system that lasts for more than 60 minutes during regular trading hours).

catch-all provision is to provide the Exchange with flexibility to apply the better of rule going forward to all pricing programs administered by the Exchange that are based on volume calculations.[6] Specifically, the Exchange may exclude any Scheduled Early Close or Unanticipated Event from such other Tier Calculations only if the member will have a lower Tier Calculation with the day included. This is the same principle-based approach that the Exchange currently takes for its ADV calculation and calculation based on a percentage of industry volume, and is similarly intended to ensure that days are removed from a member's volume calculations only if doing so would be beneficial for the member.

Clarifying Changes

The Exchange proposes to add further detail throughout the rule text to bring greater transparency as to how the Exchange will apply the better of rule when removing days from its tier calculations. The Exchange proposes to make clear that it will only remove days pursuant to the better of rule by specifying in paragraphs (1)(B) and (2) that such days may be excluded from the Tier Calculations only pursuant to paragraph (3). Paragraph (3) will then provide that if a day is to be excluded as a result of paragraph (1)(B) or (2), the Exchange will be required to exclude the day from any member's monthly options tier calculations as detailed within paragraph (3) (*i.e.,* excluding a Scheduled Early Close or Unanticipated Event from a specified tier calculation only for members that would have a lower tier calculation with the day included). With the proposed changes, the Exchange seeks to clarify current practice by expressing that it will exclude days from any member's tier calculations in a uniform manner to ensure that days are removed only in situations where the member benefits. Currently, the Exchange looks at each potential excluded day in a month and calculates for every member their ADV or industry volume percentage based on their trading volume on that day. If any member would have a lower ADV or percentage of industry volume with the particular day included, the Exchange will exclude that day for that member. As such, the proposed changes specify that the Exchange will apply the better of rule in a uniform manner for all members, and that there is no arbitrary selection of ''winners'' or ''losers'' when the Exchange excludes days. Lastly, the Exchange proposes to make two technical changes within the better of rule; first, to clarify that the rule applies in each case of the tier calculations specified in paragraph (3), and second, to use the defined term ''Tier Calculations'' instead of ''ADV or percentage of industry volume'' to reflect the changes proposed herein.

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 the proposed rule change is reasonable and equitable as it provides a framework for removing days from the Exchange's volume calculations that the Exchange believes is beneficial to members. The proposed rule change would permit the Exchange to remove a day from its Tier Calculations in more circumstances, and ensures that the Exchange will only do so in circumstances where beneficial for the member due to the member executing a lower ADV or percentage of industry volume during the excluded day. The Exchange believes it is reasonable and equitable to exclude a day from its tier calculations when the Exchange's system experiences a disruption during the 30-minute period prior to the opening of trade that renders the Exchange inaccessible to members as this preserves the Exchange's intent behind adopting volume-based pricing. Without this change, members that are precluded from submitting eligible interest during the 30-minute window before the opening of trade may be negatively impacted, even if the Exchange resolves the issue before the market opens and as a result, does not instruct members to route away. The proposed change to exclude such days will diminish the likelihood of a cost increase occurring because a member is not able to reach a volume tier calculation on that date that it would reach on other trading days during the month. Furthermore, while the Exchange may have resolved the systems disruption from its perspective prior to the opening of trade, a member may now have issues managing their orders with the Exchange as a result of the original disruption, causing a downstream ripple effect.

Similarly, excluding a day where the Exchange's system experiences a disruption that lasts for more than 60 minutes intra-day is reasonable and equitable because the proposal seeks to avoid penalizing members that might otherwise qualify for certain tiered pricing but that, because of an Exchange systems disruption, did not participate on the Exchange to the extent they might have otherwise participated. The Exchange believes that certain systems disruptions could preclude some members from submitting orders to the Exchange even if such issue is not actually a complete systems outage. Other options exchanges similarly exclude exchange systems disruptions from their pricing tiers.[9]

In addition, the Exchange believes that it is reasonable and equitable to apply the better of rule to both systems disruption-related scenarios. Without these changes, members that step up and trade significant volume on excluded trading days may be negatively impacted, resulting in an effective cost increase for those members. The proposal would align the Exchange's approach to how it applies this rule today for days where the market is not open for the entire trading day or where the Exchange instructs members to route away. Furthermore, removing the proposed days from both the numerator and denominator of a calculation based on a percentage of industry volume is reasonable and equitable as this treatment ensures that the member actually benefits from having the day removed. Again, this would align the Exchange's current approach to how it removes days from such calculations.

In light of the Exchange's proposal to adopt the two additional scenarios related to systems disruptions, the Exchange is making related, restructuring changes to the existing language in Options 7, Section 1(b) to bring greater transparency to the application of its rule. Specifically, the Exchange is distinguishing between planned and unplanned days in paragraphs (1) and (2), defining the latter as Unanticipated Events, and stipulating how the Exchange will exclude such days pursuant to this rule. Categorizing days in this manner will clarify the application of its rule in light of the Exchange's proposal to expand the rule to adopt additional days that

[6] As such, the proposed language will not apply to straight volume accumulations, and the Exchange will continue to not exclude days from such calculations, as is current practice, since members do not benefit when a day is removed from straight volume accumulations.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4) and (5).

[9] *See* footnote 5 above.

may be excluded from its tier calculations. Similarly, the Exchange believes that the proposed changes to specify how each of the days in paragraphs (1) and (2) will be excluded from its tier calculations will bring greater transparency to the application of the rule by clearly delineating the various circumstances in which the rule will apply. Providing in paragraph (1)(A) that the Exchange will always exclude from its tier calculations days that it announces in advance it will not be open for trading will clarify current practice. Providing in paragraph (3) that the Exchange may exclude any Scheduled Early Close or Unanticipated Event from the specified tier calculations, subject to the better of rule, will make clear that the Exchange will take a consistent approach when excluding days for purposes of its volume based pricing tiers. Furthermore, the clean-up changes specifying that the days in paragraphs (1)(B) and (2) may be excluded only pursuant to paragraph (3), and requiring the Exchange to exclude such days pursuant to the specifications in paragraph (3) will likewise make clear that the Exchange will take a consistent approach with respect to excluding days from its tier calculations. As discussed above, these modifications will clarify that the Exchange will apply the better of rule in a uniform manner to all members, and that there is no arbitrary selection of ''winners'' or ''losers.'' The Exchange also believes that the two technical changes proposed in the better of rule to reflect the changes proposed herein will likewise bring greater clarity to its rule. For the foregoing reasons, the Exchange believes that the proposed changes to clarify and restructure its existing rule are reasonable and equitable.

Furthermore, the Exchange believes that the proposed changes to adopt a catch-all provision in paragraph (3)(C) to other Tier Calculations not already specified in the rule to allow the Exchange to apply the better of rule going forward to all pricing programs based on other volume calculations is reasonable and equitable for the same reasons as allowing the Exchange to apply the better of rule for calculations based on ADV and industry volume percentages. The Exchange notes that aberrant low volume days resulting from, for instance, an Unanticipated Event, impacts all volume-based calculations, and allowing the Exchange to exclude such days from any volume-based tier calculation if the member would have a lower tier calculation with the day excluded will further protect members from being inadvertently penalized.

Finally, the Exchange further believes that the proposed rule change is not unfairly discriminatory because it will apply equally to all members. While the Exchange currently has rules in place for removing a day from its pricing, the Exchange believes that the proposed changes will benefit all members by providing more circumstances to remove a day, and ensuring that days are removed only in situations where the member benefits.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is designed to protect members from the possibility of a cost increase by excluding days when overall member participation might be significantly lower than a typical trading day. The Exchange believes that the proposed modifications to its tier calculations are pro-competitive and will result in lower total costs to end users, a positive outcome of competitive markets. The Exchange operates in a highly competitive market in which market participants can readily direct their order flow to competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and rebates to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed fee changes reflect this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were 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) of the Act and paragraph (f) of Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2018–73 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2018–73. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet 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–Phlx–2018–73, and should be submitted on or before December 21, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–25997 Filed 11–29–18; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84650; File No. SR–MIAX–2018–25]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Withdrawal of a Proposed Rule Change To Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members

November 26, 2018.

On September 18, 2018, Miami International Securities Exchange LLC (''MIAX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the MIAX Fee Schedule to increase certain connectivity fees. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] On October 10, 2018 the proposed rule change was published for comment in the **Federal Register** and, pursuant to Section 19(b)(3)(C) of the Act, the Commission: (1) Temporarily suspended the proposed rule change; and (2) instituted proceedings to determine whether to approve or disapprove the proposal.[4] The Commission received one comment letter on the proposal.[5] On November 23, 2018, the Exchange withdrew the proposed rule change (SR–MIAX–2018–25).

[10] 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] *See* Securities Exchange Act Release No. 84357 (October 3, 2018), 83 FR 50976.

[5] *See* Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, and Ellen Greene, Managing Director, The Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission, dated October 15, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–26001 Filed 11–29–18; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–84649; File No. SR–NYSEAMER–2018–51]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 903, Series of Options Open for Trading

November 26, 2018.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 19, 2018, NYSE American LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 903. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend Rule 903, Series of Options Open for Trading, to permit the listing and trading of up to ten expiration months for long term options on the SPDR® S&P 500® Exchange-Traded Fund (the ''SPY ETF'').

Commentary .03(a) of Rule 903 (''Commentary .03'') provides that the Exchange may list, with respect to any class of stock or Exchange-Traded Fund Share options series, options having from twelve up to thirty-nine months from the time they are listed until expiration (''LEAPS''). Under the current Rule, the Exchange may list up to six LEAPS expiration months.[4] The Exchange proposes to amend Commentary .03 to permit up to ten LEAPS expiration months for options on the SPY ETF.[5] This proposal, which is substantially the same as a recent rule amendment submitted by Nasdaq PHLX LLC (''PHLX'') and driven by customer demand,[6] would add liquidity to the SPY ETF options market by allowing market participants to hedge risks relating to SPY ETF positions over a potentially longer time period with a known and limited cost.

The SPY ETF options market today is characterized by its tremendous daily and annual liquidity. As a consequence, the Exchange believes that the listing of additional SPY ETF LEAPS expiration months would be well received by investors. This proposal to expand the number of permitted SPY ETF LEAPS would not apply to LEAPS on any other

[4] Strike price interval, bid/ask differential and continuity rules shall not apply to such options series until the time to expiration is less than nine months. *See* Commentary .03(a) of Rule 903.

[5] *See* proposed Commentary .03(a) of Rule 903 (providing in relevant part, that ''[t]here may be up to ten expiration months for options on the [SPY ETF] and up to six extended far term expiration months for options on any other index, Exchange-Trade Fund Share, or equity option class''). The Exchange also proposes a technical change to remove the errant period that appears after ''(LEAPS)'' in the title of Commentary .03, which would add clarity and consistency to Exchange rules. *See* proposed Commentary .03 of Rule 903.

[6] *See also* Securities Exchange Act Release No. 84449 (October 18, 2018), 83 FR 53699 (October 24, 2018) (SR–Phlx–2018–64) (''PHLX Rule Change''). The Exchange notes that the PHLX Rule Change does not apply to LEAPS on index options, as PHLX already provided for up to ten expirations in LEAPS on index options in PHLX Rule 1101A(b)(iii). Because Commentary .03 includes index options, this proposal is consistent with both the PHLX Rule Change and PHLX Rule 1101A(b)(iii).

class of stock or Exchange-Traded Fund Share options.[7]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[8] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5),[9] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by offering market participants additional LEAPS on SPY options for their investment and risk management purposes. The proposal is intended simply to provide additional trading opportunities which have been requested by customers, thereby facilitating transactions in options and contributing to the protection of investors and the maintenance of fair and orderly markets. The proposed rule change responds to the continuing needs of market participants, particularly portfolio managers and other institutional customers, by providing protection from long-term market moves and by offering an alternative to hedging portfolios with futures positions or off-exchange customized derivative instruments.

The Exchange believes that the addition today of four additional expiration months for SPY ETF LEAPS does not represent a proliferation of expiration months, but is instead a very modest expansion of LEAPS options in response to stated customer demand. Significantly, the proposal would feature new LEAPS expiration months in only a single class of options—the SPY ETF—that are very liquid and heavily traded, as discussed above. Additionally, the Exchange notes by way of precedent that ten expiration months are already permitted for stock index LEAPS options on other markets.[10] Further, the Exchange has the necessary systems capacity to support the new SPY ETF LEAPS expiration months.

The Exchange notes that this proposal is substantially the same as a recent rule amendment submitted by PHLX.[11]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposal merely provides investors additional investment and risk management opportunities by providing flexibility to the Exchange to list additional long term options expiration series, expanding the number of SPY LEAPS offered on the Exchange from six expiration months to ten expiration months.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13]

A proposed rule change filed under Rule 19b–4(f)(6)[14] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[15] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange's proposal would conform the Exchange's rules relating to the permitted number of SPY ETF LEAPS expiration months to those of PHLX.[16] Accordingly, the Commission believes that the proposal raises no new or novel regulatory issues, and waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission therefore waives the 30-day operative delay and designates the proposal operative upon filing.[17]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–NYSEAMER–2018–51 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAMER–2018–51. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet 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

[7] Historically, SPY is the largest and most actively traded ETF in the United States as measured by its assets under management and the value of shares traded.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *See* NYSE Arca Rule 5.19–O(b)(1) and PHLX Rule 1101A(b)(iii).

[11] *See* PHLX Rule Change, *supra* note 6.

[12] 15 U.S.C. 78s(b)(3)(A).

[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 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.

[14] *Id.*

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] *See supra,* note 6.

[17] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAMER–2018–51 and should be submitted on or before December 21, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–25996 Filed 11–29–18; 8:45 am]

BILLING CODE 8011–01–P

SURFACE TRANSPORTATION BOARD

Office of Environmental Analysis

[Finance Docket 36095]

Notice of Availability of the Draft Environmental Assessment (Draft EA) for Palmetto Railways Camp Hall Rail Line

AGENCY: Surface Transportation Board (Board) Office of Environmental Analysis (OEA), U.S. Army Corps of Engineers (Corps), joint lead agencies; U.S. Coast Guard (Coast Guard), Federal Railroad Administration (FRA), cooperating agencies.

ACTION: Notice of Availability of the Draft EA on November 30, 2018 and request for comments.

SUMMARY: On August 3, 2017, Palmetto Railways (Applicant) filed an exemption petition with the Board pursuant to 49 U.S.C. 10502 to construct and operate approximately 28 miles of new rail line between the Cross Subdivision of CSX Transportation, Inc. (CSXT) rail network near the Santee Cooper Cross Generating Station and the Camp Hall Commerce Park in Berkeley County, South Carolina. Implementation of the proposed rail line would bring industrial rail service to the Volvo Cars facility, as well as areas being developed by Santee Cooper. FRA and the Coast Guard are cooperating agencies in the preparation of this Draft EA pursuant to CEQ NEPA implementing regulations (40 CFR 1501.6).

The purpose of this Notice of Availability (NOA) is to notify individuals and agencies interested in or affected by the proposed action of the availability of the Draft EA for review and comment on November 30, 2018. The Draft EA analyzes the potential environmental impacts of the proposed action and alternatives, including the no-action alternative. The Draft EA addresses environmental issues and concerns identified during the scoping process. It also contains OEA's preliminary recommendations for environmental mitigation measures, and Palmetto Railways' voluntary mitigation measures.

The Draft EA will be available on November 30, 2018 through the Board's website at *http://www.stb.gov* by following the decisions link, through the project website at *http://www.CampHallRailNEPA.com,* and at all public libraries in Berkeley County, South Carolina.

Next Steps: Following the close of the 30-day comment period on December 30, 2018 of the Draft EA, OEA, the Corps, and the cooperating agencies will issue a Final EA that considers comments on the Draft EA. The Board will then issue a final decision based on the Draft and Final EAs and all public and agency comments in the public record for this proceeding. The final decision will address the transportation merits of the proposed project and the entire environmental record. That final decision will take one of three actions: Approve the proposed project, deny it, or approve it with mitigation conditions, including environmental conditions.

Written Comments: Any interested party may submit written comments on the Draft EA. The procedures for submitting written comments are outlined below:

ADDRESSES: Please mail written comments on the Draft EA and the recommended environmental mitigation to: Ms. Diana Wood, Surface Transportation Board, Docket No. FD 36095, c/o ICF, 9300 Lee Highway, Fairfax, VA 22031. Electronic comments on this Draft EA may also be submitted electronically on the joint lead agencies' project website (*http://www.CampHallRailNepa.com*) or emailed to *CampHallRailLineNEPA@icf.com.* Please refer to Docket No. FD 36095 in all correspondence, including electronic, addressed to the joint lead agencies.

DATES: The EA will be available for public review and comment on November 30, 2018. Mailed comments must be postmarked by December 30, 2018. Electronic comments must be received by December 30, 2018.

FOR FURTHER INFORMATION CONTACT: Diana Wood, Surface Transportation Board, Docket No. FD 36095, c/o ICF, 9300 Lee Highway, Fairfax, VA 22031.

Dated: November 15, 2018.

By the Board, Victoria Ruston, Director, Office of Environmental Analysis.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2018–25446 Filed 11–29–18; 8:45 am]

BILLING CODE 4915–01–P

TENNESSEE VALLEY AUTHORITY

Meeting of the Regional Energy Resource Council

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Notice of meeting.

SUMMARY: The TVA Regional Energy Resource Council (RERC) will hold a meeting on Tuesday, December 18, 2018, to discuss the metrics and evaluation criteria that TVA is establishing for the 2019 Integrated Resource Plan (IRP). The RERC was established to advise TVA on its energy resource activities and the priority to be placed among competing objectives and values. Notice of this meeting is given under the Federal Advisory Committee Act (FACA).

DATES: The public meeting will be held on Tuesday, December 18, 2018, from 9:00 a.m. to 4:00 p.m., EST.

ADDRESSES: The meeting will be held at the Hilton Downtown Knoxville, 501 Church Street, Knoxville, Tennessee 37902, and will be open to the public. Anyone needing special access or accommodations should let the contact below know at least a week in advance.

FOR FURTHER INFORMATION CONTACT: Liz Upchurch, 865–632–8305, *efupchurch@tva.gov.*

SUPPLEMENTARY INFORMATION: The meeting agenda includes the following:

1. Introductions
2. Overview of the 2019 Integrated Resource Plan and Supplemental Environmental Impact Statement Status
3. Overview of the Metrics and Scorecard Identified for the 2019 IRP
4. Public Comments
5. Council Discussion and Advice

The RERC will hear opinions and views of citizens by providing a public comment session starting at 10:00 a.m., EST, lasting up to one hour, on Tuesday, December 18, 2018. Persons wishing to speak are requested to register at the door between 9:00 a.m. and 10:00 a.m., EST, on Tuesday, December 18, 2018, and will be called

[18] 17 CFR 200.30–3(a)(12).

on during the public comment period. TVA will set time limits for providing oral comments, once registered. Handout materials should be limited to one printed page. Written comments are also invited and may be mailed to the Regional Energy Resource Council, Tennessee Valley Authority, 400 West Summit Hill Drive, WT–9–D, Knoxville, Tennessee 37902.

Dated: November 8, 2018.

Joseph J. Hoagland,

Vice President, Enterprise Relations and Innovation, Tennessee Valley Authority.

[FR Doc. 2018–26070 Filed 11–29–18; 8:45 am]

BILLING CODE 8120–08–P

TENNESSEE VALLEY AUTHORITY

Environmental Impact Statement for Allen Fossil Plant Ash Impoundment Closures

AGENCY: Tennessee Valley Authority.

ACTION: Notice of intent.

SUMMARY: The Tennessee Valley Authority (TVA) intends to prepare an Environmental Impact Statement (EIS) to address the potential environmental effects associated with the future management of coal combustion residual (CCR) material at the Allen Fossil Plant (ALF) located in Shelby County, Tennessee, southwest of the City of Memphis. The purpose of this EIS is to support the implementation of TVA's goal to eliminate all wet CCR storage at its coal plants by closing CCR surface impoundments across the TVA system, and to assist TVA in complying with the Environmental Protection Agency's (EPA) CCR Rule. In addition, the proposed actions would make the ALF closure area land available for future economic development projects in the greater Memphis area.

TVA will evaluate closure of the East Ash Pond Complex, the West Ash Pond, and the Metal Cleaning Pond. In addition to these closures, TVA will analyze potential location requirements and associated environmental impacts associated with construction and utilization of a proposed beneficial re-use facility to process CCR materials. TVA will also evaluate potential impacts associated with actions requiring use of permitted borrow sites and the disposal of CCR at existing offsite permitted landfills. TVA will develop and evaluate various alternatives to these actions, including the No Action Alternative. Public comments are invited concerning both the scope of the review and environmental issues that should be addressed.

DATES: Comments on the scope of the EIS must be received on or before January 4, 2019.

ADDRESSES: Written comments should be sent to Ashley Farless, NEPA Compliance Specialist, 1101 Market Street, BR4A–C, Chattanooga, TN 37402. Comments also may be submitted online at: *https://www.tva.gov/nepa* or by email to *arfarless@tva.gov.*

FOR FURTHER INFORMATION CONTACT: Other related questions should be sent to Ashley Farless, NEPA Compliance Specialist, Tennessee Valley Authority, at 423–751–2361 or *arfarless@tva.gov.*

SUPPLEMENTARY INFORMATION: This notice is provided in accordance with the Council on Environmental Quality's regulations (40 CFR parts 1500 to 1508) and TVA's procedures for implementing the National Environmental Policy Act (NEPA) and Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations (36 CFR part 800).

TVA Power System and CCR Management

TVA is a corporate agency and instrumentality of the United States created by and existing pursuant to the TVA Act of 1933 that provides electricity for business customers and local power distributors. TVA serves more than 9 million people in parts of seven southeastern states. TVA receives no taxpayer funding, deriving virtually all of its revenues from sales of electricity. In addition to operating and investing its revenues in its electric system, TVA provides flood control, navigation and land management for the Tennessee River system and assists local power companies and state and local governments with economic development and job creation.

Historically, TVA has managed its CCRs in wet impoundments or dry landfills. On March 31, 2018, ALF's three coal-fired units were retired. While in operation, ALF consumed approximately 7,200 tons of coal a day and produced approximately 5,160 million kilowatt-hours of electricity a year. CCR produced by the collective units included approximately 85,000 dry tons of slag and fly ash that was wet-sluiced to the East Ash Pond Complex every year.

It is estimated that approximately 250,000 cubic yards (yd^3) of CCR material remains in the West Ash Pond and approximately 2.7 million cubic yards (yd^3) of CCR material remains in the East Ash Pond Complex. There are approximately 193,000 cubic yards of CCR in the area surrounding the Metal Cleaning Pond.

In July 2009, the TVA Board of Directors passed a resolution for staff to review TVA practices for storing CCRs at its generating facilities, including ALF, which resulted in a recommendation to convert the wet ash management system at ALF to a dry storage system. On April 17, 2015, the EPA published the final Disposal of CCRs from Electric Utilities rule, also known as the CCR Rule.

In June 2016, TVA issued a Final Programmatic Environmental Impact Statement (PEIS) that analyzed methods for closing CCR impoundments at TVA fossil plants and identified specific screening and evaluation factors to help frame its evaluation of closures at its other facilities. A Record of Decision was released in July 2016 that would allow future environmental reviews of qualifying CCR impoundment closures to tier from the PEIS. This EIS is intended to tier from the 2016 PEIS to evaluate the closure alternatives for the CCR Ash Impoundments at ALF.

Alternatives

In addition to a No Action Alternative, this EIS will address alternatives that meet the purpose and need for the project. TVA plans to consider the following: (1) No Action, (2) closure of the Metal Cleaning Pond and closure-by-removal of the East Ash Pond Complex, the West Ash Pond and the CCR surrounding the Metal Cleaning Pond to an offsite landfill location (note that the Metal Cleaning Pond would be removed by default while removing the CCR material surrounding it), (3) closure of the Metal Cleaning Pond and closure-by-removal of the East Ash Pond Complex, the West Ash Pond and the CCR surrounding the Metal Cleaning Pond to a beneficial re-use facility & offsite landfill location (see note above in #2), and (4) closure of the Metal Cleaning Pond and closure-in-place of all CCR in the East Ash Pond Complex, the West Ash Pond and CCR surrounding the Metal Cleaning Pond.

Proposed Resources and Issues To Be Considered

This EIS will identify the purpose and need of the project and will contain descriptions of the existing environmental and socioeconomic resources within the area that could be affected by the management of CCR at ALF. Evaluation of potential environmental impacts to these resources will include, but not be limited to, water quality, aquatic and terrestrial ecology, threatened and endangered species, wetlands, land use, historic and archaeological resources, as well as solid and hazardous waste,

safety, socioeconomic and environmental justice issues. The final range of issues to be addressed in the environmental review will be determined, in part, from scoping comments received. The preliminary identification of reasonable alternatives and environmental issues in this notice is not meant to be exhaustive or final.

Public Participation

TVA is interested in an open process and wants input from the community. The public is invited to submit comments on the scope of this EIS no later than the date identified in the ''Dates'' section of this notice. Federal, state and local agencies and Native American Tribes are also invited to provide comments.

After consideration of comments received during the scoping period, TVA will develop and distribute a scoping document that will summarize public and agency comments that were received and identify the schedule for completing the EIS process. Following analysis of the issues, TVA will prepare a draft EIS for public review and comment. In making its final decision, TVA will consider the analyses in this EIS and substantive comments that it receives. A final decision on proceeding with the management and final disposal of CCR and closure of the surface impoundments will depend on a number of factors. These include results of the EIS, requirements of the CCR Rule, relevant state law requirements, engineering and risk evaluations, and financial considerations.

TVA anticipates holding a community meeting near ALF after releasing the Draft EIS. Meeting details will be posted on TVA's website. TVA expects to release the Draft EIS in the Fall of 2019.

Authority: 40 CFR 1501.7.

M. Susan Smelley,

Director, Environmental Compliance and Operations.

[FR Doc. 2018–25914 Filed 11–29–18; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Office of Commercial Space Transportation: Notice of Availability and Request for Comment on the Draft Environmental Assessment for Issuing SpaceX a Launch License for an In-Flight Dragon Abort Test, Kennedy Space Center, Brevard County, Florida

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of availability and request for comment.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), Council on Environmental Quality NEPA implementing regulations, and FAA Order 1050.1F, *Environmental Impacts: Policies and Procedures,* the FAA is announcing the availability of and requesting comment on the Draft Environmental Assessment for Issuing SpaceX a Launch License for an In-flight Dragon Abort Test, Kennedy Space Center, Brevard County, Florida (Draft EA).

DATES: Comments must be received on or before December 31, 2018.

ADDRESSES: Comments should be mailed to Daniel Czelusniak, Environmental Protection Specialist, Federal Aviation Administration, 800 Independence Avenue SW, Suite 325, Washington, DC 20591. Comments may also be submitted by email to *SpaceXDragonAbortEA@icf.com.*

FOR FURTHER INFORMATION CONTACT: Daniel Czelusniak, Environmental Protection Specialist, Federal Aviation Administration, 800 Independence Avenue SW, Suite 325, Washington, DC 20591; phone (202) 267–5924; email *SpaceXDragonAbortEA@icf.com.*

SUPPLEMENTARY INFORMATION: The FAA is evaluating SpaceX's proposal to conduct a one-time in-flight Dragon abort test at Kennedy Space Center's Launch Complex 39A, which would require the FAA to issue a launch license. Issuing a launch license is considered a Federal action subject to environmental review under NEPA. Under the Proposed Action, the FAA would issue a license to SpaceX, which would authorize SpaceX to conduct the abort test using a Falcon 9 launch vehicle and a Dragon-2 (*i.e.,* SpaceX's crew version of Dragon). Dragon-2 was developed with the intent to carry astronauts. The proposed abort test is part of SpaceX's commercial crew certification process with the National Aeronautics and Space Administration (NASA). The abort test is scheduled to occur in 2019.

Alternatives under consideration include the Proposed Action and the No Action Alternative. Under the No Action Alternative, the FAA would not issue a license to SpaceX to conduct the abort test, and therefore SpaceX would not conduct the abort test.

The Draft EA evaluates the potential environmental impacts from the Proposed Action and No Action Alternative on visual effects (including light emissions); coastal resources; air quality; climate; noise and noise-compatible land use; biological resources; water resources (surface waters); hazardous materials, solid waste, and pollution prevention; and historical, architectural, archeological, and cultural resources. Potential cumulative impacts are also addressed in the Draft EA.

The FAA has posted the Draft EA on the FAA Office of Commercial Space Transportation website: *https://www.faa.gov/about/office_org/headquarters_offices/ast/environmental/nepa_docs/review/launch/.*

The FAA encourages all interested parties to provide comments concerning the scope and content of the Draft EA. Before including your address, phone number, email address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask the FAA in your comment to withhold from public review your personal identifying information, the FAA cannot guarantee that we will be able to do so.

Issued in Washington, DC, on November 15, 2018.

Daniel Murray,

Manager, Space Transportation Development Division.

[FR Doc. 2018–26075 Filed 11–29–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice Rescinding Eight Notices of Intent To Prepare Environmental Impact Statements

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

ACTION: Notice.

SUMMARY: The Federal Railroad Administration (FRA) is issuing this notice to advise the public that FRA is rescinding the Notices of Intent (NOI) for the following Environmental Impact Statements (EIS): The Pennsylvania Maglev Proposal; the Tupelo Railroad Relocation Planning and Environmental Study; the Tier 2 EIS for the Chicago to Joliet High-Speed Rail (HSR) Project; the Tier 2 EIS for the HSR Project between Granite City, IL to St. Louis, MO HSR Project; EIS for the ACEforward Program; EIS for the Milwaukee, WI to Minneapolis, MN Rail Corridor; 7) the Los Angeles to San Louis Obispo North

(LOSSAN) Rail Corridor Project; and 8) the Chicago to Detroit/Pontiac Corridor Investment Program.

FOR FURTHER INFORMATION CONTACT: For additional information please contact Michael Johnsen, Supervisory Environmental Protection Specialist, at the Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone: 202–493–0845; or email: *Michael.Johnsen@dot.gov.*

SUPPLEMENTARY INFORMATION: FRA has identified several projects that, for various reasons, are no longer advancing through FRA environmental review and has therefore determined it is appropriate to rescind the applicable NOI to prepare an EIS. The following NOIs are being rescinded:

- Pennsylvania Maglev Proposal: FRA published the NOI on July 19, 2001. The purpose of the EIS was to further explore the feasibility of a magnetic levitation train system linking Pittsburgh International Airport to Pittsburgh and its eastern suburbs in Allegheny and Westmoreland Counties. However, the project sponsor has since decided not to pursue a maglev project in this corridor.
- Relocation or Reconstruction of Rail Lines in Tupelo, MS: FRA published the NOI on June 29, 2006 to study the potential relocation or reconstruction of rail lines in the Tupelo, MS central business district. However, the project sponsor has not advanced the environmental review and has not identified current or foreseeable funding for the project.
- Chicago to Joliet High-Speed Rail (HSR) Project: FRA published the NOI on February 18, 2014 to study potential HSR service along the Rock Island District Railroad corridor between Chicago and Joliet, IL. The project sponsor has informed FRA that it does not intend to pursue the environmental review for the project at this time.
- HSR Project between Granite City, Illinois to St. Louis, Missouri: FRA published this NOI on February 18, 2014 to study the increase of rail capacity associated with the Mississippi River crossings in the Granite City to St. Louis Tier 2 EIS. However, the project sponsor has informed FRA that it does not intend to pursue the environmental review for the project at this time.
- ACEforward Program: FRA published the NOI on September 18, 2013. The purpose of the EIS was to study the expansion of existing rail service between Stockton and San Jose, CA and extension of new rail service to Modesto and Merced, CA. However, the project sponsor has determined that the orginial scope for the ACEforward EIS is no longer consistent with regional planning efforts for improved rail service throughout the corridor.
- Milwaukee, WI to Minneapolis, MN Rail Corridor: FRA published a revised NOI on May 24, 2013. The purpose of the EIS is to evaluate ways to improve passenger rail service from the Twin Cities, MN to Milwaukee, WI. The project sponsor has informed FRA that it does not wish to pursue the environmental review for the project at this time.
- LOSSAN Rail Corridor Project: FRA published the NOI for this project on January 1, 2011. The purpose of the EIS was to study ways to improve passenger rail service from Los Angeles through San Louis Obispo. The NOI is being rescinded as the service options on this corridor have been reevaluated in the updated California State Rail Plan.
- Chicago to Detroit/Pontiac Corridor Investment Program: FRA published the NOI on August 31, 2012. The purpose of the EIS was to study potential service options and corresponding infrastructure improvements between Chicago, IL, and Pontiac, MI. The project sponsor and FRA have agreed to rescind the NOI, however the associated alternatives analysis and service development plan may be used for further environmental reviews, where necessary.

Issued in Washington, DC.

Jamie Rennert,

Office Director, Office of Program Delivery.

[FR Doc. 2018–25993 Filed 11–29–18; 8:45 a.m.]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2018–0013; Notice 1]

Notice of Receipt of Petition for Decision that Nonconforming Model Year 2015 Bentley Continental Passenger Cars Are Eligible for Importation

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

ACTION: Receipt of petition.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that certain model year (MY) 2015 Bentley Continental passenger cars (PCs) that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS) are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and were certified by their manufacturer as complying with the safety standards (the U.S.-certified version of the MY 2015 Bentley Continental PCs) and are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is December 31, 2018.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and must be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the 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:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the

dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Neil Thurgood, Office of Vehicle Safety Compliance, NHTSA, telephone (202) 366–0712.

SUPPLEMENTARY INFORMATION:

I. History: Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS (49 CFR 571) shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA, pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, *Processing of Petitions,* NHTSA publishes notices in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

II. Summary of Petition: Wallace Environmental Testing Laboratories (WETL), of Houston, Texas (Registered Importer R–90–005) has petitioned NHTSA to decide whether nonconforming MY 2015 Bentley Continental PCs are eligible for importation into the United States. The vehicles that WETL believes are substantially similar are MY 2015 Bentley Continental PCs manufactured for sale in the United States, and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner submitted information with its petition intended to demonstrate that the subject non-U.S.-certified vehicles, as originally manufactured, conform to many applicable FMVSS in the same manner as their U.S.-certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that the non-U.S.-certified MY 2015 Bentley Continental PCs, as originally manufactured, conforms to: Standard Nos. 102 *Transmission Shift Position Sequence, Starter Interlock, and Transmission Braking Effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 106 *Brake Hoses,* 110 *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 Kilograms (10,000 Pounds) or Less,* 113 *Hood Latch System,* 116 *Motor Vehicle Brake Fluids,* 118 *Power-Operated Window, Partition, and Roof Panel Systems,* 124 *Accelerator Control Systems,* 126 *Electronic Stability Control Systems for Light Vehicles,* 135 *Light Vehicle Brake Systems,* 138 *Tire Pressure Monitoring Systems,* 201 *Occupant Protection in Interior Impact,* 202a *Head Restraints; Mandatory Applicability Begins on September 1, 2009,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance; Applicable unless a Vehicle is Certified to § 571.216a,* 219 *Windshield Zone Intrusion,* 225 *Child Restraint Anchorage Systems,* 301 *Fuel System Integrity,* and 302 *Flammability of Interior Materials.*

The petitioner also contends that the subject non-U.S.-certified passenger cars are capable of being readily altered to meet the following standards in the manners indicated:

Standard No. 101 *Controls and Displays:* The brake warning telltale must be modified to show the word ''BRAKE'' when activated.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* Installation of the front and rear side-mounted reflex reflectors with U.S.-conforming components.

Standard No. 111 *Rear Visibility:* Replacement of the passenger side mirror with the U.S.-model or inscription of the required warning statement on the face of the existing mirror.

Standard No. 114 *Theft Protection and Rollaway Prevention:* Installation of a supplemental key warning buzzer or activation of the U.S.-version software to meet the requirements of this standard.

Standard No. 208 *Occupant Crash Protection:* Inspection to ascertain if the software and firmware installed in the vehicle are the same as the most up-to-date versions installed in the U.S.-conforming version of the vehicle. Replacement of any software or firmware found not to be the most recent versions. Replacement of sun visors with U.S.-model components to meet the labeling requirements of FMVSS No. 208.

Standard No. 401 *Interior Trunk Release:* Installation of U.S.-model trunk release components to meet the requirements of this standard.

The petitioner further states that labels will be affixed to conform the vehicle to the requirements of 49 CFR parts 565 and 567, VIN *Content* and *Certification,* respectively.

III. Comments: All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and considered. Comments filed after the closing date will also be considered to the fullest extent possible and available for examination in the docket at the above addresses.

Once the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

This notice of receipt of the subject petition does not represent any agency decision or other exercise of judgment concerning the merits of the petition. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Michael A. Cole,

Acting Director, Office of Vehicle Safety Compliance.

[FR Doc. 2018–26054 Filed 11–29–18; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2018–0014; Notice 1]

Notice of Receipt of Petition for Decision That Nonconforming Model Year 2005 Chevrolet Corvette Passenger Cars Are Eligible for Importation

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

ACTION: Receipt of petition.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a

petition for a decision that certain model year (MY) 2005 Chevrolet Corvette passenger cars (PCs) that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS) are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S.-certified version of the MY 2005 Chevrolet Corvette PCs) and are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is December 31, 2018.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket number cited in the title of this notice and must be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the 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:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Neil Thurgood, Office of Vehicle Safety Compliance, NHTSA, telephone (202) 366–0712.

SUPPLEMENTARY INFORMATION:

I. History

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS (49 CFR 571) shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, *Processing of Petitions,* NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

II. Summary of Petition

Wallace Environmental Testing Laboratories (WETL), of Houston, Texas (Registered Importer R–90–005) has petitioned NHTSA to decide whether nonconforming MY 2005 Chevrolet Corvette PCs are eligible for importation into the United States. The vehicles that WETL believes are substantially similar are MY 2005 Chevrolet Corvette PCs, manufactured for sale in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner submitted information with its petition intended to demonstrate that the subject non-U.S.-certified vehicles as originally manufactured, conform to many applicable FMVSS in the same manner as their U.S.-certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that the non-U.S.-certified MY 2005 Chevrolet Corvette PCs, as originally manufactured, conforms to: Standard Nos. 102 *Transmission Shift Position Sequence, Starter Interlock, and Transmission Braking Effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 106 *Brake Hoses,* 108 *Lamps, Reflective Devices and Associated Equipment,* 110 *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 Kilograms (10,000 Pounds) or Less,* 111 *Rearview Mirrors,* 113 *Hood Latch System,* 114 *Theft Protection,* 116 *Motor Vehicle Brake Fluids,* 118 *Power-Operated Window, Partition, and Roof Panel Systems,* 124 *Accelerator Control Systems,* 135 *Light Vehicle Brake Systems,* 138 *Tire Pressure Monitoring Systems,* 201 *Occupant Protection in Interior Impact,* 202a *Head Restraints; Mandatory Applicability Begins on September 1, 2008,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance,* 219 *Windshield Zone Intrusion,* 225 *Child Restraint Anchorage Systems,* 301 *Fuel System Integrity,* 302 *Flammability of Interior Materials* and 401 *Interior Trunk Release.*

The petitioner also contends that the subject non-U.S.-certified passenger cars are capable of being readily altered to meet the following standards in the manners indicated:

Standard No. 101 *Controls and Displays:* The brake warning telltale must be modified to show the word ''BRAKE'' when activated.

Standard No. 208 *Occupant Crash Protection:* Inspection to ascertain if the software and firmware installed in the vehicle are the same as the most up-to-date versions installed in the U.S.-conforming version of the vehicle. Replacement of any software or firmware found not to be the most recent versions. Replacement of sun visors with U.S.-model components to meet the labeling requirements of FMVSS No. 208.

The petitioner additionally states that a vehicle identification plate must be

affixed to the vehicle near the left windshield pillar to meet the requirements of 49 CFR part 565.

III. Comments

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and considered. Comments filed after the closing date will also be considered to the fullest extent possible and available for examination in the docket at the above addresses.

Once the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

This notice of receipt of the subject petition does not represent any agency decision or other exercise of judgment concerning the merits of the petition. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Michael A. Cole,

Acting Director, Office of Vehicle Safety Compliance.

[FR Doc. 2018–26060 Filed 11–29–18; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2018–0008; Notice 1]

Notice of Receipt of Petition for Decision That Nonconforming Model Year 2016 Chevrolet Equinox Multipurpose Passenger Vehicles Are Eligible for Importation

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

ACTION: Receipt of petition.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that certain model year (MY) 2016 Chevrolet Equinox multipurpose passenger vehicles (MPVs) that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS), are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and were certified by their manufacturer as complying with the safety standards (the U.S.-certified 2016 Chevrolet Equinox MPVs) and are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is December 31, 2018.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket number cited in the title of this notice and be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the 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:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Neil Thurgood, Office of Vehicle Safety Compliance, NHTSA (202–366–0712).

SUPPLEMENTARY INFORMATION:

I. History: Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

II. Summary of Petition: Wallace Environmental Testing Laboratories (WETL), of Houston, Texas (Registered Importer R–90–005) has petitioned NHTSA to decide whether nonconforming MY 2016 Chevrolet Equinox MPVs are eligible for importation into the United States. The vehicles which WETL believes are substantially similar are MY 2016 Chevrolet Equinox MPVs sold in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared non-U.S.-certified MY 2016 Chevrolet Equinox MPVs to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

The petitioner submitted information with its petition intended to demonstrate that the subject non-U.S.-certified vehicles, as originally manufactured, conform to many applicable FMVSS in the same manner as their U.S.-certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that the non-U.S.-certified MY 2016 Chevrolet Equinox MPVs, as originally manufactured, conforms to: Standard

Nos. 102 *Transmission Shift position Sequence, Starter Interlock, and Transmission Braking Effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 106 *Brake Hoses,* 110 *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 Kilograms (10,000 pounds) or Less,* 111 *Rear Visibility,* 113 *Hood Latch System,* 114 *Theft Protection and Rollaway Prevention,* 116 *Motor Vehicle Brake Fluids,* 118 *Power-Operated Window, Partition, and Roof Panel Systems,* 124 *Accelerator Control Systems,* 126 *Electronic Stability Control Systems for Light Vehicles,* 135 *Light Vehicle Brake Systems,* 138 *Tire Pressure Monitoring Systems,* 202a *Head Restraints; Mandatory Applicability Begins on September 1, 2009,* 203 *Impact Protection for the Driver from the Steering Control System,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance, Applicable unless a Vehicle is Certified to § 571.216a,* 219 *Windshield Zone Intrusion,* 225 *Child Restraint Anchorage Systems,* 226 *Ejection Mitigation,* 301 *Fuel System Integrity,* and 302 *Flammability of Interior Materials.*

The petitioner also contends that the subject non-U.S.-certified MPVs are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* The brake warning telltale must be modified to show the word ''BRAKE'' when activated.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* Inspection to ascertain if the software and firmware installed in the vehicle are the same as the most up-to-date versions installed in the U.S.-conforming version of the vehicle. Replacement of any software or firmware found not to be the most recent version.

Standard No. *201 Occupant Protection in Interior Impact:* Replacement of sun visors with U.S.-model components to meet the labeling requirements of FMVSS No. 208 and to continue to meet the requirements of FMVSS No. 201.

Standard No. 208 *Occupant Crash Protection:* Inspection to ascertain if the software and firmware installed in the vehicle are the same as the most up-to-date versions installed in the U.S.-conforming version of the vehicle. Replacement of any software or firmware found not to be the most recent version. Replacement of sun visors with U.S.-model components to meet the labeling requirements of FMVSS No. 208.

The petitioner further states that labels will be affixed to conform the vehicle to the requirements of 49 CFR parts 565 and 567, VIN *Content* and *Certification,* respectively.

III. Comments: All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and considered. Comments filed after the closing date will also be considered to the fullest extent possible and available for examination in the docket at the above **ADDRESSES**.

Once the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

This notice of receipt of the subject petition does not represent any agency decision or other exercise of judgment concerning the merits of the petition Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Michael A. Cole,

Acting Director, Office of Vehicle Safety Compliance.

[FR Doc. 2018–26063 Filed 11–29–18; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2018–0029; Notice 1]

Notice of Receipt of Petition for Decision That Nonconforming Model Year 2015 Chevrolet Silverado Trucks Are Eligible for Importation

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

ACTION: Receipt of petition.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that certain model year (MY) 2015 Chevrolet Silverado trucks that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS), are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and were certified by their manufacturer as complying with the safety standards (the U.S.-certified 2015 Chevrolet Silverado trucks) and are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is December 31, 2018.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket number cited in the title of this notice and must be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the 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:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this

petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Neil Thurgood, Office of Vehicle Safety Compliance, NHTSA (202–366–0712).

SUPPLEMENTARY INFORMATION:

I. History: Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition it receives and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

II. Summary of Petition: Wallace Environmental Testing Laboratories (WETL), of Houston, Texas (Registered Importer R–90–005) has petitioned NHTSA to decide whether nonconforming MY 2015 Chevrolet Silverado trucks are eligible for importation into the United States. The vehicles which WETL believes are substantially similar are MY 2015 Chevrolet Silverado trucks sold in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared non-U.S.-certified MY 2015 Chevrolet Silverado trucks to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

The petitioner submitted information with its petition intended to demonstrate that the subject non-U.S.-certified vehicles as originally manufactured, conform to many applicable FMVSS in the same manner as their U.S.-certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that the non-U.S.-certified MY 2015 Chevrolet Silverado trucks, as originally manufactured, conforms to: Standard Nos. 102 *Transmission Shift position Sequence, starter interlock, and transmission braking effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 106 *Brake Hoses,* 108 *Lamps, Reflective Devices, and Associated Equipment,* 110 *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 Kilograms (10,000 pounds) or Less,* 111 *Rear visibility,* 113 *Hood Latch System,* 114 *Theft Protection and Rollaway Prevention,* 116 *Motor Vehicle Brake Fluids,* 118 *Power-Operated Window, Partition, and Roof Panel Systems,* 124 *Accelerator Control Systems,* 126 *Electronic Stability Control Systems for Light Vehicles,* 135 *Light Vehicle Brake Systems,* 138 *Tire Pressure Monitoring Systems,* 201 *Occupant Protection in Interior Impact,* 202a *Head Restraints; Mandatory Applicability Begins on September 1, 2009,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance, Applicable unless a Vehicle is Certified to § 571.216a,* 219 *Windshield Zone Intrusion,* 225 *Child Restraint Anchorage Systems,* 301 *Fuel System Integrity,* and *302 Flammability of Interior Materials.*

The petitioner also contends that the subject non-U.S.-certified trucks are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* The brake warning telltale must be modified to show the word ''BRAKE'' when activated.

Standard No. 208 *Occupant Crash Protection:* Inspection to ascertain if the software and firmware installed in the vehicle are the same as the most up-to-date versions installed in the U.S.-conforming version of the vehicle. Replacement of any software or firmware found not to be the most recent versions. Replacement of sun visors with U.S.-model components to meet the labeling requirements of FMVSS No. 208.

The petitioner further states that labels will be affixed to conform the vehicle to the requirements of 49 CFR parts 565 and 567, VIN *Content* and *Certification,* respectively.

III. Comments: All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and considered. Comments filed after the closing date will also be considered to the fullest extent possible and available for examination in the docket at the above addresses.

Once the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

This notice of receipt of the subject petition does not represent any agency decision or other exercise of judgment concerning the merits of the petition. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Michael A. Cole,

Acting Director, Office of Vehicle Safety Compliance.

[FR Doc. 2018–26058 Filed 11–29–18; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2018–0069; Notice 1]

Notice of Receipt of Petition for Decision That Nonconforming Model Year 2008 Jeep Grand Cherokee Multipurpose Passenger Vehicles Are Eligible for Importation

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

ACTION: Receipt of petition.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that certain model year (MY) 2008 Jeep Grand Cherokee multipurpose passenger vehicles (MPVs) that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS), are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S.-certified 2008 Jeep Grand Cherokee MPV) and are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is December 31, 2018.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket number cited in the title of this notice and must be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the 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:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/*. Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Neil Thurgood, Office of Vehicle Safety Compliance, NHTSA (202–366–0712).

SUPPLEMENTARY INFORMATION:

I. History: Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notices in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

II. Summary of Petition: Wallace Environmental Testing Laboratories (WETL), of Houston, Texas (Registered Importer R–90–005) has petitioned NHTSA to decide whether nonconforming MY 2008 Jeep Grand Cherokee MPVs are eligible for importation into the United States. The vehicles which WETL believes are substantially similar are MY 2008 Jeep Grand Cherokee MPVs sold in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared non-U.S.-certified MY 2008 Jeep Grand Cherokee MPVs to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

The petitioner submitted information with its petition intended to demonstrate that the subject non-U.S.-certified vehicles as originally manufactured, conform to many applicable FMVSS in the same manner as their U.S.-certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that the non-U.S.-certified MY 2008 Jeep Grand Cherokee MPVs, as originally manufactured, conforms to: Standard Nos. 102 *Transmission Shift position Sequence, Starter interlock, and transmission braking effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 106 *Brake Hoses,* 110 *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 Kilograms (10,000 pounds) or Less,* 111 *Rearview Mirrors,* 113 *Hood Latch System,* 116 *Motor Vehicle Brake Fluids,* 118 *Power-Operated Window, Partition, and Roof Panel Systems,* 124 *Accelerator Control Systems,* 126 *Electronic Stability Control Systems,* 135 *Light Vehicle Brake Systems,* 138 *Tire Pressure Monitoring Systems,* 201 *Occupant Protection in Interior Impact,* 202a *Head Restraints; Mandatory Applicability begins on September 1, 2008,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance,* 219 *Windshield Zone Intrusion,* 225 *Child Restraint Anchorage Systems,* 301 *Fuel System Integrity,* and 302 *Flammability of Interior Materials.*

The petitioner also contends that the subject non-U.S.-certified MPVs are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* The brake warning telltale must be modified to show the word ''BRAKE'' when activated.

Standard No. 108 *Lamps Reflective Devices and Associated Equipment:* Installation of the front and rear side mounted reflex reflectors with U.S.-conforming components.

Standard No. 114 *Theft Protection and Rollaway Prevention:* Installation of a supplemental key warning buzzer, or activation of the U.S.-version software to meet the requirements of this standard.

Standard No. 208 *Occupant Crash Protection:* Inspection to ascertain if the software and firmware installed in the vehicle are the same as the most up-to-date versions installed in the U.S.-conforming version of the vehicle. Replacement of any software or firmware found not to be the most recent versions. Replacement of sun visors with U.S.-model components to meet the labeling requirements of FMVSS No. 208.

The petitioner further states that labels will be affixed to conform the vehicle to the requirements of 49 CFR parts 565 and 567, VIN *Content* and *Certification,* respectively.

III. Comments: All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and considered. Comments filed

after the closing date will also be considered to the fullest extent possible and available for examination in the docket at the above addresses.

Once the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

This notice of receipt of the subject petition does not represent any agency decision or other exercise of judgment concerning the merits of the petition. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Michael A. Cole,

Acting Director, Office of Vehicle Safety Compliance.

[FR Doc. 2018–26057 Filed 11–29–18; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2018–0088; Notice 1]

Notice of Receipt of Petition for Decision That Nonconforming Model Year 2015 Ferrari 458 Speciale Aperta Passenger Cars Are Eligible for Importation

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

ACTION: Receipt of petition.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that certain model year (MY) 2015 Ferrari 458 Speciale Aperta Passenger Cars (PCs) that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS) are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S.-certified version of the MY 2015 Ferrari 458 Speciale Aperta PCs) and are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is December 31, 2018.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the 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:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/*. Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Neil Thurgood, Office of Vehicle Safety Compliance, NHTSA, telephone (202) 366–0712.

SUPPLEMENTARY INFORMATION:

I. *History:* Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS (49 CFR 571) shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA, pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, *Processing of Petitions,* NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

II. *Summary of Petition:* J.K. Technologies, LLC (JK), of Baltimore, Maryland (Registered Importer R–90–006) has petitioned NHTSA to decide whether nonconforming MY 2015 Ferrari 458 Speciale Aperta PCs are eligible for importation into the United States. The vehicles that JK believes are substantially similar are MY 2015 Ferrari 458 Speciale Aperta PCs manufactured for sale in the United States, and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner submitted information with its petition intended to demonstrate that the subject non-U.S.-certified vehicles, as originally manufactured, conform to many applicable FMVSS in the same manner as their U.S.-certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that the non-U.S.-certified MY 2015 Ferrari 458 Speciale Aperta PCs, as originally manufactured, conform to: Standard Nos. 102 *Transmission Shift Position Sequence, Starter Interlock, and Transmission Braking Effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 106 *Brake Hoses,* 113 *Hood Latch System,* 114 *Theft Protection and Rollaway Prevention,* 116 *Motor Vehicle Brake Fluids,* 118 *Power-Operated Window, Partition, and Roof Panel Systems,* 124 *Accelerator Control Systems,* 126 *Electronic Stability Control Systems for Light Vehicles,* 135 *Light Vehicle Brake*

Systems, 138 *Tire Pressure Monitoring Systems,* 201 *Occupant Protection in Interior Impact,* 202 *Head Restraints,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance; Applicable unless a Vehicle is Certified to § 571.216a,* 219 *Windshield Zone Intrusion,* 301 *Fuel System Integrity,* and 302 *Flammability of Interior Materials.*

The petitioner also contends that the subject non-U.S.-certified vehicles are capable of being readily altered to meet the following standards in the manner indicated:

Standard No. 101 *Controls and Displays:* Replacement of the instrument cluster with the U.S.-model component and reprogramming of its software as described in the petition.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* Installation of wiring and programming to activate the required side marker lights.

Standard No. 110 *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 Kilograms (10,000 Pounds) or Less:* Installation of the required tire information placard.

Standard No. 111 *Rear Visibility:* Replacement of the passenger side mirror with the U.S.-model Component, or inscription of the required warning statement on the face of the existing mirror.

Standard No. 208 *Occupant Crash Protection:* Replacement of several components as described in the petition. Replacement of the sensor mat in the passenger-side seat cushion, and activation of the SRS airbag control module. Replacement of sun visors with U.S.-model components to meet the labeling requirements of FMVSS No. 208.

The petitioner further states that labels will be affixed to bring the vehicle into conformity with the requirements of 49 CFR parts 565 and 567, VIN *Content* and *Certification,* respectively.

III. *Comments:* All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and considered. Comments filed after the closing date will also be considered to the fullest extent possible and available for examination in the docket at the above addresses.

Once the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

This notice of receipt of the subject petition does not represent any agency decision or other exercise of judgment concerning the merits of the petition. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Claudia W. Covell,

Acting Director, Office of Vehicle Safety Compliance.

[FR Doc. 2018–26062 Filed 11–29–18; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2018–0070; Notice 1]

Notice of Receipt of Petition for Decision That Certain Nonconforming Model Year 2011 Mercedes-Benz GL550 Multipurpose Passenger Vehicles Originally Certified to the Canadian Motor Vehicle Safety Standards Are Eligible for Importation

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

ACTION: Receipt of petition.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that certain model year (MY) 2011 Mercedes-Benz GL550 multipurpose passenger vehicles (MPVs) that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS), but that are certified by their original manufacturer as complying with all applicable Canadian motor vehicle safety standards (CMVSS), are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S.-certified 2011 Mercedes-Benz GL550 MPVs and are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is December 31, 2018.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket number cited in the title of this notice and submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the 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:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Neil Thurgood, Office of Vehicle Safety Compliance, NHTSA (202–366–0712).

SUPPLEMENTARY INFORMATION:

I. History

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally

manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

II. Summary of Petition

J.K. Technologies, LLC (JK), of Baltimore, Maryland (Registered Importer R–90–006) has petitioned NHTSA to decide whether nonconforming MY 2011 Mercedes-Benz GL550 CMVSS-certified MPVs are eligible for importation into the United States. The vehicles which JK believes are substantially similar are MY 2011 Mercedes-Benz GL550 MPVs sold in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared the CMVSS-certified MY 2011 Mercedes-Benz GL550 CMVSS certified MPVs to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

The petitioner submitted information with its petition intended to demonstrate that the subject non-U.S.-certified vehicles as, originally manufactured, conform to many applicable FMVSS in the same manner as their U.S.-certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that the non-U.S.-certified MY 2011 Mercedes-Benz GL550 CMVSS certified MPVs, as originally manufactured, conform to: Standard Nos. 102 *Transmission Shift Position Sequence,* Starter *Interlock, and Transmission Braking Effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 106 *Brake Hoses,* 108 *Lamps, Reflective Devices and Associated Equipment,* 110 *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 Kilograms (10,000 pounds) or Less,* 111 *Rearview Mirrors,* 113 *Hood Latch System,* 114 *Theft Protection and Rollaway Prevention,* 116 *Motor Vehicle Brake Fluids,* 118 *Power-Operated Window, Partition, and Roof Panel Systems,* 124 *Accelerator Control Systems,* 126 *Electronic Stability Control Systems,* 135 *Light Vehicle Brake Systems,* 201 *Occupant Protection in Interior Impact,* 202a *Head Restraints; Mandatory Applicability Begins on September 1, 2009,* 203 *Impact Protection for the Driver from the Steering Control System,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 208 *Occupant Crash Protection,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance; Applicable unless a Vehicle is Certified to § 571.216a,* 219 *Windshield Zone Intrusion,* 225 *Child Restraint Anchorage Systems,* 301 *Fuel System Integrity,* and 302 *Flammability of Interior Materials.*

The petitioner also contends that the subject non-U.S.-certified passenger cars are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* Replacement of the instrument cluster with the U.S.-model component and reprogramming of its software as described in the petition. In addition, replacement of the engine start control push button switch with the U.S.-model component to correct the labeling to meet the requirements of the standard.

Standard No. 138 *Tire Pressure Monitoring Systems:* Replacement or addition of U.S.-model TPMS components and the wiring harness, and then reprogramming of the vehicle ECUs as necessary to meet the requirements of the standard as described in the petition and shown in its attachments. The certifying manufacturer, Mercedes Benz, stated in a letter provided by the petitioner that they do not provide a retrofit or conversion to render this vehicle compliant with this specific standard. NHTSA is, therefore, specifically seeking public comment on whether the petitioner's proposed approach to conforming the subject vehicles to FMVSS No. 138 is capable of achieving conformity.

The petitioner further states that labels will be affixed to conform the vehicle to the requirements of 49 CFR parts 565 and 567, *VIN Content* and *Certification,* respectively.

III. Comments

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and considered. Comments filed after the closing date will also be considered to the fullest extent possible and available for examination in the docket at the above addresses.

Once the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

This notice of receipt of the subject petition does not represent any agency decision or other exercise of judgment concerning the merits of the petition. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Claudia W. Covell,

Acting Director, Office of Vehicle Safety Compliance.

[FR Doc. 2018–26059 Filed 11–29–18; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2018–0007; Notice 1]

Notice of Receipt of Petition for Decision That Nonconforming Model Year 2016 Mercedes-Benz GL500 Multipurpose Passenger Vehicles Are Eligible for Importation

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

ACTION: Receipt of petition.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that certain model year (MY) 2016 Mercedes-Benz GL500 multipurpose passenger vehicles (MPVs) that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS), are eligible for importation into the United States because they are substantially similar to

vehicles that were originally manufactured for sale in the United States and were certified by their manufacturer as complying with the safety standards (the U.S.-certified 2016 Mercedes-Benz GL550 MPV) and are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is December 31, 2018.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket number cited in the title of this notice and must be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the 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:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Neil Thurgood, Office of Vehicle Safety Compliance, NHTSA (202–366–0712).

SUPPLEMENTARY INFORMATION:

I. History: Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

II. Summary of Petition: Wallace Environmental Testing Laboratories (WETL), of Houston, Texas (Registered Importer R–90–005) has petitioned NHTSA to decide whether nonconforming MY 2016 Mercedes-Benz GL500 MPVs are eligible for importation into the United States. The vehicles which WETL believes are substantially similar are MY 2016 Mercedes-Benz GL550 MPV sold in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared non-U.S.-certified MY 2016 Mercedes-Benz GL500 MPVs to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

The petitioner submitted information with its petition intended to demonstrate that the subject non-U.S.-certified vehicles, as originally manufactured, conform to many applicable FMVSS in the same manner as their U.S.-certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that the non-U.S.-certified MY 2016 Mercedes-Benz GL500 MPVs, as originally manufactured, conforms to: Standard Nos. 102 *Transmission Shift Position Sequence, Starter Interlock, and Transmission Braking Effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 106 *Brake Hoses, 110 Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or Less,* 113 *Hood Latch System,* 116 *Motor Vehicle Brake Fluids,* 118 *Power-Operated Window, Partition, and Roof Panel Systems,* 124 *Accelerator Control Systems,* 126 *Electronic Stability Control Systems for Light Vehicles,* 135 *Light Vehicle Brake Systems,* 138 *Tire Pressure Monitoring Systems,* 201 *Occupant Protection in Interior Impact,* 202a *Head Restraints; Mandatory Applicability Begins on September 1, 2009,* 203 *Impact Protection for the Driver from the Steering Control System,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance, Applicable unless a Vehicle is Certified to § 571.216a,* 219 *Windshield Zone Intrusion,* 225 *Child Restraint Anchorage Systems,* 301 *Fuel System Integrity,* and 302 *Flammability of Interior Materials.*

The petitioner also contends that the subject non-U.S.-certified MPVs are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* The brake warning telltale must be modified to show the word ''BRAKE'' when activated.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* The headlamps and front side marker lamps must be removed and replaced with conforming lamps.

Standard No. 111 *Rearview Mirrors:* The passenger side mirror must be replaced with a U.S.-model that includes the required warning label.

Standard No. 114 *Theft Protection and Rollaway Prevention:* Installation of the U.S.-model anti-theft system to activate the key warning, audible alarm.

Standard No. 208 *Occupant Crash Protection:* Inspection to ascertain if the software and firmware installed in the vehicle are the same as the most up-to-date versions installed in the U.S.-conforming version of the vehicle. Replacement of any software or

firmware found not to be the most recent version.

The petitioner further states that labels will be affixed to conform the vehicle to the requirements of 49 CFR parts 565 and 567, VIN *Content* and *Certification,* respectively.

III. Comments: All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and considered. Comments filed after the closing date will also be considered to the fullest extent possible and available for examination in the docket at the above **ADDRESSES**.

Once the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

This notice of receipt of the subject petition does not represent any agency decision or other exercise of judgment concerning the merits of the petition. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Michael A. Cole,

Acting Director, Office of Vehicle Safety Compliance.

[FR Doc. 2018–26061 Filed 11–29–18; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: *OFAC:* Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Regulatory Affairs, tel. 202–622–4855; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*http://www.treasury.gov/ofac*).

Notice of OFAC Actions

On November 20, 2018, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

Individuals

1. ALCHWIKI, Mhd Amer (a.k.a. AL CHWIKI, Mohamad Amer Mohamad Akram; a.k.a. ALCHWIKI, Amer; a.k.a. ALCHWIKI, Amer Mhd; a.k.a. ALCHWIKI, Mohamad Amer; a.k.a. AL–SHUWAYKI, Muhammad 'Amir Muhammad Akram; a.k.a. AL–SHWEIKI, Mohamad Amer; a.k.a. AL–SHWEIKI, Muhammad Omar; a.k.a. ALSHWIKI, Mhd Amer (Cyrillic: АЛЬШВИКИ, Мхд Амер); a.k.a. CHWIKI, Mohammad Amer; a.k.a. SHUWAYKI, Mohamad Amer; a.k.a. SHWEIKI, Mohammad Amer), 71 Linton Road, Acton, London W3 9HL, United Kingdom; Syria; DOB 04 Sep 1972; POB Damascus, Syria; nationality Syria; citizen Syria; Additional Sanctions Information—Subject to Secondary Sanctions Pursuant to the Hizballah Financial Sanctions Regulations; alt. Additional Sanctions Information—Subject to Secondary Sanctions; Gender Male; Passport N012430661; alt. Passport N010794545; alt. Passport N007024509; alt. Passport N005668098 (individual) [SDGT] [SYRIA] [IRGC] [IFSR] (Linked To: GLOBAL VISION GROUP; Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS (IRGC)-QODS FORCE; Linked To: HIZBALLAH).

Designated pursuant to section 1(b)(i) of Executive Order 13582 of August 17, 2011, ''Blocking Property of the Government of Syria and Prohibiting Certain Transactions With Respect to Syria'' (E.O. 13582) for materially assisting, sponsoring, or providing financial, material, or technological support for, or goods or services in support of, CENTRAL BANK OF SYRIA, an entity identified as meeting the definition of the Government of Syria, as set forth in section 8(d) of E.O. 13582 and section 542.305 of the Syrian Sanctions Regulations, 31 CFR part 542.

Also designated pursuant to section 1(b)(ii) of E.O. 13582 for having acted or purported to act for or on behalf of, directly or indirectly, GLOBAL VISION GROUP, an entity whose property and interests in property are blocked pursuant to E.O. 13582.

Also designated pursuant to section 1(d)(i) of Executive Order 13224 of September 23, 2001, ''Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism'' (E.O. 13224) for assisting in, sponsoring, or providing financial, material, or technological support for, or financial or other services to or in support of, ISLAMIC REVOLUTIONARY GUARD CORPS (IRGC)-QODS FORCE, an entity whose property and interests in property are blocked pursuant to E.O. 13224.

Also designated pursuant to section 1(d)(i) of E.O. 13224 for assisting in, sponsoring, or providing financial, material, or technological support for, or financial or other services to or in support of, HIZBALLAH, an entity whose property and interests in property are blocked pursuant to E.O. 13224.

2. AL–BAZZAL, Muhammad Qasim (a.k.a. BAZZAL, Mohamad; a.k.a. ''MU'IN''); DOB 26 Aug 1984; POB Ba'albakk, Lebanon; Additional Sanctions Information—Subject to Secondary Sanctions Pursuant to the Hizballah Financial Sanctions Regulations; Gender Male; Passport LR0510789; Identification Number 18349929 (Lebanon) (individual) [SDGT] (Linked To: HIZBALLAH).

Designated pursuant to section 1(c) of E.O. 13224 for acting for or on behalf of HIZBALLAH, an entity whose property and interests in property are blocked pursuant to E.O. 13224.

3. DOGAEV, Andrey (a.k.a. DOGAYEV, Andrey; a.k.a. DOGAYEV, Andrey Yuryevich (Cyrillic: ДОГАЕВ, Андрей Юрьевич)); DOB 19 Dec 1955; POB Russia; Gender Male; Passport 72 9279533 (Russia) issued 27 Aug 2014 expires 27 Aug 2024; First Deputy Director of Promsyrioimport (individual) [SYRIA] (Linked To: PROMSYRIOIMPORT).

Designated pursuant to section 1(b)(ii) of E.O. 13582 for having acted or purported to act for or on behalf of, directly or indirectly, PROMSYRIOIMPORT, an entity whose property and interests in property are blocked pursuant to E.O. 13582.

4. SAJJAD, Rasoul (a.k.a. SAJJAD, Rassoul; a.k.a. SAJJAD, Rasul), Iran; DOB 09 Aug 1970; POB Esfahan, Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Gender Male; Passport G9333110 (Iran) issued 03 Mar 2014 expires 03 Mar 2019; (individual) [SDGT] [IRGC] [IFSR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS (IRGC)-QODS FORCE).

Designated pursuant to section 1(d)(i) of E.O. 13224 for assisting in, sponsoring, or providing financial, material, or technological support for, or financial or other services to or in support of, Iran's ISLAMIC REVOLUTIONARY GUARD CORPS–QODS FORCE, an entity whose property and interests in property are blocked pursuant to E.O. 13224.

5. YAGHOUBI MIAB, Hossein (a.k.a. YAGHOOBI MAYAB, Hossein; a.k.a. YAGHOOBI, Hossein; a.k.a. YAGHUBI MAYAB, Hosein; a.k.a. YAQUBI, Hosein), Iran; DOB 23 Jul 1961; POB Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Gender Male; Passport G9342868 (Iran) issued 16 Mar 2016

expires 16 Mar 2021 (individual) [SDGT] [IRGC] [IFSR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS (IRGC)-QODS FORCE).

Designated pursuant to section 1(d)(i) of E.O. 13224 for assisting in, sponsoring, or providing financial, material, or technological support for, or financial or other services to or in support of, Iran's ISLAMIC REVOLUTIONARY GUARD CORPS–QODS FORCE, an entity whose property and interests in property are blocked pursuant to E.O. 13224.

Entities

1. GLOBAL VISION GROUP (a.k.a. LIMITED LIABILITY COMPANY GLOBAL CONCEPTS GROUP (Cyrillic: ОБЩЕСТВО С ОГРАНИЧЕННОЙ ОТВЕТСТВЕННОСТЬЮ ГЛОБАЛЬНЫЕ КОНЦЕПЦИИ ГРУПП); a.k.a. ''LLC GKG'' (Cyrillic: ''ООО ГКГ'')), Office I Room 7, Building 3, House 22, Staromonetny Lane, Moscow 119180, Russia; Russia; Staromonetne STR 22/3, Moscow, Russia; Additional Sanctions Information—Subject to Secondary Sanctions Pursuant to the Hizballah Financial Sanctions Regulations; alt. Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [SYRIA] [IRGC] [IFSR] (Linked To: BANIAS REFINERY COMPANY; Linked To: ALCHWIKI, Mhd Amer).

Designated pursuant to section 1(b)(i) of E.O. 13582 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, BANIAS REFINERY COMPANY, an entity identified as meeting the definition of the Government of Syria as set forth in section 8(d) of E.O. 13582 and section 542.305 of the Syrian Sanctions Regulations, 31 CFR part 542.

Also designated pursuant to section 1(b)(i) of E.O. 13582 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, CENTRAL BANK OF SYRIA, an entity identified as meeting the definition of the Government of Syria as set forth in section 8(d) of E.O. 13582 and section 542.305 of the Syrian Sanctions Regulations, 31 CFR part 542.

Also designated pursuant to section 1(c) of E.O. 13224 for being owned or controlled by, Mhd Amer ALCHWIKI, an individual whose property and interests in property are blocked pursuant to E.O. 13224.

2. PROMSYRIOIMPORT (a.k.a. FEDERAL STATE UNITARY ENTERPRISE FOREIGN ECONOMIC ASSOCIATION PROMSYRIOIMPORT; a.k.a. PROMSYRIOIMPORT FOREIGN ECONOMIC ASSOCIATION S.O.C.; a.k.a. VO PROMSYRIEIMPORT (Cyrillic: ВО ПРОМСЫРЬЕИМПОРТ); a.k.a. VO PROMSYRIEIMPORT FGUP; a.k.a. VO PROMSYRIOIMPORT), d. 13 str. 4, bulvar Novinski, Moscow 121099, Russia; 13 Novinski Boulevard, Moscow 121834, Russia; Novinskiy Boulevard 13, Building 4, Moscow 123995, Russia; Novinsky bld. 13, build 4, Moscow 121099, Russia; Government Gazette Number 01860331; Registration Number 1027700499903 (Russia); Tax ID No. 7704140399 (Russia) [SYRIA] (Linked To: SYRIAN COMPANY FOR OIL TRANSPORT).

Designated pursuant to section 1(b)(i) of E.O. 13582 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, SYRIAN COMPANY FOR OIL TRANSPORT, an entity identified as meeting the definition of the Government of Syria as set forth in section 8(d) of E.O. 13582 and section 542.305 of the Syrian Sanctions Regulations, 31 CFR part 542.

3. MB BANK (f.k.a. BANK MELLI IRAN ZAO; a.k.a. JOINT STOCK COMPANY 'MIR BUSINESS BANK'; a.k.a. JSC 'MB BANK'; a.k.a. MB BANK, AO; a.k.a. MIR BIZNES BANK; a.k.a. MIR BIZNES BANK, AO; a.k.a. MIR BUSINESS BANK (Cyrillic: МИР БИЗНЕС БАНК); a.k.a. MIR BUSINESS BANK ZAO), 9/1 ul Mashkova, Moscow 105062, Russia; Russia; 9/1 Mashkova St., Moscow 105062, Russia; 6a Lenin Square Bld. A, Astrakhan 414000, Russia; SWIFT/BIC MRBBRUMM; website *www.mbbru.com;* Additional Sanctions Information—Subject to Secondary Sanctions; All Offices Worldwide [SDGT] [SYRIA] [IFSR] (Linked To: BANK MELLI IRAN; Linked To: GLOBAL VISION GROUP).

Designated pursuant to section 1(b)(i) of E.O. 13582 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, GLOBAL VISION GROUP, an entity whose property and interests in property are blocked pursuant to E.O. 13582.

4. TADBIR KISH MEDICAL AND PHARMACEUTICAL COMPANY (a.k.a. TADBIR KISH MEDICAL AND PHARMACEUTICAL CO.; a.k.a. TADBIR TED VA DAROYE KISH), Iran; Unit A103, 1st Floor, Padena Complex, Iran Blvd., Kish, Iran; Unit A301, 1st Floor, Padena Complex, Iran Blvd., Kish, Iran; Unit 301, 3rd Floor, Sadaf Tower, Kish, Iran [SYRIA] (Linked To: GLOBAL VISION GROUP).

Designated pursuant to section 1(b)(i) of E.O. 13582 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, GLOBAL VISION GROUP, an entity whose property and interests in property are blocked pursuant to E.O. 13582.

Dated: November 27, 2018.

Andrea M. Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2018–26077 Filed 11–29–18; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple IRS Information Collection Requests

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before December 31, 2018 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW, Suite 8142, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Jennifer Leonard by emailing *PRA@treasury.gov,* calling (202) 622–0489, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Internal Revenue Service (IRS)

Title: Notice Concerning Fiduciary Relationship/Notice Concerning Fiduciary Relationship of Financial Institution.

OMB Control Number: 1545–0013.

Type of Review: Extension without change of a currently approved collection.

Description: Form 56 is used to inform the IRS that a person in acting for another person in a fiduciary capacity so that the IRS may mail tax notices to the fiduciary concerning the person for whom he/she is acting. The data is used to ensure that the fiduciary relationship is established or terminated and to mail or discontinue mailing designated tax notices to the fiduciary. The filing of Form 56–F by a fiduciary (FDIC or other federal agency acting as a receiver or conservator of a failed financial institution (bank or thrift) gives the IRS the necessary information to submit send letters, notices, and notices of tax liability to the federal fiduciary now in charge of the financial institution rather than sending the notice, etc. to the institution's last known address.

Form: 56, 56–F.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 25,000.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 173,944.

Estimated Time per Response: 2.01 hours.

Estimated Total Annual Burden Hours: 349,786.

Title: Annual Summary and Transmittal of U.S. Information Returns.

OMB Control Number: 1545–0108.

Type of Review: Extension without change of a currently approved collection.

Description: Sections 408(i), 6041 through 6045, 6047, 6049, 6050A, 6050B, 6050D, 6050E, 6050H, 6050J, 6050N, and 6050P of the Internal Revenue Code (IRC), provide for the filing of information returns to report the payment of certain types of income, mortgage interest, and IRA contributions. Regulation section 1.6041–1(a)(2) provides that the transmittal of paper Form 1097, 1098, 1098–F, 1099, 1099–LS, 1099–SB, 3921, 3922, 5498, and W–2G shall be made with Form 1096, Annual Summary and Transmittal of U.S. Information Returns.

Form: 1096.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 5,640,300.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 5,640,300.

Estimated Time per Response: .23 hours.

Estimated Total Annual Burden Hours: 1,297,269.

Title: Certain Government Payments.

OMB Control Number: 1545–0120.

Type of Review: Extension without change of a currently approved collection.

Description: Form 1099–G is used by governments (primarily state and local) to report to the IRS (and notify recipients of) certain payments (*e.g.,* unemployment compensation and income tax refunds). IRS uses the information to insure that the income is being properly reported by the recipients on their returns.

Form: 1099–G.

Affected Public: State, Local, and Tribal Governments.

Estimated Number of Respondents: 1,900.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 82,364,600.

Estimated Time per Response: .30 hours.

Estimated Total Annual Burden Hours: 24,709,380.

Title: Form W–2G—Certain Gambling Winnings.

OMB Control Number: 1545–0238.

Type of Review: Revision of a currently approved collection.

Description: Section 6041 of the Internal Revenue Code requires payers of certain gambling winnings to report them to IRS. If applicable, section 3402(g) and section 3406 require tax withholding on these winnings. We use the information to ensure taxpayers' reporting compliance.

Form: W–2G, W–2.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 15,349,567.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 15,349,567.

Estimated Time per Response: .41 hours.

Estimated Total Annual Burden Hours: 6,293,323.

Title: Returns Required on Magnetic Media.

OMB Control Number: 1545–0957.

Type of Review: Extension without change of a currently approved collection.

Description: Certain filers of information returns are required by law to file on magnetic media. In some instances, waivers from this requirement are necessary and justified. Form 8508 is submitted by the filer and provides information on which IRS will base its waiver determination.

Form: 8508.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 1,000.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 1,000.

Estimated Time per Response: Time per response.

Estimated Total Annual Burden Hours: 750.

Title: Form 1099–S—Proceeds From Real Estate Transactions.

OMB Control Number: 1545–0997.

Type of Review: Extension without change of a currently approved collection.

Description: Form 1099–S is used by the real estate reporting person to report proceeds from a real estate transaction to the IRS.

Form: 1099–S.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 75,000.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 2,573,400.

Estimated Time per Response: .16 hours.

Estimated Total Annual Burden Hours: 411,744.

Title: Form 8693—Low-Income Housing Credit Disposition Bond or Treasury Direct Account Application.

OMB Control Number: 1545–1029.

Type of Review: Extension without change of a currently approved collection.

Description: Form 8693 is needed per IRC section 42(j)(6) to post bond or establish a Treasury Direct Account and waive the recapture requirements under section 42(j) for certain disposition of a building on which the low-income housing credit was claimed. Internal Revenue regulations section 301.7101–1 requires that the posting of a bond must be done on the appropriate form as determined by the Internal Revenue Service.

Form: 8693.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 1,000.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 667.

Estimated Time per Response: 5.38 hours.

Estimated Total Annual Burden Hours: 3,589.

Title: TD 8316 Cooperative Housing Corporations.

OMB Control Number: 1545–1041.

Type of Review: Extension without change of a currently approved collection.

Description: This document contains previously approved amendments to the Income Tax Regulations under section 216 of the Internal Revenue Code of 1986, relating to cooperative housing corporations. Section 216 of the Code was amended by the Tax Reform Act of 1986. The regulations provide cooperative housing corporations and tenant-stockholders with guidance needed to comply with the law.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 2,500.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 2,500.

Estimated Time per Response: .5 hours.

Estimated Total Annual Burden Hours: 1,250.

Title: Notice of Plan Merger or Consolidation, Spinoff, or Transfer of Plan Assets or Liabilities; Notice of Qualified Separate Lines of Business.

OMB Control Number: 1545–1225.

Type of Review: Revision of a currently approved collection.

Description: Plan administrators are required to notify IRS of any plan mergers, consolidations, spinoffs, or transfers of plan assets or liabilities to another plan. Employers are required to notify IRS of separate lines of business for their deferred compensation plans. Form 5310–A is used to make these notifications.

Form: 5310–A.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 694.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 694.

Estimated Time per Response: 10.59 hours.

Estimated Total Annual Burden Hours: 7,347.

Title: Tax Treatment of Salvage and Reinsurance.

OMB Control Number: 1545–1227.

Type of Review: Extension without change of a currently approved collection.

Description: The regulation provides a disclosure requirement for an insurance company that increases losses shown on its annual statement by the amount of estimated salvage recoverable taken into account.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 2,500.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 2,500.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 5,000.

Title: TD 8825 (Final)—Regulations Under Section 382 of the Internal Revenue Code of 1986; Application of Section 382 in Short Taxable Years and With Respect to Controlled Groups.

OMB Control Number: 1545–1434.

Type of Review: Extension without change of a currently approved collection.

Description: Section 382 limits the amount of income that can be offset by loss carryovers after an ownership change. These previously approved regulations provide rules for applying section 382 in the case of short taxable years and with respect to controlled groups.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 3,500.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 3,500.

Estimated Time per Response: .25 hours.

Estimated Total Annual Burden Hours: 875.

Title: Requirements Respecting the Adoption or Change of Accounting Method, Extensions of Time to Make Elections.

OMB Control Number: 1545–1488.

Type of Review: Extension without change of a currently approved collection.

Description: This document contains previously approved final regulations providing the procedures for requesting an extension of time to make certain elections under the Internal Revenue Code. In addition, the regulations provide the standards that the Commissioner will use in determining whether to grant taxpayers extensions of time to make certain elections including changes in accounting method and accounting period.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 500.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 500.

Estimated Time per Response: 10 hours.

Estimated Total Annual Burden Hours: 5,000.

Title: Form 8850—Pre-Screening Notice and Certification Request for the Work Opportunity and Welfare-to-Work Credits.

OMB Control Number: 1545–1500.

Type of Review: Extension without change of a currently approved collection.

Description: Employers use Form 8850 as part of a written request to a state employment security agency to certify an employee as a member of a targeted group for purposes of qualifying for the work opportunity credit. The work opportunity credit covers individuals who begin work for the employer before July 1, 1999.

Form: 8850.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 440,000.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 440,000.

Estimated Time per Response: 7.37 hours.

Estimated Total Annual Burden Hours: 3,242,800.

Title: Long-Term Care and Accelerated Death Benefits.

OMB Control Number: 1545–1519.

Type of Review: Revision of a currently approved collection.

Description: Under the terms of IRC sections 7702B and 101g, qualified long-term care and accelerated death benefits paid to chronically ill individuals are treated as amounts received for expenses incurred for medical care. Amounts received on a per diem basis in excess of $175 per day are taxable. Section 6050Q requires all such amounts to be reported. Form 1099–LTC is used if any long-term care benefits, including accelerated death benefits are paid. Payers include insurance companies, governmental units, and viatical settlement providers.

Form: 1099 LTC.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 3,000.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 377,467.

Estimated Time per Response: .23 hours.

Estimated Total Annual Burden Hours: 88,818.

Title: REG–209823–96 (TD 8791)—Guidance Regarding Charitable Remainder Trusts and Special Valuation Rules for Transfer of Interests in Trusts.

OMB Control Number: 1545–1536.

Type of Review: Extension without change of a currently approved collection.

Description: A charitable remainder trust provides for a specified periodic distribution to one or more beneficiaries for life or for a term of years with an irrevocable remainder interest held for the benefit of charity. A contribution to a charitable remainder trust generally qualifies for a charitable deduction. Regulation REG–209823–96 provides an alternative method and guidance, allowing a taxpayer to use a current qualified appraisal (as defined in § 1.170A–13(c)(3)) from a qualified appraiser (as defined in § 1.170A–13(c)(5)) for valuing a trust's difficult-to-value assets, which may reduce cost to taxpayer and offer be less burdensome. Likely respondents are business or other for profits.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 150.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 150.

Estimated Time per Response: .5 hours.

Estimated Total Annual Burden Hours: 75.

Title: Rev. Proc. 99–17—Mark to Market Election for Commodities Dealers and Securities and Commodities Traders.

OMB Control Number: 1545–1641.

Type of Review: Extension without change of a currently approved collection.

Description: The revenue procedure prescribes the time and manner for dealers in commodities and traders in securities or commodities to elect to use the mark-to-market method of accounting under Sec. 475(e) or (f) of the Internal Revenue Code. The collections of information of this revenue procedure are required by the IRS in order to facilitate monitoring taxpayers changing accounting methods resulting from making the elections under Sec. 475(e) or (f).

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 1,000.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 1,000.

Estimated Time per Response: .5 hours.

Estimated Total Annual Burden Hours: 500.

Title: Form 8717 and 8717–A—User Fee for Employee Plan Determination Letter Request.

OMB Control Number: 1545–1772.

Type of Review: Revision of a currently approved collection.

Description: The Omnibus Reconciliation Act of 1990 requires payment of a ''user fee'' with each application for a determination letter. Because of this requirement, the Form 8717 was created to provide filers the means to make payment and indicate the type of request.

Form: 8717, 8717–A.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 40,000.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 40,000.

Estimated Time per Response: 11.23 hours.

Estimated Total Annual Burden Hours: 449,340.

Title: User Fee for Exempt Organization Determination Letter Request.

OMB Control Number: 1545–1798.

Type of Review: Extension without change of a currently approved collection.

Description: Section 7528 of the Code directs the Secretary of the Treasury or delegate (the ''Secretary'') to establish a program requiring the payment of user fees for requests to the Service for letter rulings, opinion letters, determination letters, and similar requests. Form 8718, User Fee for Exempt Organization Determination Letter Request, was created as a result of The Omnibus Reconciliation Act of 1990 which requires payment of a ''user fee'' with each application for a determination letter. Form 8718 provides filers with the means to enclose their user fee payment and indicate what type of request they are making.

Form: 8718.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 14,376.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 14,376.

Estimated Time per Response: .05 hours.

Estimated Total Annual Burden Hours: 719.

Title: Interest Rates and Appropriate Foreign Loss Payment Patterns For Determining the Qualified Insurance Income of Certain Controlled Corporations under Section 954(f).

OMB Control Number: 1545–1799.

Type of Review: Extension without change of a currently approved collection.

Description: This notice provide guidance on how to determine the foreign loss payment patterns of a foreign insurance company owned by U.S. shareholder for purposes of determining the amount of investment income earned by the insurance company that is not treated as Subpart F income under section 954(i).

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 300.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 300.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 300.

Title: Repayment of a Federal Government Buyout and Possible Suspension of Severance Pay.

OMB Control Number: 1545–1920.

Type of Review: Extension without change of a currently approved collection.

Description: Form 12311 outlines the regulations requiring those employees being rehired by the government and received a buyout from their previous job to make repayment of the buyout before they will be hired again.

Form: 12311.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 6,624.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 6,624.

Estimated Time per Response: .08 hours.

Estimated Total Annual Burden Hours: 530.

Title: TD 9360 (Final)—Guidance on Passive Foreign Company (PFIC) Purging Elections.

OMB Control Number: 1545–1965.

Type of Review: Extension without change of a currently approved collection.

Description: The IRS needs the information to substantiate the taxpayer's computation of the taxpayer's share of the PFIC's post-1986 earning and profits.

Form: None.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 250.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 250.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 250.

Title: Form 8932—Credit for Employer Differential Wage Payments.

OMB Control Number: 1545–2126.

Type of Review: Extension without change of a currently approved collection.

Description: Qualified employers will file Form 8932 to claim the credit for qualified differential wage payments paid to qualified employees after June 17, 2008, and before January 1, 2010. Authorized under I.R.C. section 45P.

Form: 8932.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 21,100.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 21,100.

Estimated Time per Response: 2.96 hours.

Estimated Total Annual Burden Hours: 62,456.

Title: Form 5884–C—Work Opportunity Credit for Qualified Tax-Exempt Organizations Hiring Qualified Veterans.

OMB Control Number: 1545–2226.

Type of Review: Extension without change of a currently approved collection.

Description: Form 5884–C, Work Opportunity Credit for Qualified Tax-

Exempt Organizations Hiring Qualified Veterans, was developed as a result of VOW to Hire Heroes Act of 2011, Public Law 112–56. Section 261 of Public Law 112–56 expanded the Work Opportunity Credit to tax-exempt organizations that hire unemployed veterans. The tax credit is a reduction in payroll taxes paid by the tax-exempt organization. Form 5884–C allows a tax-exempt organization a way to claim the credit and provides the IRS the information to process the tax credit.

Form: 5884–C.

Affected Public: Not-for-profit institutions.

Estimated Number of Respondents: 60,530.

Frequency of Response: Annually and On occasion.

Estimated Total Number of Annual Responses: 60,530.

Estimated Time per Response: 6.57 hours.

Estimated Total Annual Burden Hours: 397,683.

Title: Form 8957—Foreign Account Tax Compliance Act (FATCA) Registration, Form 8966—FATCA Report, 8966–C, Cover Sheet for Form 8966 Paper Submissions, Form 8809–I—Application for Extension of Time to File.

OMB Control Number: 1545–2246.

Type of Review: Revision of a currently approved collection.

Description: Form 8957 is to be used by a foreign financial institution to apply for status as a foreign financial institution as defined in IRC 1471(b)(2). Form 8966 is for reporting purposes and is to be filed by foreign financial institutions to report foreign reportable amounts paid to their current account holders that are nonparticipating FFIs. Form 8966 is further to be filed by a withholding agent to report US owners of certain foreign entities regarding withhold-able payments made to these entities. Form 8809–I is an application for an extension of time to file Form 8966. Form 8508–I is a request for a waiver from filing Form 8966 electronically. Form 8966–C is a cover sheet for those submitting a paper version of Form 8966.

Form: 8957, 8966, 8966–C, 8809–I, 8508 I.

Affected Public: Businesses or other for profits.

Estimated Number of Respondents: 5,561,180.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 5,561,180.

Estimated Time per Response: Form 8957: 8.14 hours; Form 8966: .42 hours; Form 8966–C: .12 hours; Form 8809–I: 3.36 hours; Form 8508 I: 4.29 hours.

Estimated Total Annual Burden Hours: 2,912,282 hours.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: November 27, 2018.

Jennifer P. Quintana,

Treasury PRA Clearance Officer.

[FR Doc. 2018–26039 Filed 11–29–18; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Bureau of the Fiscal Service Information Collection Requests

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before December 31, 2018 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW, Suite 8142, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Jennifer Leonard by emailing *PRA@treasury.gov,* calling (202) 622–0489, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Bureau of the Fiscal Service (FS)

Title: Trace Request for EFT Payments.

OMB Control Number: 1530–0002.

Type of Review: Revision of a currently approved collection.

Description: Used to notify the financial institutions that a beneficiary has claimed non-receipt of credit for a payment. The form is designed to help the financial institution locate any problem and to keep the beneficiary informed of any action taken.

Form: FMS–150–2, FS Form 150.1.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 26,895.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 203,719.

Estimated Time per Response: .13 hours.

Estimated Total Annual Burden Hours: 27,162.

Title: Creditor's Request for Payment of Treasury Securities Belonging to a Decedent's Estate Being Settled Without Administration.

OMB Control Number: 1530–0027.

Type of Review: Revision of a currently approved collection.

Description: The information is requested to obtain a creditor's consent to dispose of savings bonds/notes in settlement of a deceased owner's estate without administration.

Form: FS Form 1050.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 1,500.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 1,500.

Estimated Time per Response: .10 hours.

Estimated Total Annual Burden Hours: 1,500.

Title: Application by Voluntary Guardian of Incapacitated Owner of United States Savings Bonds/Notes.

OMB Control Number: 1530–0031.

Type of Review: Revision of a currently approved collection.

Description: Used by voluntary guardian of incapacitated bond owner(s) to establish right to act of behalf of owner.

Form: PD F 2513.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 1,000.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 1,000.

Estimated Time per Response: .33 hours.

Estimated Total Annual Burden Hours: 333.

Title: Application for Issue of United States Mortgage Guaranty Insurance Company Tax and Loss Bonds.

OMB Control Number: 1530–0052.

Type of Review: Revision of a currently approved collection.

Description: Submitted by companies engaged in the business of writing

mortgage guaranty insurance for purpose of purchasing ''Tax and Loss'' bonds.

Form: FS Form 3871.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 33.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 33.

Estimated Time per Response: .25 hours.

Estimated Total Annual Burden Hours: 8.

Title: Disposition of Securities Belonging to a Decedent's Estate Being Settled Without Administration.

OMB Control Number: 1530–0055.

Type of Review: Revision of a currently approved collection.

Description: The information is collected from a voluntary representative of a decedent's estate to support a request for disposition of United States Treasury Securities and/or related payments in the event that the estate is not being administered.

Form: FS Form 5336.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 25,350.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 25,350.

Estimated Time per Response: .5 hours.

Estimated Total Annual Burden Hours: 12,675.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: November 27, 2018.

Jennifer P. Quintana,

Treasury PRA Clearance Officer.

[FR Doc. 2018–26064 Filed 11–29–18; 8:45 am]

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FEDERAL REGISTER

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Book 2 of 2 Books

Pages 61729–62240

Part II

Securities and Exchange Commission

17 CFR Parts 230, 232, 239, et al.
Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 232, 239, 240, 270, and 274

[Release Nos. 33–10569; 34–84508; IC–33286; File No. S7–23–18]

RIN 3235–AK60

Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is proposing rule and form amendments that are intended to help investors make informed investment decisions regarding variable annuity and variable life insurance contracts. The proposal would modernize disclosures by using a layered disclosure approach designed to provide investors with key information relating to the contract's terms, benefits, and risks in a concise and more reader-friendly presentation, with access to more detailed information available online and electronically or in paper format on request. The proposed new rule would permit a person to satisfy its prospectus delivery obligations under the Securities Act of 1933 for a variable annuity or variable life insurance contract by sending or giving a summary prospectus to investors and making the statutory prospectus available online. The proposed rule also would consider a person to have met its prospectus delivery obligations for any portfolio companies associated with a variable annuity or variable life insurance contract if the portfolio company prospectuses are posted online. In addition, we are proposing amendments to the registration forms for variable annuity and variable life insurance contracts to update and enhance the disclosures to investors in these contracts, and to implement the proposed summary prospectus framework. We are further proposing to require variable contracts to use the Inline eXtensible Business Reporting Language (''Inline XBRL'') format for the submission of certain required disclosures in the variable contract statutory prospectus. We are also proposing certain technical and conforming amendments to our rules and forms, including amendments to rules relating to variable life insurance contracts, as well as rescission of certain related rules and forms. Lastly, we are seeking comments regarding parallel amendments to rules governing mutual fund summary prospectuses and registration forms applicable to other types of registered investment companies.

DATES: Comments should be submitted on or before February 15, 2019.

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 No. S7–23–18 on the subject line.

Paper Comments

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–23–18. 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, Room 1580, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information you wish to make available publicly. Investors wishing to provide comments regarding the proposed summary prospectus may wish to submit our Feedback Flier, available at Appendix C.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's 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: Daniel K. Chang, James Maclean, Amy Miller, Senior Counsels; Amanda Hollander Wagner, Branch Chief; Michael C. Pawluk, Senior Special Counsel, Investment Company Regulation Office, at (202) 551–6792; Keith Carpenter or Michael Kosoff, Senior Special Counsels, Disclosure and Review Office, at (202) 551–6921, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission (''Commission'') is proposing new rule 498A [proposed rule 17 CFR 230.498A] under the Securities Act. The Commission is also proposing amendments to the following rules:

Commission reference	CFR citation (17 CFR)
Regulation S–T [17 CFR 232.10 through 232.903]:	
Rule 11	§ 232.11.
Rule 405	§ 232.405.
Securities Act of 1933 (''Securities Act''): [1]	
Rule 159A	§ 230.159A.
Rule 421	§ 230.421.
Rule 431	§ 230.431.
Rule 482	§ 230.482.
Rule 485	§ 230.485.
Rule 497	§ 230.497.
Rule 498	§ 230.498.
Securities Exchange Act of 1934 (''Exchange Act''): [2]	
Rule 14a–16	§ 240.14a–16.
Investment Company Act of 1940 (''Investment Company Act''): [3]	
Rule 0–1	§ 270.0–1.

Commission reference	CFR citation (17 CFR)
Rule 6c–7	§ 270.6c–7.
Rule 6c–8	§ 270.6c–8.
Rule 6e–2	§ 270.6e–2.
Rule 6e–3(T)	§ 270.6e–3(T).
Rule 11a–2	§ 270.11a–2.
Rule 14a–2	§ 270.14a–2.
Rule 26a–1	§ 270.26a–1.
Rule 27c–1	§ 270.27c–1.
Securities Act and Investment Company Act:	
Form N–3	§ 239.17a and 274.11b.
Form N–4	§ 239.17b and 274.11c.
Form N–6	§ 239.17c and 274.11d.

Finally, the Commission is proposing to rescind:

Commission reference	CFR citation (17 CFR)
Investment Company Act:	
Rule 26a–2	§ 270.26a–2.
Rule 27a–1	§ 270.27a–1.
Rule 27a–2	§ 270.27a–2.
Rule 27a–3	§ 270.27a–3.
Rule 27d–2	§ 270.27d–2.
Rule 27e–1	§ 270.27e–1.
Rule 27f–1	§ 270.27f–1.
Rule 27g–1	§ 270.27g–1.
Rule 27h–1	§ 270.27h–1.
Form N–27E–1	§ 274.127e–1.
Form N–27F–1	§ 274.127f–1.
Form N–27I–1	§ 274.302.
Form N–27I–2	§ 274.303.
Securities Act and Investment Company Act:	
Form N–1	§ 239.15 and 274.11.

Table of Contents

I. Introduction and Background

To meet life insurance needs and other financial goals, investors may consider variable annuity and variable life insurance contracts (together, ''variable contracts'' or ''contracts'') as a way of combining insurance guarantees with the potential for long-term investment appreciation.[4] Variable contracts are generally more complex than other retail investment products, such as mutual funds, in a variety of ways. These investment products combine both investment and insurance features. They frequently offer a menu of optional benefits that an investor may select to customize the contract to meet his or her individual needs. In addition, most have two-level fee structures, where fees are assessed at both the contract level by the issuer (including any additional charges for optional benefits selected by the investor) and at the underlying investment option level. Further transactional charges may also apply, some of which could be substantial, for example, in the case of withdrawals made from a contract prior to a specified number of years.[5] Special tax rules also apply to variable products, with both tax advantages and potential

[1] 15 U.S.C. 77a *et seq.*

[2] 15 U.S.C. 78a *et seq.*

[3] 15 U.S.C. 80a *et seq.*

[4] For an overview of variable annuities and variable life insurance contracts, *see infra* section I.A.

[5] A contract may impose a ''surrender charge'' if, after purchase payments are made, an investor withdraws money from the contract during a stated period typically ranging from six to ten (or even more) years.

adverse tax impacts in certain circumstances.[6]

Investors should understand the features, risks, and charges associated with any potential investment. Providing investors with key information is particularly important in the context of variable contracts, since their structure is typically more complex than other types of investment products. The operation and terminology associated with these products can be difficult for investors to understand. Moreover, variable contract prospectuses are often quite lengthy (frequently more than a hundred pages), particularly in the case of products that include optional benefits. It is also common for insurers to describe different versions of the contract in one prospectus, some of which may no longer be available to new investors, leaving investors to wade through a lengthy document to find disclosures relevant to the particular contract that they purchased or are considering purchasing.

In addition, variable contract investors generally allocate their purchase payments to a range of investment options. For most variable contracts, these investment options typically are mutual funds, which are separately registered and have their own prospectuses.[7] Because insurers issuing variable contracts typically bundle prospectuses for the underlying portfolio companies together with the variable contract prospectus, the disclosures that investors receive at the time of the initial purchase and on an annual basis thereafter can be voluminous.[8]

We are concerned that the volume, format, and content of disclosures in the variable contract context may make it difficult for some investors to find and understand key information that they need to make an informed investment decision. To improve the current disclosure framework and update the manner in which variable contract investors receive and review prospectuses and related information, we are proposing new rule 498A under the Securities Act that permits the use of a summary prospectus to satisfy statutory prospectus delivery obligations, along with other rule and form amendments intended to implement the summary prospectus framework. Investors would continue to have access to the contract statutory prospectus and other information about the contract online (and could receive paper or electronic copies upon request), which would continue to provide more-detailed information about the contract.

Specifically, the approach under the proposed new rule contemplates the use of two types of summary prospectuses: An ''initial summary prospectus'' to be provided to new investors, and an ''updating summary prospectus'' to be provided to existing investors. To help investors make an informed investment decision, each type of summary prospectus uses a layered disclosure approach designed to provide investors with key information relating to the contract's terms, benefits, and risks in a concise and more reader-friendly presentation, with website addresses or hyperlinks to more detailed information posted online and delivered electronically or in paper format on request. In proposing new rule 498A, we are considering approaches that could affect, and raise the possibility of future amendments to, certain parallel provisions of rule 498 and certain of our registration forms applicable to other types of registered investment companies.

A. Overview of Variable Annuities and Variable Life Insurance Products

Variable contracts are contracts between an investor and an insurance company that provide investors with exposure to the securities markets while also offering certain insurance protections, such as protection against market losses, protection against outliving their assets, or assurances that their beneficiaries will receive a certain amount upon death.[9] Unlike traditional annuities and life insurance contracts, variable contracts have an investment component that allows investors the possibility of increasing their potential benefits.[10] Variable contracts also offer tax benefits such as tax-deferral on investment earnings until distribution. This combination of insurance guarantees and tax-deferred investment may be appealing to investors.

When an investor purchases a variable contract, he or she makes a purchase payment (in either a lump sum or a series of payments), and in return, the insurance company promises to pay a stream of periodic income payments, either immediately or at some future date. Variable annuities allow investors to receive periodic payments for either a definite period (*e.g.,* 20 years), or for an indefinite period (*e.g.,* the life of the investor), and also provide a basic death benefit to protect the investor's beneficiaries. The investor may allocate the cash value of the purchase payments to a range of investment options available under the contract, including to portfolio companies and, in some cases, to a fixed account option that pays a fixed or minimum rate of interest. The investor's account value changes depending on the performance of the investment options the investor has selected.

Similar to variable annuities, variable life insurance contracts offer a death benefit to the investor, as well as the ability to accumulate cash value.[11] Also

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6 For example, assets within a variable contract grow tax-deferred, and transfers between investment options under the contract are not taxable events. However, investors may face a 10% federal income tax penalty if money is withdrawn before the investor reaches 59½ years old. For these and other reasons, a variable contract generally is sold as a long-term investment.

7 For purposes of this release, we refer to these entities as ''portfolio companies.''

8 For example, variable annuity contracts offer an average of 59 investment options, with some contracts offering more than 250 investment options. *See* Insured Retirement Institute, *IRI Fact Book 2018* (''IRI Fact Book''), at 170. Furthermore, variable life insurance contracts offer an average of 64 investment options, with some contracts offering more than 300 investment options. These variable life figures are based on June 2018 data obtained from Morningstar Direct.

9 The average contract value for individual variable annuities is approximately $106,187. *See* IRI Fact Book, *supra* note 8, at 170. Americans who own annuities have a median annual household income of $64,000 (80% have total annual household incomes below $100,000). Most individual annuity owners are retired. Although the average age of an annuity owner is 70, the average age at which owners purchased their first annuity is 51. *See* The Gallup Organization and Mathew Greenwald & Associates for The Committee of Annuity Insurers, *Survey of Owners of Individual Annuity Contracts* (2013) (''Gallup Survey''), at 8–9. There is limited data available regarding variable life insurance contracts, but based upon the data that is available, the Commission believes that the demographics of investors for those products are likely comparable.

10 Variable contracts generally are treated as annuity or insurance contracts under state insurance laws and securities under the federal securities laws. Although section 3(a)(8) of the Securities Act exempts from the Act any insurance or endowment policy or annuity contract issued by a corporation subject to the supervision of the insurance commissioner of any State or Territory of the United States or the District of Columbia, we have determined, and the courts have held, that variable annuities are securities under the federal securities laws and are not, therefore, entitled to this exemption. *See, e.g., SEC* v. *Variable Annuity Life Ins. Co. of Am.,* 359 U.S. 65 (1959) (variable annuity contracts are securities, and not insurance policies or annuity contracts within the meaning of the Act's exemption because the issuer of a variable annuity contract has no element of fixed return and does not assume any investment risk, which is inherent in the concepts of insurance and annuity contracts); *see also* Adoption of Rule 3c–4 Under the Investment Company Act of 1940, Investment Company Act Release No. 7644, 1 SEC Docket 17 (Jan. 31, 1973) (because the contract holder participates directly in the investment experience of the separate account and bears an investment risk, a variable life insurance contract is a security, not entitled to the exemption set forth in section 3(a)(8) of the Securities Act).

11 Unlike other types of life insurance, variable life insurance exposes the investor to greater market risk (the cash value can decrease), but also offers

like variable annuities, a variable life insurance contract permits the investor to allocate insurance premiums to a variety of portfolio companies, and may also offer a fixed account investment option. Because an investor will generally allocate the insurance premiums to portfolio companies, the cash value (and in some cases, the death benefit [12]) will vary with the performance of these investments.

Investors bear a number of ongoing fees, expenses, and other charges when investing in a variable contract, including mortality and expense risk charges,[13] administrative fees, fees for optional benefits selected by the investor, and portfolio company fees and expenses.[14] Investors may also bear certain transaction-based charges, including surrender charges.[15] Variable life insurance contracts also impose an additional insurance charge to cover the cost of the death benefit.[16]

Variable contracts commonly offer optional benefit features as riders to the contract with their own terms and conditions. Riders commonly provide enhanced death benefits, as well as ''living benefits'' that may be designed to provide protection against investment losses or longevity risk, or to cover financial losses that result from illness, incapacity, or injury. These optional riders have become increasingly popular with variable contract investors.[17] Typically, there is a separate charge for each rider.

B. Prospectus Disclosure and Delivery

1. Requirements for Variable Contract Prospectus Disclosure and Delivery

The prospectus delivery requirements for variable contracts arise from the legal structure of these products. The ''separate account'' [18] established by the sponsoring insurance company is the legal entity that registers its securities. The separate account is an account that is owned by the insurance company.[19] Separate accounts are typically registered as investment companies under the Investment Company Act [20] and also register their securities under the Securities Act by filing a registration statement with the Commission.

Separate accounts may be organized either as management companies [21] or unit investment trusts (''UITs'').[22] Variable annuity separate accounts that are management companies file registration statements on Form N–3,[23] while those that are UITs file registration statements on Form N–4. Most variable annuity contracts sold today are offered by Form N–4 registrants.[24] Variable life separate accounts, which also are typically organized as UITs, file registration statements on Form N–6.[25]

Form N–4 (variable annuity) and N–6 (variable life) registrants are sometimes referred to as ''two-tier'' investment company structures. The top tier, which is the separate account established by the insurer and registered with the Commission as a UIT, is itself divided into ''subaccounts,'' each of which invests in the shares of an underlying portfolio company (*e.g.,* a mutual fund or exchange-traded fund (''ETF'')) that serves as an investment option under the variable contract. In this structure, the insurer's separate account, not the variable contract investor, is the legal owner of the underlying fund shares.[26]

Section 5(b)(2) of the Securities Act makes it unlawful to carry or cause to be carried a security for purposes of sale or for delivery after sale ''unless accompanied or preceded'' by a prospectus that meets the requirements of section 10(a) of the Act.[27] For purposes of section 5 of the Securities Act, each additional purchase payment under a variable contract is considered a ''sale'' requiring delivery of a current prospectus.[28]

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the potential for long-term returns that can grow the cash value. An investor may access the cash value of his or her contract by taking out loans (or withdrawals), which may be subject to surrender charges and are taxable under certain circumstances. Taking a loan or withdrawal reduces the policy's cash value and death benefit, and may require additional premium payments to keep the policy in force.

[12] The death benefit can vary based on optional benefit features that the contract investor selects. *See infra* paragraph accompanying note 17.

[13] The mortality and expense (''M&E'') risk charge, which is based on an investor's account value, compensates the insurance company for offering certain contract features (*e.g.,* death benefit or annuitization) and is sometimes used to pay the insurance company's costs to sell the contract (*e.g.,* commissions). Typical M&E charges are approximately 1.25% of account value per year for variable annuities, and 0.90% for variable life insurance. *See* IRI Fact Book, *supra* note 8, at 55.

[14] Investors indirectly bear the operating fees and expenses of the portfolio companies they select as the underlying investments in their variable contracts.

[15] *See supra* note 5.

[16] These additional insurance charges are determined at the time of the contract is written and vary based on the insured's personal characteristics, such as age and health. These charges are in addition to the M&E risk charge discussed above. *See supra* note 13.

[17] *See, e.g.,* IRI Fact Book, *supra* note 8, at 83 (''Just under $2 trillion of VA assets were held by insurance companies as of the fourth quarter of 2017, with an estimated $800 billion having a living benefit.''); Gallup Survey, *supra* note 9, at 21 (stating that ''[n]early eight in ten annuity owners (79%) who own a variable annuity report that their contract has a guaranteed lifetime withdrawal benefit.'').

[18] *See* section 2(a)(37) of the Investment Company Act (defining ''separate account'' to mean an account established and maintained by an insurance company pursuant to state law under which income, gains and losses from assets allocated to that account are credited against the account without regard to other income, gains or losses of the insurance company). In addition to directing all or part of their purchase payments to the investment options (typically mutual funds) available under the separate account, investors may also direct their purchase payments to a fixed account that pays a fixed, or minimum, rate of interest. The fixed account is part of the insurance company's general account, which, unlike the separate account, is subject to the insurance company's claims-paying ability and creditor reach.

[19] The assets of the separate account are segregated from the other assets of the insurance company (such as the insurance company's general account) and are therefore insulated from the claims of the insurance company's creditors. *See* rule 26a–2 under the Investment Company Act (providing exemptions from certain provisions of the Act to permit the insurance company that sponsors a separate account to hold the assets of the separate account).

[20] In general, an insurance company's separate account is an investment company under the Investment Company Act. *See Prudential Ins. Co.* v. *SEC,* 326 F.2d 383, 388 (3d Cir. 1964) (concluding that the insurer's separate account, which was a completely segregated account devoted to investing in securities, the cash for which was derived from payments made by the purchaser of the variable annuity contract, and the proceeds from which were held for the sole benefit of the annuitant, was separable from the insurance company and should be deemed the ''investment company'' for purposes of the Act). Not all variable contract separate accounts are investment companies; exclusions may apply to certain separate accounts that rely, for example, on sections 3(c)(1), (7), or (11) of the Investment Company Act.

[21] *See* section 4(3) of the Investment Company Act (defining ''management company'' to mean any investment company other than a face-amount certificate company or a unit investment trust).

[22] *See* section 4(2) of the Investment Company Act (defining ''unit investment trust'' to include an investment company that is organized under a trust indenture, does not have a board of directors, and only issues redeemable securities, each of which represents an undivided interest in a unit of specified securities).

[23] Form N–3 filers register as management investment companies because the active management of the investment portfolio occurs at the separate account level. During the early years of variable product history, this was the predominant type of separate account. However, by 2017, only five variable annuity separate accounts were registered as management investment companies on Form N–3.

[24] In 2017, 435 variable annuity separate accounts registered as UITs on Form N–4.

[25] In 2017, 238 variable life insurance separate accounts registered as UITs on Form N–6.

[26] Variable contract investors do not hold legal title to the assets of the insurance company's separate account. *See supra* note 19. However, certain legal rights, such as voting rights, generally pass through to variable contract investors.

[27] *See* section 10(a) of the Securities Act (generally requiring a prospectus relating to a security to contain the information contained in the registration statement). For purposes of this release, a prospectus meeting the requirements of a section 10(a) prospectus is referred to as a ''statutory prospectus.''

[28] *See* Registration Forms for Insurance Company Separate Accounts that Offer Variable Annuity Contracts, Investment Company Act Release No. 14575 (June 14, 1985) [50 FR 26145 (June 25, 1985)]

Continued

Variable contract issuers generally maintain current prospectuses for their products through the filing of annual post-effective amendments to their registration statement and, as necessary, supplementing or ''stickering'' the contract prospectus or statement of additional information (''SAI'').[29] Rather than bearing the expense of sending a prospectus with each confirmation of an investor's purchase of additional shares, which often occurs on a periodic basis (*e.g.,* monthly), most registrants instead send copies of the new prospectus to all investors each time it is updated. It is our understanding that this practice is similar to that followed by most mutual funds.

We understand that an insurer or the financial intermediary distributing the variable contact will typically deliver the variable contract prospectus upon issuance of the contract, in order to comply with the requirements of section 5(b)(2).[30] However, we also understand that many insurers make it a practice to provide the variable contract prospectus to potential investors, often as part of the application package.

The Commission has interpreted section 5(b)(2) of the Securities Act to require delivery of a portfolio company prospectus to an investor in a variable contract who has allocated his or her purchase payments to that portfolio company.[31] We understand that today most investors receive summary prospectuses (as opposed to statutory prospectuses) for the underlying portfolio companies at the same time they receive the statutory prospectus for the variable contract. Since variable contracts generally offer exchange privileges permitting an investor to reallocate all or a portion of his or her investment from one underlying portfolio company to another, many insurance companies deliver prospectuses for all underlying portfolio companies to simplify the administrative task of tracking whether it delivered the appropriate current prospectus. Other insurers have invested in systems that enable the insurer to customize the delivery of underlying portfolio company prospectuses such that investors only receive prospectuses for the portfolio companies to which they have allocated purchase payments.

Although paper is the default format for delivery of contract prospectuses, portfolio company prospectuses, and certain other required disclosures, we understand that most insurers offer investors the option to elect electronic delivery of these documents. The Commission has provided guidance noting that electronic delivery may be used to satisfy prospectus delivery requirements if: (1) The investor has notice of the availability of the information; (2) the use of the medium is not so burdensome that intended recipients cannot effectively access the information being provided; and (3) the issuer has evidence of delivery.[32] Issuers relying on this guidance have typically satisfied the ''evidence of delivery'' requirement by obtaining informed consent to electronic delivery. Investors that have elected electronic delivery of materials associated with their variable contract typically receive an email that contains a link to the website where the materials are available.

2. Evolution of Layered Disclosure and Delivery of Information to Investors

Our proposal builds on our experience with both layered disclosure (under the mutual fund summary prospectus)[33] and integrated disclosure (enhanced over a decade ago with securities offering reform for corporate issuers).[34] It also draws on more than twenty years of experience with the use of the internet as a medium to provide information to investors.[35]

Through each of these sets of reforms, ''omitting prospectuses'' as permitted by section 10(b) of the Securities Act have become a central feature of various parts of our securities offering and disclosure regime.[36] In particular, our proposed approach for satisfying prospectus

(''Forms N–3 and N–4 Adopting Release'') at n.14 and accompanying text.

[29] In addition to updating the registration statement for the variable contract annually to include updated financial statements, variable contract issuers also make amendments to the contract registration statement (generally as part of this annual update process), as necessary to reflect material or other changes to the information disclosed. *See* section 10(a)(3) of the Securities Act (requiring, among other things, that a prospectus used more than nine months after the effective date of a registration statement be updated so that the information contained therein shall not be more than 16 months old). *But see infra* section II.C (discussing circumstances in which certain variable contract issuers provide alternative disclosures instead of the contract statutory prospectus, as described in certain staff no-action letters). *See also* section 11 of the Securities Act (providing a civil remedy for a registration statement that contains ''an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading.''); rule 408 under the Securities Act [17 CFR 230.408(a)] (requiring registrants to include, in addition to the information expressly required to be included in a registration statement, such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.).

Additionally, portfolio companies may supplement or ''sticker'' their prospectus or SAI. *See generally* rule 497 under the Securities Act.

[30] Because the requirements of section 5(b)(2) of the Securities Act are applicable to ''any person,'' its obligations are applicable to financial intermediaries through whom variable contracts are sold, as well as variable contract issuers.

[31] *See* Forms N–3 and N–4 Adopting Release, *supra* note 28, at n.49 and accompanying text (''Of course, delivery of a prospectus of an underlying company in which a contractowner actually invests will be required pursuant to section 5(b)(2) under the 1933 Act (15 U.S.C. 77e(b)(2)).'').

[32] *See* Use of Electronic Media for Delivery Purposes, Investment Company Act Release No. 21399 (Oct. 6, 1995) [60 FR 53458 (Oct. 13, 1995)] (''1995 Release''); Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information; Additional Examples Under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Company Act of 1940, Investment Company Act Release No. 21945 (May 9, 1996) ([61 FR 24644 (May 15, 1996]) (''1996 Release''); Use of Electronic Media, Investment Company Act Release No. 24426 (Apr. 28, 2000) [65 FR 25843 (May 4, 2000)] (''2000 Release'').

[33] Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Investment Company Act Release No. 28584 (Jan. 13, 2009) [74 FR 4546 (Jan. 26, 2009)] (''2009 Summary Prospectus Adopting Release'') (permitting the use of a summary prospectus by registered open-end management investment companies).

[34] Securities Offering Reform, Securities Act Release No. 8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)] (''Securities Offering Reform'') at n.202 and accompanying text (allowing the use of free writing prospectuses to provide information to investors and stating that a free writing prospectus is a permitted prospectus for purposes of section 10(b) of the Securities Act and, as such, can be used without violating section 5(b)(1) of the Securities Act). Additionally, Congress recently required the Commission to extend securities offering reform to closed-end funds (*see* section 509 of the Economic Growth, Recovery Relief, and Consumer Protection Act, S. 2155, 115th Cong. (2017–2018)), and to business development companies (*see* section 3 of the Small Business Credit Availability Act, S. 2324, 115th Cong. (2017–2018)).

[35] *See, e.g.,* 1995 Release, *supra* note 32 (providing Commission views on the use of electronic media to deliver information to investors, with a focus on electronic delivery of prospectuses, annual reports, and proxy solicitation materials); 1996 Release, *supra* note 32 (providing Commission views on electronic delivery of required information by broker-dealers, transfer agents, and investment advisers); 2000 Release, *supra* note 32 (providing updated interpretive guidance on the use of electronic media to deliver documents on matters such as telephonic and global consent, issuer liability for website content, and legal principles that should be considered in conducting online offerings).

See also Securities Offering Reform, *supra* note 34 (adopting rule 172 under the Securities Act providing an ''access equals delivery'' framework under which issuers and intermediaries can satisfy their final prospectus delivery obligations); Shareholder Choice Regarding Proxy Materials, Investment Company Act Release No. 27911 (July 26, 2007) [72 FR 42222 (Aug. 1, 2007)] (''Shareholder Choice Regarding Proxy Materials'') (adopting rule amendments requiring issuers to post their proxy materials on a specified website and provide shareholders with a notice of internet availability of the materials).

[36] *See infra* note 93 and accompanying text (discussing omitting prospectuses as permitted by section 10(b) of the Securities Act).

delivery obligations for variable contract prospectuses is generally modeled on the Commission's mutual fund summary prospectus framework, with some modifications that reflect the unique structure, features, and risks of variable contracts. Likewise, our proposed approach for satisfying portfolio company prospectus delivery requirements incorporates aspects of the ''access equals delivery'' framework we adopted in 2005, in instances where certain information has already been provided to investors,[37] as well as certain website posting requirements from the mutual fund summary prospectus rule.

Our proposal also draws on the Commission's investor testing efforts, outreach, and other empirical research concerning investors' preferences. This included information about summary content and layered disclosure approaches as well as methods of delivery for required disclosures and use of the internet for financial and other purposes generally.[38] Most recently, the Commission released a request for comment on many of these same issues.[39] Certain comments that the Commission has received on its recent Form CRS Relationship Summary proposal[40] also reflect support for a disclosure regime that leverages the benefits of layered disclosure.[41]

Moreover, certain observations by the staff of the Commission's Office of Investor Education and Advocacy as part of its 2012 Financial Literacy Study show that investors generally favor a layered approach to disclosure and, wherever possible, the use of a summary containing key information about an investment product or service.[42] Investors may have a preference for certain efficiencies afforded by more concise information, as research shows the introduction of a shorter and simplified summary prospectus may allow investors to spend less time and effort to arrive at the same portfolio decision they would have come to after reading the statutory prospectus.[43] For these same reasons, we believe that variable contract investors would benefit from the summary disclosures and layered approach contemplated by our proposal, especially given the fact that variable contracts are typically more complex than other types of investment products, in part due to the two-tier structure that most use.

Based upon the foregoing, we believe that a summary prospectus framework for variable contracts would benefit investors. The mutual fund industry has widely adopted the use of summary prospectuses.[44] We believe our proposed prospectus delivery approach would be similarly widely adopted by issuers of variable contracts.[45]

C. Rulemaking Proposal Overview

We are proposing a new disclosure framework that, among other things, would permit the use of summary prospectuses for variable contracts, with additional information available to investors online. To help investors make an informed investment decision, this proposal uses a layered disclosure approach designed to provide investors with key information relating to the contract's terms, benefits, and risks in a concise and more reader-friendly presentation, with access to more detailed information available online, or delivered in paper or electronic format on request. We anticipate that the proposed framework would improve investor understanding of variable contracts.

The proposed rule builds upon our experience creating a summary prospectus option for mutual funds in 2009, but with certain differences intended to reflect the nature of variable contracts.[46] Like the Commission's mutual fund summary prospectus rule, the summary prospectus that the proposed rule contemplates is meant to highlight key information of variable contracts that we believe would help an

[37] Securities Offering Reform contemplated delivery of a preliminary prospectus to investors purchasing during an initial public offering, while our proposal would require delivery of variable contract summary prospectuses, which would accompany or precede delivery of the variable contract security and which would contain certain key information about portfolio companies. *See, e.g.,* Securities Offering Reform, *supra* note 34; *infra* notes 120 and 192 and accompanying text (outlining certain portfolio company information which would be disclosed in variable contract summary prospectuses).

[38] For example, in 2007, the Commission engaged a consultant to conduct focus group interviews and a telephone survey concerning investors' views and opinions about various disclosure documents filed by companies, including mutual funds. The consultant's report concerning the focus group testing and related transcripts are in the comment file for this rule (*available at https://www.sec.gov/comments/s7-08-15/s70815-1.pdf*). The consultant's report concerning the telephone survey is available at *http://www.sec.gov/pdf/disclosuredocs.pdf* (approximately 60% of investors believed mutual fund prospectuses contained too much information and 56% of investors who received mutual fund prospectuses but rarely, very rarely, or never read them indicated that was because the prospectuses were too complicated or hard to understand, or too long and too wordy).

In addition, in 2011, the Commission engaged a consultant to conduct investor testing regarding shareholder reports. The consultant's report concerning that testing (''Investor Testing of Mutual Fund Shareholder Reports'') is in the comment file for this rule (*available at https://www.sec.gov/comments/s7-08-15/s70815-3.pdf*). Separately, in 2012, Commission staff prepared a study of investor financial literacy pursuant to section 917 of the Dodd-Frank Act. *See* SEC Staff, Study Regarding Financial Literacy Among Investors (Aug. 2012) (''2012 Financial Literacy Study''). Materials relating to this study, including the staff's report, are available at *http://www.investor.gov/publications-research-studies/sec-research.*

[39] *See* Request for Comment on Fund Retail Investor Experience and Disclosure, Investment Company Act Release No. 33113 (June 5, 2018) [83 FR 26891 (June 11, 2018)] (''Request for Comment on Fund Retail Investor Experience''). The comment file for this request for comment is available at *https://www.sec.gov/comments/s7-12-18/s71218.htm.* Multiple comment letters that the Commission has received to date on this request for comment reflect a preference for shorter summary disclosures, with additional information available online or upon request. *See, e.g.,* Comment Letter of Carol Palmer, File No. S7–12–18 (June 5, 2018); Comment Letter of Perry Balke, File No. S7–12–18 (June 5, 2018); Comment Letter of Sara Karlidag, File No. S7–12–18 (June 6, 2018); Comment Letter of Harold Thomas, File No. S7–12–18 (June 8, 2018); Comment Letter of Carla Rojas, File No. S7–12–18 (June 9, 2018).

[40] *See* Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles, Investment Advisers Act Release No. 4888 (Apr. 18, 2018) [83 FR 21416 (May 9, 2018)]. The comment file for this proposal is available at *https://www.sec.gov/comments/s7-08-18/s70818.htm.*

[41] *See, e.g.,* Comment Letter of the Insured Retirement Institute, File No. S7–08–18 (Aug. 7, 2018); Comment Letter of Massachusetts Mutual Life Insurance Company, File No. S7–08–18 (Aug. 7, 2018).

[42] *See* 2012 Financial Literacy Study, *supra* note 38, at v-xix. The key information that investors found useful and relevant before purchasing an investment product includes information on fees and expenses, investment performance, principal risks, and investment objectives. With respect to the presentation of disclosure, the 2012 Financial Literacy Study indicates that investors preferred disclosures being ''written in clear, concise, understandable language, using bullet points, tables, charts, and/or graphs.'' *See id.* at iv.

[43] *See* John Beshears et al., *How Does Simplified Disclosure Affect Individuals' Mutual Funds Choices?,* Explorations in the Economics of Aging, 75, 76 (David A. Wise ed., 2011) (''Beshears Paper''), *available at https://scholar.harvard.edu/laibson/publications/how-does-simplified-disclosure-affect-individuals-mutual-fund-choices.*

[44] We estimate that as of December 31, 2017, approximately 95% of mutual funds and ETFs use summary prospectuses. This estimate is based on EDGAR data for the number of mutual funds and ETFs that filed a summary prospectus in 2017 (10,686) and the Investment Company Institute's estimated number of mutual funds and ETFs as of 12/31/2017 (11,253). *See* Investment Company Institute, 2018 Investment Company Fact Book, at 52, *available at https://www.ici.org/pdf/2018_factbook.pdf.*

[45] *See infra* section III.C (stating that we expect a vast majority of insurers will choose to use summary prospectuses).

[46] However, the proposed rule departs from rule 498 in requiring two separate types of summary prospectuses. *See infra* sections II.A.1 and II.A.2. We designed this framework to distinguish the information we believe new and existing investors need, and to highlight the particular contract features and risks that are particularly relevant to these two groups of investors, taking into account information that we understand these investors may receive through other channels (*e.g.,* as a result of state insurance law, other regulatory requirements, and industry practice).

investor make an informed investment decision.[47]

Because variable contracts typically include a number of optional benefits and underlying investment options, a summary could not, by its nature, include all relevant aspects and details regarding each of these contract features. The variable contract summary prospectus is designed to be a succinct summary of the contract's key terms and benefits and most significant risks, making it easier to read and more understandable for investors. This summary prospectus would serve as the cornerstone of a layered disclosure framework that would alert investors to the availability of more detailed information in the statutory prospectus and in other locations, and would be tailored to the unique aspects of these products. As a result, investors would have ready access to key information in connection with an investment decision.

The main elements of the new disclosure framework include:

• *Option to use summary prospectus.*[48] Proposed new rule 498A would permit the use of two distinct types of contract summary prospectuses: (1) Initial summary prospectuses covering variable contracts currently offered to new investors; and (2) updating summary prospectuses for existing investors. The initial summary prospectus would include certain key information about the contract's most salient features, benefits, and risks, presented in plain English in a standardized order. The updating summary prospectus would include a brief description of certain changes to the contract that occurred during the previous year, as well as a subset of the information required to be in the initial summary prospectus. Certain key information about the portfolio companies would be provided in both the initial summary prospectus and updating summary prospectus.

• *Availability of variable contract statutory prospectus and other materials.*[49] The proposed rule would require the variable contract statutory prospectus, as well as the contract's SAI, to be publicly accessible, free of charge, at a website address specified on or hyperlinked in the cover of the summary prospectus. An investor who receives a contract summary prospectus would be able to request the contract statutory prospectus and SAI to be sent in paper or electronically, at no cost to the investor.

• *Optional method to satisfy portfolio company prospectus delivery requirements.*[50] The proposed rule would provide an optional method for satisfying portfolio company prospectus delivery obligations by making portfolio company summary and statutory prospectuses available online at the website address specified on or hyperlinked in the variable contract summary prospectus, with certain key information about the portfolio companies provided in the variable contract's summary prospectus.[51] Investors would also be able to request and receive those disclosures in paper or electronically at no cost. This new option for satisfying portfolio company prospectus delivery requirements would only be available for portfolio companies available as investment options through variable contracts that use contract summary prospectuses.

• *Discontinued Variable Contracts.*[52] In proposing the new variable contract summary prospectus disclosure framework, we acknowledge the industry practice of providing alternative disclosures under the specific circumstances described in certain staff no-action letters. In light of this proposal, we believe that it is useful to consider the appropriate disclosure framework for the types of contracts that were the subject of the staff no-action letters.

• *Form amendments.*[53] We are also proposing to amend Forms N–3, N–4, and N–6—the registration forms for variable contracts—to update and enhance the disclosure regime for these investment products.[54] The proposed amendments are intended to consolidate certain summary information in a condensed presentation, reflect industry developments (*e.g.,* the prevalence of optional benefits in today's variable contracts), and otherwise improve disclosures provided to variable contract investors.

• *Inline XBRL.*[55] Registrants would be required to use the Inline XBRL format for the submission of certain variable contract information. This requirement is intended to harness technology to provide a mechanism for allowing investors, their investment professionals, data aggregators, and other data users to efficiently analyze and compare the available information about variable contracts, as required by their particular needs and circumstances.

• *Other Amendments.*[56] We are proposing certain technical and conforming amendments to our rules to reflect the proposed new regime for variable contract summary prospectuses. We are also proposing certain technical amendments to rules relating to variable life insurance contracts, as well as rescission of certain rules and forms.

Table 1 summarizes the various requirements—under the current prospectus delivery regime, and under the proposed summary prospectus regime—for information to either be (1) delivered to all investors, (2) made available online, or (3) delivered to those investors who so request:

TABLE 1—INFORMATION AVAILABLE TO VARIABLE CONTRACT INVESTORS

	Current prospectus delivery regime[57]	Optional proposed summary prospectus regime
Contract Statutory Prospectus.	Delivered to all investors	Required to be available online and delivered (in paper or electronic format) upon request.
Contract SAI	Available upon request	Required to be available online and delivered (in paper or electronic format) upon request.
Contract Part C Information	Not delivered to investors or required to be available online, but is filed with registration statement (available on EDGAR).	Not delivered to investors or required to be available online, but is filed with registration statement (available on EDGAR).
Initial Summary Prospectus	N/A	Delivered to new investors.
Updating Summary Prospectus.	N/A	Delivered to existing investors.

[47] The mutual fund summary prospectus rule is designed to provide investors with ''streamlined and user friendly information that is key to an investment decision.'' *See* Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Investment Company Act Release No. 28064 (Nov. 21, 2007) [72 FR 67790 (Nov. 30, 2007)] (''2007 Summary Prospectus Proposing Release''), at section I; *see also* Richard J. Wirth, *What's Puzzling You . . . Is the Nature of Variable Annuity Prospectuses,* 34 Western New England Law Review 127 (2012) (''Informed decision-making demands that consumers have enough of an understanding of what's for sale and what trade-offs are being asked of them in order to make an informed decision about whether or not to buy a product.'').

[48] *See infra* section II.A.

[49] *See infra* section II.A.4.

[50] *See infra* section II.B.

[51] This option would not apply to Form N–3 registrants, which do not have underlying portfolio companies due to a single-tier investment company structure.

[52] *See infra* section II.C.

[53] *See infra* section II.D.

[54] The Commission first adopted the registration form for variable annuities over 30 years ago, and adopted the registration form for variable life insurance over 15 years ago. *See* Forms N–3 and N–4 Adopting Release, *supra* note 28; Registration Form for Insurance Company Separate Accounts Registered as Unit Investment Trusts That Offer Variable Life Insurance Policies, Investment Company Act Release No. 25522 (Apr. 12, 2002) [67 FR 19848 (Apr. 23, 2002)] (''Separate Accounts Offering Variable Life Release'').

[55] *See infra* section II.E.

[56] *See infra* section II.F.

TABLE 1—INFORMATION AVAILABLE TO VARIABLE CONTRACT INVESTORS—Continued

	Current prospectus delivery regime [57]	Optional proposed summary prospectus regime
Portfolio Company Prospectuses.	Delivered to all investors	Delivered to investors, or, if the new option to satisfy portfolio company prospectus delivery is relied-upon,[58] required to be available online and delivered (in paper or electronic format) upon request.[59]

Under proposed rule 498A, use of the summary prospectus to satisfy a registrant's section 5(b)(2) obligation would be voluntary. We have designed the proposal to permit, but not require, registrants to use a summary prospectus coupled with the internet availability of variable contract disclosures to make the delivery process more convenient and efficient. While we believe the summary prospectus regime will benefit investors, we are proposing that the approach be optional in light of the novel nature of this disclosure approach for variable contracts (including its use of layered disclosure), and because of the diversity of variable contracts (and corresponding diversity of disclosure for variable contracts).

We believe that optionality not only would give market participants time to adjust to the new layered disclosure approach, but also give the Commission and its staff the opportunity to assess the benefits to investors and insurers. While approximately 95% of mutual funds currently use a summary prospectus,[60] it took nearly eight years after the adoption of the mutual fund summary prospectus framework for the industry to reach that threshold.[61]

Given the current widespread use of summary prospectuses by mutual funds, we believe investors and other market participants have generally become comfortable with the use of a summary prospectus. However, the proposed variable contract summary prospectus regime would differ from the mutual fund summary prospectus framework in several key ways (*e.g.,* the use of an initial and an updating summary prospectus, and the new layered disclosure approach to satisfying portfolio company prospectus delivery obligations). Therefore, we intend to review the use of the summary prospectus by investors in variable contracts that voluntarily adopt the summary prospectus and then reconsider whether use of the summary prospectus for variable contracts should be mandated in the future.[62]

We believe that the diversity of variable contracts (and the corresponding diversity regarding variable contracts' approach to prospectus disclosure) also supports permitting, but not requiring, insurers to use the variable contract summary prospectus regime. We have observed that some variable contracts are fairly basic, offering few (or no) optional benefits and few investment options. Because these contracts have fairly straightforward disclosure documents, the summary prospectus regime may be less compelling for these products, as compared to more complex variable products with numerous optional benefits and investment options (which tend to have longer and more complicated prospectuses). Registrants will likely assess the relative benefit of using a summary prospectus based on the types of products they offer and the length of their current prospectuses—as well as the benefit of more concise disclosure to investors—when evaluating whether to opt into the new layered disclosure regime.[63] An optional approach would also preserve flexibility for registrants that may not wish to undertake the costs of the transition to a summary prospectus regime.

II. Discussion

A. New Option To Use a Summary Prospectus for Variable Contracts

We are proposing new rule 498A, which would provide a new option for a person to satisfy its prospectus delivery obligations for variable contracts under section 5(b)(2) of the Securities Act by: (1) Sending or giving to new investors key information contained in a variable contract statutory prospectus in the form of an initial summary prospectus; (2) sending or giving to existing investors each year a brief description of certain changes to the contract, and a subset of the information in the initial summary prospectus, in the form of an updating summary prospectus; and (3) providing the statutory prospectus and other materials online. In addition, the new rule would require a registrant (or the financial intermediary distributing the variable contact) to send the variable contract statutory prospectus and other materials to the investor in paper or electronic format upon request.

1. Initial Summary Prospectus

a. Overview

The proposed rule would require a person relying on the rule to send or give an initial summary prospectus in connection with sales of variable contracts to new investors.[64] We have designed the initial summary prospectus to use a layered disclosure approach that would provide investors with key information relating to the contract's terms, benefits, and risks in a concise and more reader-friendly presentation, with access to more detailed information available online and electronically or in paper format on request. Simplicity and clarity are of heightened importance in a prospectus in connection with an initial purchase decision for a variable contract because of the long-term nature and complexity of these products. In addition, these considerations are important because, unlike with other investment products, typically variable contract investors have a state-mandated ''free look'' opportunity to return the contract for a full refund of premium within a limited number of days following contract issuance.[65]

[57] This column assumes that the contract at issue is not providing alternative disclosures to investors in lieu of the statutory prospectus, as described in certain staff no-action letters discussed below in section II.C.

[58] *See infra* section II.B.2.

[59] Additionally, summary information about portfolio companies would be available in the initial summary prospectus and updating summary prospectus. *See infra* sections II.A.1.c.ii(*i*) and II.A.2.c.ii(c).

[60] *See supra* note 44.

[61] Estimates are based on EDGAR filings.

[62] *See* 2009 Summary Prospectus Adopting Release, *supra* note 33, at 66–67 (similarly noting the Commission's intent to review the use of the mutual fund summary prospectus by investors in funds that voluntarily adopt the summary prospectus).

[63] *See infra* section III.C.1.

[64] Proposed rule 498A(f)(1). For an initial purchase of a variable contract, the initial summary prospectus must be ''sent or given no later than the time of the carrying or delivery of the contract security.'' *See infra* section II.A.3.

[65] State insurance law requirements typically require that variable contracts have free look provisions that permit investors to return the contract for a refund within a stated number of days of receiving it (usually between ten and twenty days). The amount of the refund may differ between variable annuity contracts and variable life

Continued

One unique aspect of variable contract disclosure practices is the wide variety of information about the contract that we understand investors commonly receive throughout the lifecycle of the contract. During the sales process, potential investors typically receive informational materials provided by the insurer, such as marketing brochures, investment option guides, and other explanatory materials that focus on key features of the particular contract or variable contracts generally. They may also receive disclosures required under state law, such as a ''Buyer's Guide'' that generally describes how variable contracts work.[66] Each investor also typically completes an application, along with certain assessment forms, in order to determine whether a variable contract may be appropriate for the investor.[67]

Once the application is approved, the investor receives the contract, which sets forth in detail the investor-specific contract terms and is accompanied by the contract statutory prospectus. In addition to receiving an updated contract statutory prospectus and the prospectuses of the portfolio companies at least annually,[68] investors also receive other information during the lifecycle of a variable contract. This includes, for example, information required under federal law (such as purchase and sale confirmations, and annual and semi-annual reports for the portfolio companies to which the investor has allocated contract value). This also includes notices that insurers may choose to send to investors alerting them to key events (such as required minimum distributions, withdrawals, annuitization, ability to exercise an optional benefit, and loan confirmations).[69] We have designed the initial summary prospectus to complement current disclosure practices by not unnecessarily duplicating other disclosures, and by highlighting aspects of the contract that may not be described in detail elsewhere.

b. Scope of Disclosure To Be Included in Initial Summary Prospectus

The proposed rule requires that the initial summary prospectus may only describe a single contract that the registrant currently offers for sale.[70] We understand that industry practice is to combine multiple contract prospectuses into a single registration statement on Form N–3, N–4, or N–6 when those prospectuses describe variable contracts that are ''essentially identical.'' [71] We also understand that certain contract prospectuses include disclosure about contract features and options that the registrant may no longer offer to new investors.

Aggregating disclosures for multiple contracts, or currently-offered and no-longer-offered features and options of a single contract, can hinder investors from distinguishing between contract features and options that apply to them and those that do not. Therefore, the proposed rule limits the initial summary prospectus to describing only a single contract that the registrant offers under the statutory prospectus to which the initial summary prospectus relates. While the initial summary prospectus could only describe one contract, the proposed rule nonetheless would permit it to describe more than one class of a currently-offered contract.[72]

Although the content requirements for the initial summary prospectus cross-reference items of Forms N–3, N–4, and N–6, we anticipate that the proposed rule's scope provisions may cause registrants to vary certain disclosures that appear in the statutory prospectus when the same disclosure topics appear in the initial summary prospectus. This may occur even if both disclosures respond to the same form item requirement.[73] For example, a registrant that describes several currently- and previously-offered optional benefits in response to Item 11 of Form N–4 in its statutory prospectus would not be permitted to describe optional benefits that it no longer currently offers in its initial summary prospectus.

We request comment generally on the proposed scope requirements for the initial summary prospectus, and specifically on the following issues:

- Should the initial summary prospectus be limited to describing a single contract that the registrant currently offers for sale? Would this reduce the initial summary prospectus' complexity and minimize confusion to investors? Would this requirement be burdensome in any way for registrants to interpret, administer, or manage operationally, and if so, how? Should the proposed rule instead frame this requirement of one summary prospectus-per-contract in another manner, for clarity or for any other reason?
- Should we allow an initial summary prospectus to describe multiple contracts if the registrant currently offers multiple contracts through the related registration statement? Would the answer change if the multiple contracts were offered on a single prospectus versus multiple separate prospectuses? Would this make the initial summary prospectus substantially longer or confusing to investors, and would it decrease the likelihood that investors would read an initial summary prospectus?
- Should we restrict the number of contract classes that may be included in an initial summary prospectus?

c. Preparation of the Initial Summary Prospectus

The following chart outlines the information that the proposed rule would require to appear in an initial summary prospectus. Along with specifying required introductory disclosures on the outside front cover page or the beginning of the initial

insurance contracts and also may vary among the states.

See also NAIC, *Annuity Disclosure Model Regulations* (2nd Quarter, 2015) (''2015 NAIC Annuity Disclosure Model Regulations''), *available at http://www.naic.org/store/free/MDL-245.pdf* (''Where the Buyer's Guide and disclosure document are not provided at or before the time of application, a free look period of no less than fifteen (15) days shall be provided for the applicant to return the annuity contract without penalty. This free look shall run concurrently with any other free look provided by state law or regulation.''); NAIC, *Life Insurance Disclosure Model Regulations,* (3rd Quarter, 2018), *available at http://www.naic.org/store/free/MDL-580.pdf* (''[I]f the policy for which application is made contains an unconditional refund provision of at least ten (10) days, the Buyer's Guide may be delivered with the policy or prior to delivery of the policy.'').

[66] Some states have adopted model regulations that require insurers to provide certain disclosure documents to annuity investors either at or before the time of application. For example, the ''Buyer's Guide'' describes in plain English how variable contracts work, what certain technical terms mean, tax implications, and fees. *See* NAIC, Buyer's Guide for Deferred Annuities Variable (2013), *available at http://www.naic.org/documents/prod_serv_consumer_anb_lv_2013.pdf;* NAIC, Life Insurance Buyer's Guide, (2007), *available at http://naic.org/documents/consumer_guide_life.pdf.*

[67] *See, e.g.,* FINRA Rule 2330 (Members' Responsibilities Regarding Deferred Variable Annuities) (establishing sales practice standards, including suitability standards, regarding recommended purchases and exchanges of variable annuities).

[68] *See supra* note 31 and accompanying text; *see also infra s*ection II.C (discussing circumstances under which certain variable contract issuers provide alternative disclosures instead of the contract statutory prospectus, as described in certain staff no-action letters).

[69] Additionally, to the extent that a variable contract investor meets periodically with a sales agent, the sales agent may also provide additional supplemental information about the contract or the portfolio companies.

[70] Proposed rule 498A(b)(1).

[71] *See* General Guidance to Variable Annuity, Variable Life, and Other Insurance Company Investment Contract Registrants, SEC Staff No-Action Letter (Nov. 3, 1995), at section I.4 (discussing industry practice); *see also infra* section II.D.1 (discussing our proposed form instructions that would incorporate this existing staff guidance).

[72] Proposed rule 498A(b)(1). Similarly, a mutual fund summary prospectus ''may describe only one Fund, but may describe more than one Class of a Fund.'' *See* rule 498(b)(4).

[73] *See infra* section II.A.7.c. (discussing potential section 11 liability considerations to the extent that the language in the summary prospectus is not identical in substance to the same sections of the statutory prospectus).

summary prospectus, the proposed rule references particular disclosure items from Forms N–3, N–4, and N–6 (as proposed to be amended).[74] The information would be required to appear in the same order, and under the relevant corresponding headings, as the proposed rule specifies.[75] We propose a standardized presentation to require certain disclosure items that we believe would be most relevant to investors (such as the proposed contract overview section and proposed table that includes key information about the contract), to appear at the beginning of the initial summary prospectus, with supplemental information appearing further in. The required presentation could also facilitate comparison of different variable contracts.[76]

TABLE 2—OUTLINE OF THE INITIAL SUMMARY PROSPECTUS

Heading in initial summary prospectus	Proposed item of Form N-3	Proposed item of Form N-4	Proposed item of Form N-6
Cover Page:			
Identifying Information.			
Legends.			
EDGAR Contract Identifier.			
Table of Contents (optional).			
Content:			
Overview of the [Variable Annuity/Life Insurance] Contract	2	2	2.
Important Information You Should Consider About the [Contract]	3	3	3.
Standard Death Benefit	11(a)	10(a)	10(a).
Other Benefits Available Under the Contract	12(a)	11(a)	11(a).
Buying the Contract	13(a)	12(a)	9(a)–9(e).
How Your Contract Can Lapse			14.
Surrendering Your Contract or Making Withdrawals: Accessing the Money in Your Contract.	14(a)	13(a)	12(a).
Additional Information About Fees	4	4	4.
Appendix: Portfolio Companies Available Under the Contract	19 or 20[77]	18	18.

i. Cover Page and Table of Contents

Identifying Information. Under the proposed rule, the following information would be required to appear on the front cover page or the beginning of the initial summary prospectus:

- The depositor's name;
- the registrant's name;
- the name of the contract, and the class or classes if any, to which the initial summary prospectus relates;
- a statement identifying the initial summary prospectus as a ''Summary Prospectus for New Investors''; and
- the approximate date of the first use of the initial summary prospectus.[78]

Legends. The cover page or beginning of the initial summary prospectus would also be required to include the following legends:

This Summary Prospectus summarizes key features of the [name of Contract]. You should read this Summary Prospectus carefully, particularly the section titled Important Information You Should Consider About the [Contract].

Before you invest, you should review the prospectus for the [name of Contract], which contains more information about the [Contract], including its features, benefits, and risks. You can find the prospectus and other information about the [Contract] online at [____]. You can also obtain this information at no cost by calling [____] or by sending an email request to [____].[79]

You may cancel your [Contract] within 10 days of receiving it without paying fees or penalties. In some states, this cancellation period may be longer. Upon cancellation, you will receive either a full refund of the amount you paid with your application or your total contract value. You should review the prospectus, or consult with your investment professional, for additional information about the specific cancellation terms that apply.

Additional general information about certain investment products, including [variable annuities/variable life insurance contracts], has been prepared by the Securities and Exchange Commission's staff and is available at *Investor.gov*.[80]

These proposed legends are designed to provide identifying information about the variable contract to which the initial

[74] To the extent we have proposed amendments to Forms N–3, N–4, and N–6 that would facilitate the proposed summary prospectus content requirements, as well as amend the content requirements for the statutory prospectus, we generally discuss these amendments in more detail in section II.D below. However, in order to better explain the initial summary prospectus, we have elected to discuss new or amended items that we propose to include in the statutory prospectus, to the extent they would also appear in the initial summary prospectus, in this section II.A.1.

[75] Proposed rule 498A(b)(5).

[76] We understand that many investors purchase variable contracts through an intermediary and often do not directly compare competing products. A standardized order may nonetheless be useful for investment professionals to compare the products they ultimately recommend to investors with other products, as well as investors considering whether to purchase a new annuity contract to replace an existing one. *See infra* note 160 and accompanying text. Having a more comparable document may ultimately promote greater comparability across products, registrants, and insurance institutions, which could lead to better investor understanding and increased competition.

As discussed below in Section II.E, we are also proposing to require the use of Inline XBRL format for the submission of certain required disclosures in the variable contract statutory prospectus. The structured data format would allow investors, financial intermediaries, third-party analysts, and others to more efficiently analyze and compare these products.

[77] Registrants on Form N–3 could omit the appendix specified by proposed Item 19 of Form N–3, and instead provide the more detailed disclosures about the investment options offered under the contract required by proposed Item 20 of Form N–3. *See infra* note 517 and accompanying text.

[78] Proposed rule 498A(b)(2)(i) through (v).

[79] The legend would be required to provide an internet address, other than the address of the Commission's electronic filing system, toll-free telephone number, and email address that investors can use to obtain the statutory prospectus and other information, request other information about the variable contract, and to make investor inquiries. Proposed rule 498A(b)(2)(vi)(B).

The website address would be required to be specific enough to lead investors to a direct link to the statutory prospectus and other required information, rather than to the home page or another part of the website. The website could host other relevant disclosure documents with prominent links to each required document. *Id.*

The legend could indicate, if applicable, that the statutory prospectus and other information are available from a financial intermediary (such as a broker-dealer) through which the contract may be purchased or sold. *Id.*

For purposes of this proposed requirement, documents available on the website address would be required to be publicly accessible and free of charge. *See* proposed rule 498A(h)(1); *see also infra* section II.A.4.

[80] Proposed rule 498A(b)(2)(vi).

summary prospectus relates, as well as certain general information that would be applicable to all variable contracts.[81] While the proposed legend describing how to obtain further information about the contract generally parallels the legend on the cover page of mutual fund summary prospectuses,[82] we have proposed several additional legends that we believe are appropriate in the context of variable contracts. These additional legends notify investors that: (1) The initial summary prospectus is a summary that should be read carefully (and that investors should particularly focus on the ''Important Information You Should Consider About the [Contract]'' section of the summary prospectus); (2) they may cancel the variable contract within a limited amount of time after receiving it (that is, alerting investors to the existence of the free look period); [83] and (3) additional general information about certain investment products, including variable contracts, is available at *Investor.gov.*[84]

If any information is incorporated by reference into the initial summary prospectus, the proposed rule would require that the legend include certain disclosures related to that information.[85] These requirements are described below in section II.A.6. The cover page would also be required to include a legend indicating that the Securities and Exchange Commission has not approved or disapproved of the contract or passed upon the accuracy or adequacy of the disclosure in the summary prospectus and that any contrary representation is a criminal offense.[86]

EDGAR Contract Identifier. We are also proposing to require that the contract's EDGAR contract identifier be included on the bottom of the back cover page or last page of the initial summary prospectus in a type size smaller than that generally used in the prospectus (*e.g.,* 8-point modern type).[87] This requirement is intended to enable Commission staff and others to more easily link the initial summary prospectus with other filings associated with the contract.

Table of Contents. The proposed rule would permit an initial summary prospectus to include a table of contents.[88] A table of contents must show the page number of the various sections or subdivisions of the summary prospectus, and immediately follow the cover page in any prospectus delivered electronically.[89]

We request comment generally on the proposed requirements for the cover page and table of contents of the initial summary prospectus, and specifically on the following issues:

- Should we include any additional information or eliminate any of the information that we have proposed to include in these parts of the initial summary prospectus? For example, for prospectuses filed on Form S–11, which is used for registration under the Securities Act of securities of certain real estate companies, the cover page must include a prominent cross-reference to the risk factors section of the prospectus, including the page number where it appears, as well as certain disclosures, if applicable, regarding limitations on transferability of the securities being registered and the absence of a market for securities of the same class as those being registered.[90] Would it be helpful for the cover page of the initial summary prospectus to contain similar disclosures relevant to variable contracts? For example, in addition to stating that investors should particularly focus on the ''Important Information You Should Consider About the [Contract]'' section of the initial summary prospectus, should the cover page include disclosures regarding surrender charges or other items relating to the contract, a cross-reference to the risk factors section or other sections of the statutory prospectus, or other disclosures?
- Are the proposed legends sufficient to notify investors of the availability and significance of the contract statutory prospectus and other information about the variable contract and how to obtain this information? Should the legends include greater detail about the information that is available?
- Will the proposed legends adequately inform investors of the various means for obtaining additional information about a variable contract? Are the proposed requirements for the website address where additional information is available adequate to ensure that the website and the additional information will be easy to locate?
- Would the proposed legend on the cover page or beginning of the initial summary prospectus with information on the free look period help alert investors that they may cancel their contracts without fees or penalties within a limited time after the sale? Should this legend be more prominently displayed (*e.g.,* larger font size, boxed, or bolded) relative to the other legends?
- As proposed, should registrants be permitted to modify the required legends, provided the modified legends provide comparable information?
- Should the legends include a reference to the *Investor.gov* website? Why or why not? If so, what specific information about variable contracts would be most helpful to investors for the staff to provide on this website?
- Should the proposed requirement to include the contract's EDGAR contract identifier on the bottom of the back cover page or last page of the initial summary prospectus instead require that another identifier be provided? If so, what identifier should be listed, and why?
- Should registrants be permitted to include a table of contents in the initial summary prospectus? Instead, should a table of contents be required? Does rule 481(c) under the Securities Act provide appropriate requirements for a table of contents included in an initial summary prospectus?

ii. Content of the Initial Summary Prospectus

Proposed rule 498A specifies the content and order thereof required in an initial summary prospectus.[91] An initial summary prospectus must contain the information required by the proposed rule, and only that information, in the order specified by the rule.[92] Adhering to these content requirements is one condition that an initial summary prospectus must satisfy in order to be deemed to be a prospectus that is permitted under section 10(b) of the Securities Act and section 24(g) of the

[81] A registrant would be able to modify the proposed legends so long as the modified statements contain comparable information. Proposed rule 498A(b)(2)(vi)(A).

[82] *See* rule 498(b)(1)(v).

[83] Many investors may not be familiar with the free look period, and the proposed legend is intended to alert them of its existence and explain where they may obtain additional information about its operation. This is particularly important because the free look period may be the only time the investor may cancel the contract without paying significant surrender fees or tax penalties.

[84] The Commission's Office of Investor Education and Advocacy maintains the website as an online resource to help investors make sound investment decisions and avoid fraud. The website includes investment bulletins, alerts, guidance and tools designed to assist investors, including those considering variable contracts, in obtaining additional information and resources on understanding and managing their investments. *See, e.g.,* Updated Investor Bulletin: Variable Annuities (Oct. 30, 2018), *available at https://www.investor.gov/additional-resources/news-alerts/alerts-bulletins/updated-investor-bulletin-variable-annuities;* Investor Bulletin: Variable Life Insurance; Investor Bulletin: Variable Life Insurance (Oct. 30, 2018), *available at https://www.investor.gov/additional-resources/news-alerts/alerts-bulletins/investor-bulletin-variable-life-insurance.*

[85] Proposed rule 498A(b)(2)(vi)(C).

[86] Proposed rule 498A(b)(2)(vii); *cf.* rule 481(b)(1) under the Securities Act.

[87] Proposed rule 498A(b)(3). An EDGAR contract identifier is issued by the Commission, is ten characters in length (nine numbers preceded by a ''C''), and uniquely, and persistently, identifies each contract. These identifiers are available to the public. Information filed with the Commission containing these identifiers is searchable by the public and our staff using the contract identifiers and also using the contract names without the need to reference the registrant issuing the contract. *See* Rulemaking for EDGAR System, Investment Company Act Release No. 26990 (July 18, 2005) [70 FR 43558 (July 27, 2005)] at text following n.29.

[88] Proposed rule 498A(b)(4).

[89] Rule 481(c).

[90] *See* Item 1 of Form S–11 (requiring certain disclosures and also referencing Item 501 of Regulation S–K); *see also* Item 501 of Regulation S–K [17 CFR 229.501].

[91] Proposed rule 498A(b)(5).

[92] *Id.*

Investment Company Act for the purposes of section 5(b)(1) of the Securities Act.[93] To aid market participants in understanding the types of disclosures we propose to require, Appendix A to this release contains a hypothetical initial summary prospectus for a variable annuity separate account with a registration statement filed on Form N–4. This hypothetical initial summary prospectus is provided solely for illustrative purposes and is not intended to imply that it would reflect a ''typical'' initial summary prospectus.

(a) Overview of the Contract

The initial summary prospectus would begin with a section including certain basic and introductory information about the contract and its benefits, under the heading ''Overview of the [Variable Annuity/Life Insurance] Contract.'' [94] This section would appear at the beginning of the initial summary prospectus because it is designed to provide basic information about how the variable contract functions. We believe that investors of different levels of financial sophistication may benefit from receiving this information early in the initial summary prospectus. This would provide a contextual baseline to help inform investors' understanding of disclosure about more detailed aspects of the variable contract that are described later in the initial summary prospectus.

Specifically, this section would be required to include a concise description of the following:

Purpose of Contract. The proposed requirement to briefly describe the purpose(s) of the contract in general terms [95] is intended to provide the reader with information on what financial objectives that contract could help the investor achieve, as well as the profile of an investor for whom the contract may be appropriate (*e.g.,* by discussing a representative investor's time horizon, liquidity needs, and financial goals). This requirement could be satisfied, for example, by stating that the contract is meant to help the investor accumulate assets through an investment portfolio, to provide or supplement the investor's retirement income, or to provide death benefits and/or other benefits, and that the contract may not be appropriate for an investor that intends to access his or her invested funds within a short-term timeframe.

Phases of Contract (for Variable Annuity Contracts). The proposed requirement to include a brief description of the accumulation (savings) phase and annuity (income) phases of the contract [96] is meant to provide basic information about how the variable annuity contract functions, which in turn would help highlight how the contract differs from other types of investment products. It also is designed to address common areas of confusion among variable annuity investors. For example, it would highlight the effect of annuitization on the ability to make withdrawals and the continuation of contract benefits.

This discussion would require a brief overview of the investment options available under the contract (that is, portfolio companies and any general or fixed account option).[97] The registrant also would be required to prominently disclose that additional information on the portfolio companies is provided in an appendix to the summary prospectus (or elsewhere in the case of registrants on Form N–3 that chose to omit the appendix from the initial summary prospectus in favor of more detailed information about investment options as required by proposed Item 20 of Form N–3),[98] and provide a cross-reference or link to the relevant appendix.[99] Finally, the registrant would be required to state, if applicable, that if an investor annuitizes, he or she will receive a stream of income payments, but he or she will be unable to make withdrawals, and death benefits and living benefits will terminate.[100]

Premiums (for Variable Life Insurance Contracts). Instead of requiring a description of the phases of the contract as with variable annuities, Form N–6 would require the ''Overview'' section to briefly describe the payment of premiums under the variable life insurance contract. This description of premiums would include: (1) Whether premiums may vary in timing and amount (*e.g.,* flexible premiums); (2) whether restrictions may be imposed on premium payments (*e.g.,* by age of insured, or by amount); (3) how premiums may be allocated (this discussion would include a brief overview of the investment options available under the contract, as well as any general (fixed) account options); and (4) a statement that payment of insufficient premiums may result in a lapse of the contract.[101]

Unlike variable annuities, variable life insurance requires the investor to make continuous premium payments in order to avoid a lapse of the contract. We therefore believe the ''Overview'' section should prominently explain the role of premium payments in the contract, and highlight for investors a key risk that non-payment (or insufficient payment) of premiums could result in contract lapse.

Contract Features. Finally, this section would include a summary of the contract's primary features, including death benefits, withdrawal options, loan provisions, and any available optional benefits.[102] If applicable, the registrant would be required to state that the investor will incur an additional fee for selecting a particular benefit.[103] Because registrants would discuss many of these subjects in other sections of the initial summary prospectus in greater detail (and would discuss each of these subjects in more detail in the contract statutory prospectus), this paragraph is intended to be summary in nature.

We request comment generally on the ''Overview'' section that we propose would appear in the initial summary prospectus, and specifically on the following issues:

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[93] Proposed rule 498A(b); *see also infra* section II.A.3.

Section 10(b) of the Securities Act authorizes the Commission to adopt rules deemed necessary or appropriate in the public interest or for the protection of investors that permit the use of an ''omitting prospectus'' for the purposes of section 5(b)(1) that omits or summarizes information contained in the statutory prospectus. Section 24(g) of the Investment Company Act authorizes the Commission to permit the use of a prospectus under section 10(b) of the Securities Act to include information the substance of which is not included in the statutory prospectus. 15 U.S.C. 77j(b); 15 U.S.C. 77e(b)(1); 15 U.S.C. 80a–24(g); *see also* 2009 Summary Prospectus Adopting Release, *supra* note 33, at n.70.

[94] *See* proposed rule 498A(b)(5)(i); *see also* proposed Item 2 of Forms N–3, N–4, and N–6; *infra* section II.D.2.b.

[95] *See* proposed rule 498A(b)(5)(i); *see also* proposed Item 2(a) of Forms N–3, N–4, and N–6.

[96] *See* proposed rule 498A(b)(5)(i); *see also* proposed Item 2(b) of Forms N–3 and N–4.

[97] However, a detailed explanation of the separate account, sub-accounts, and portfolio companies is not required. *See* Instruction 2 to proposed Item 2(b)(1) of Forms N–3 and N–4.

The registrant thus would not list the names of each portfolio company available under the contract, as this would be duplicative of information available in the appendix that would accompany the summary prospectus. *See infra* section II.A.1.c.ii(*i*).

[98] *See infra* note 517 and accompanying text.

[99] *See* proposed rule 498A(b)(5)(i); *see also* Instruction 1 to proposed Item 2(b)(1) of Forms N–3 and N–4.

[100] *See* proposed rule 498A(b)(5)(i); *see also* proposed Item 2(b)(2) of Forms N–3 and N–4.

[101] *See* proposed rule 498A(b)(5)(i); *see also* proposed Item 2(b) of Form N–6. The proposed instructions to this requirement would require the registrant to disclose that additional information on the portfolio companies is provided in an appendix to the summary prospectus, and provide a cross-reference to the relevant appendix. *See* proposed rule 498A(b)(5)(i); *see also* Instruction 1 to proposed Item 2(b)(3) of Form N–6.

[102] *See* proposed rule 498A(b)(5)(i); *see also* proposed Item 2(c) of Forms N–3, N–4, and N–6.

[103] *Id.*

• Are the requirements of the proposed section clear and appropriate in light of the goals of the initial summary prospectus, and would the information disclosed to investors be helpful to investors in light of these goals? Is this the most useful information for the beginning of the initial summary prospectus? Would it provide investors with context to better understand the remainder of the initial summary prospectus? Why or why not? Would the information provided in the proposed section be unnecessarily duplicative with other information that would appear in the initial summary prospectus?

• Should we impose word or page limits on the proposed section? If so, what should the word or page limits be (*e.g.,* no more than one page)?

• Are there additional disclosure topics that should be required to be included in the proposed ''Overview'' section? Instead, should we provide flexibility to registrants in preparing this section as to topics, etc.?

(b) Key Information

The initial summary prospectus would next include a table (the ''Key Information Table'') that would provide a brief description of key facts about the variable contract in a specific sequence and in a standardized presentation that is designed to be easy to read and navigate.[104] Specifically, it would include a summary of five topic areas: (1) Fees and expenses; (2) risks; (3) restrictions; (4) taxes; and (5) conflicts of interest. This is intended to highlight, in a consolidated location, important considerations related to these products, including certain unique aspects of the variable contract that might be unfamiliar to investors who have experience with mutual funds or other types of investment products.[105]

The Key Information Table includes a number of prescribed disclosures and is designed to complement the ''Overview'' section. We have proposed placing these two disclosure sections at the beginning of the initial summary prospectus because we believe they contain certain basic information that is critical for variable contract investors to read. We are also proposing that this information be provided in a standardized tabular presentation because we believe that, as compared to the narrative-type presentation of corresponding disclosures in the statutory prospectus, a summary tabular presentation would be easier to read and better convey the importance of the information to investors.[106] This presentation may also facilitate comparisons of certain disclosure topics among variable contract prospectuses.

We propose requiring that a registrant provide the Key Information Table under the heading ''Important Information You Should Consider About the [Contract].'' [107] There would be specified headings for each of the five topic areas that the table would include, and under each heading would be two columns. The left column would list the required disclosure line-items for each of the five topic areas, and the right column would provide a brief description for each corresponding line-item, according to the respective instructions for each proposed line-item.[108]

(i) Fees and Expenses

Variable contracts typically have multiple layers of fees, expenses, and charges that can be confusing to investors. While the Fee Table currently required in variable contract prospectuses provides comprehensive fee and expense information,[109] that information is frequently presented over a span of two or more pages when a prospectus is printed on paper. We believe that investors may benefit from a shorter, more tailored discussion in the Key Information Table that is intended to convey the importance of a contract's fee and expense structure. As discussed below, we are proposing to require that the initial summary prospectus also include the Fee Table from the statutory prospectus.[110] This framework would allow an investor to determine the level of fee information that best suits his or her informational needs.

Surrender Charges. We believe that it is important that investors understand that if they make a withdrawal in the first several years of their contract, they may pay a significant charge that will reduce the value of their investment. We believe, however, that investors frequently do not understand, or may be surprised by, surrender charges associated with early withdrawals.[111]

The proposed Key Information Table would require certain information intended to alert investors about the potential impact of surrender charges imposed on early withdrawals. The first line-item in the proposed table, ''Surrender Charge (charges for early withdrawals),'' would require a statement that if the investor withdraws money from the contract within [x] years following his or her last premium payment, he or she will be assessed a surrender charge. This statement would include the maximum surrender charge, and the maximum number of years that a surrender charge may be assessed since the last payment was made under the contract.[112]

In addition, we are proposing to require an example of the maximum surrender charge an investor could pay (in dollars) under the contract assuming a $100,000 investment (*e.g.,* ''[i]f you make an early withdrawal, you could pay a surrender charge of up to $9,000 on a $100,000 investment.'').[113] We

[104] *See* proposed rule 498A(b)(5)(ii); proposed Item 3 of Forms N–3, N–4, and N–6.

[105] In determining these proposed topic areas, we considered investor complaints received by the Commission's Office of Investor Education and Advocacy and the results of the 2012 Financial Literacy Study. *See* text accompanying note 667 (regarding investor complaints); 2012 Financial Literacy Study, *supra* note 39. We also considered various regulatory and industry sources. *See, e.g.,* FINRA Rule 2330(b)(1)(A)(i) (variable annuity investors must be informed, ''in general terms, of various features of deferred variable annuities, such as the potential surrender period and surrender charge; potential tax penalty if consumers sell or redeem deferred variable annuities before reaching the age of 59½; mortality and expense fees; investment advisory fees; potential charges for and features of riders; the insurance and investment components of deferred variable annuities; and market risk'').

[106] We considered mutual fund disclosure research that supported the view that a tabular presentation would be an effective disclosure delivery method. *See, e.g.,* John Kozup, Elizabeth Howlett, and Michael Pagano, *The Effects of Summary Information on Consumer Perceptions of Mutual Fund Characteristics,* The Journal of Consumer Affairs 42, 37–59 (2008) (concluding that summary information, particularly using graphical presentation, is an effective way to facilitate the processing of information for investors evaluating mutual funds).

Experts in disclosure effectiveness for consumer-facing communications also have encouraged the use of a ''strong design grid'' (such as the tabular presentation we propose) to clarify concepts to consumers and to organize disclosure elements. *See, e.g.,* Susan Kleimann, *Making Disclosures Work for Consumers,* Presentation to the SEC's Investor Advisory Committee (June 14, 2018), *available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac061418-slides-by-susan-kleimann.pdf* (''Kleimann Presentation'').

[107] Immediately following this heading would be the statement: ''An investment in the Contract is subject to fees, risks, and other important considerations, some of which are briefly summarized in the following table. You should review the prospectus for additional information about these topics.''

[108] The table also could include a third column, which would include cross-references to the locations in the statutory prospectus where the subject matter that each line-item requires is described in greater detail, or would otherwise cross-reference that information. *See infra* note 162 and accompanying text.

[109] *See* Item 3 of current Forms N–3, N–4, and N–6 (''Fee Table'').

[110] *See infra* section II.A.1.c.ii(h).

[111] The Commission's Office of Investor Education and Advocacy frequently receives investor inquiries about variable contract surrender charges, suggesting that many investors may be confused about how surrender charges work.

[112] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 2(a) to proposed Item 3 of Forms N–3, N–4, and N–6. The maximum surrender charge would be expressed as a percentage of the contribution or premium or the amount surrendered, whichever is applicable.

[113] We propose to use $100,000 as the basis for the surrender charge example because the value of the average variable annuity contract has recently exceeded $100,000. *See* IRI Fact Book, *supra* note

believe that for purposes of the Key Information Table, providing a dollar figure may better communicate to investors the impact of surrender charges than a surrender charge schedule that shows the applicable surrender charge per year as a percentage.[114]

Transaction Charges. The second line-item in the ''Fees and Expenses'' section of the proposed table, ''Transaction Charges (charges for certain transactions),'' would require a statement that, in addition to surrender charges, the investor may also be charged for other transactions. This statement would be required to include a brief description of the types of such charges (*e.g.,* front-end loads, charges for transferring cash value between investment options, charges for wire transfers, etc.).[115] We are not proposing to require registrants to disclose the amount of each transaction charge in the Key Information Table because we understand the costs associated with most transaction charges to be relatively small, as a percentage of average account size (unlike surrender charges). Moreover, the Fee Table would require more detailed information about each of these charges (including the amount of each charge).[116] The line-item for Transaction Charges in the Key Information Table is designed to provide a simple narrative description to alert investors that surrender charges are not the only transaction charges they could pay.

Ongoing Fees and Expenses. The third line-item in the ''Fees and Expenses'' section, ''Ongoing Fees and Expenses (annual expenses),'' is designed to alert investors that they also will bear recurring fees on an annual basis.[117] In Form N–3 and N–4, the disclosure in this line-item would begin with the legend ''The table below describes the fees and expenses that you may pay *each year,* depending on the options you choose.'' [118]

Form N–4 registrants would disclose, in a tabular presentation in the order specified, the minimum and maximum annual fees for: (1) Base contract expenses; [119] (2) investment options (*e.g.,* portfolio company fees and expenses); [120] and (3) optional benefits.[121] Since Form N–3 registrants have a single-tier structure and consolidate fees and expenses for investment options into base contract expenses, Form N–3 registrants would disclose the same information as Form N–4 registrants except fees for base contract expenses and investment options would be consolidated into a single entry labeled ''annual contract expenses.'' [122] The minimum annual fee column would show the lowest available current fee for each annual fee category (*i.e.,* the least expensive contract class, the lowest total annual portfolio company operating expense, lowest annual contract expenses, and the least expensive optional benefit available for an additional charge).[123] The maximum annual fee column would show the highest fees for these categories. Additionally, a legend preceding the minimum and maximum annual fee table would refer investors to their contract specifications page for information about the specific fees they would pay each year based on the options elected.[124]

This presentation would consolidate the more detailed information in the Fee Table, in an effort to minimize the need for investors to perform complex calculations to understand the fees they will pay.[125] For example, like the proposed ''Ongoing Fees and Expenses'' line-item in the Key Information Table, the Fee Table would also include information about the contract's base contract fee, portfolio company fees and expenses, and optional benefits.[126] However, the Fee Table would be required to include a separate response for each contract form that the prospectus offers that has different fees, and also a separate response for each contract class.[127] In order to condense this information, the parallel disclosure in the Key Information Table would be presented as fee ranges.

We have also designed an example in Forms N–3 and N–4 to provide a high-level cost illustration that would give an investor a tool to understand the basic cost framework of the contract. To emphasize that an investor's choices have a significant impact on the costs associated with his or her investment, we propose to require a two-column tabular presentation in the order specified reflecting the lowest and highest current annual cost estimates for the variable contract.[128] The following legend would precede this table: ''Because your contract is customizable, the choices you make affect how much you will pay. To help you understand the cost of owning your contract, the

8, at 170. Using this figure would result in cost estimates that more closely mirror the actual experience of many variable contract investors. *See infra* note 130 and accompanying text.

[114] Registrants would continue to disclose the surrender fee in the Fee Table as a line-item in the ''Transaction Expenses'' table. They also would continue to reflect the consequence of any surrender fee in the ''Example'' to the Fee Table that would show the investor's contract costs if he or she were to surrender the contract after 1 year, 3 years, 5 years, and 10 years. *See* Item 3 of Forms N–3, N–4, and N–6.

[115] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 2(b) to proposed Item 3 of Forms N–3, N–4, and N–6. Although surrender charges are a type of transaction charge, we are proposing to require surrender charges be separately disclosed in the Key Information Table to highlight to investors the significant costs associated with early withdrawals.

[116] *See* proposed Item 4 of Forms N–3, N–4, and N–6 (requiring disclosure of transaction expenses).

[117] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 2(c) to proposed Item 3 of Forms N–3, N–4, and N–6.

[118] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 2(c)(i)(A) to proposed Item 3 of Forms N–3 and N–4.

[119] Minimum and maximum annual fees for base contract expenses would not be required on Form N–6 because life insurance charges are based on underwriting and can vary significantly from one insured person to another depending on various demographic characteristics. This could lead to significant variations between these amounts, which we do not expect would be helpful, and may be confusing, to investors.

[120] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 2(c)(i)(D) to proposed Item 3 of Form N–4. Registrants would use the gross expense ratio disclosed in the Fee Table of a portfolio company's current prospectus, which is the same basis for calculating portfolio company expense ratios as Items 4 (Fee Table) and 18 ([Portfolio Companies] Available Under the Contract) of Form N–4.

[121] The disclosure would also require, in a parenthetical or footnote to the table or each caption, an explanation of the basis for each percentage (*e.g.,* as a percentage of separate account value or benefit base, or % of net asset value). *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 2(c)(i)(C) to proposed Item 3 of Form N–4 (% of net asset value).

[122] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 2(c)(i)(B) to proposed Item 3 of Form N–3.

[123] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 2(c)(i) to proposed Item 3 of Form N–3; Instruction 2(c)(i) to proposed Item 3 of Form N–4.

Because the table showing minimum and maximum annual fees is intended to inform investors about the types and ranges of fees associated with a variable contract, we are excluding certain assumptions from the calculations. For example, although we know that some registrants do not charge extra for certain optional benefits, we want to alert investors to the costs associated with optional benefits that are available for an additional charge. Accordingly, the disclosure should reflect the minimum cost associated with an optional benefit that has a fee.

[124] Instruction 2(c)(i)(A) to proposed Item 3 of Forms N–3 and N–4. Many states require a contract specifications page that contains information about the premiums, fees, annuitization date and other information specific to an investor's variable annuity contract. *See, e.g.,* the Insurance Compact's Individual Deferred Variable Annuity Contract Standards, *available at https://www.insurancecompact.org/rulemaking_records/080911_stds_annuity_individual_deferred_variable.pdf.*

[125] This reflects the principle, which experts in disclosure effectiveness for consumer-facing communications have encouraged, of ''eliminat[ing] most complex calculations'' for consumers. *See* Kleimann Presentation, *supra* note 106.

[126] *See* proposed Item 4 of Forms N–3 and N–4.

[127] *See* Instructions 6 and 7 to proposed Item 4 of Forms N–3 and N–4.

[128] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 2(c)(ii) to proposed Item 3 of Forms N–3 and N–4.

following table shows the lowest and highest cost you could pay *each year.* This estimate assumes that you do not take withdrawals from the contract, which could add surrender charges that substantially increase costs.'' [129]

The lowest and highest annual dollar costs in this table would be based on certain prescribed assumptions (*i.e.,* a $100,000 investment) [130] with no additional contributions, transfers, or withdrawals, no sales charges, and a 5% annual return over a hypothetical 10-year period.[131] The lowest annual cost estimate would be based on the least expensive combination of contract classes and portfolio company charges, excluding optional benefits, and the highest annual cost estimate would reflect the most expensive combination of these items.[132] Excluding optional benefits from the lowest annual cost estimate, and including them in the highest annual cost estimate, would illustrate the cost impact of adding optional benefits to a contract.[133] With this information, the investor would be able to roughly estimate further costs,[134] and could obtain additional information about costs in the statutory prospectus if needed. [135]

In Form N–6, we have proposed that registrants provide disclosure in the ''Ongoing Fees and Expenses'' section of the table that primarily uses a narrative presentation, rather than the approach taken in Forms N–3 and N–4, due to the fact that maximum expenses could potentially exceed 100% of contract value based on the underwriting of the variable life insurance contract and therefore potentially be misleading to investors. This section of the table would require: (1) A brief statement that investment in a variable life insurance contract is subject to certain ongoing fees and expenses that are set based on characteristics of the insured; and (2) the minimum and maximum annual fees for the investment options in a tabular presentation.[136]

(ii) Risks

The proposed Key Information Table also would include a condensed discussion of contract risks. Current risk disclosures in variable contract statutory prospectuses typically span multiple pages. While this level of disclosure may be appropriate for a statutory prospectus, we believe that a more-concise overview presentation of contract risks is better suited for the Key Information Table in light of the goals of the summary prospectus. Like the summary of fee and expense information that would appear in the proposed Key Information Table, these risk summaries are intended to provide a concise overview, with additional information available for an investor who desires or requires additional details.

Specifically, the table would include four line-items under the heading ''Risks,'' each of which would include disclosure about a risk that we believe investors should be alerted to: (1) Risk of loss; (2) risks that could occur if an investor believes a variable annuity is a short-term investment; (3) risks associated with the contract's investment options; and (4) insurance company risks.[137] Each of these line-items would include succinct descriptions of the respective risk.

The first line-item is intended to convey the concept that although variable contracts have elements of insurance, unlike most traditional forms of insurance, these products are subject to the risk of investment loss.[138] This could help prevent any misunderstanding if, for example, an investor confused a variable annuity contract and a fixed annuity contract and did not understand that the contract value in a variable annuity could decline.

The second line-item is intended to emphasize to investors that variable contracts are generally long-term investments and not appropriate for an investor who needs ready access to cash, particularly in view of the impact of surrender charges and/or tax penalties for early withdrawals.[139] The third line-item is intended to focus on the general risk of poor investment performance (as opposed to the details of the specific risks associated with each of the particular investment options available under the contract).[140]

The fourth line-item is meant to alert investors that any obligations, guarantees, or benefits under the contract that may be subject to the claims-paying ability of the insurance company (as opposed to the separate account, which is insulated from the claims of the insurance company's creditors) will depend on the financial

[129] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 2(c)(ii)(A) to proposed Item 3 of Forms N–3 and N–4.

[130] While the example in the Fee Table in current Forms N–3 and N–4 uses $10,000 as the basis for calculating assumptions relating to the costs of investing in a contract, we propose to use $100,000 as the basis for the cost assumption in the ''Key Information'' table because the value of the average variable annuity contract has recently exceeded $100,000. *See* IRI Fact Book, *supra* note 8, at 170. Using this figure would result in costs estimates that more closely mirror the actual experience of many variable contract investors. For that reason, we are also proposing to amend the Forms to use $100,000 as the base assumption for similar examples used in the Forms, as discussed below.

[131] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 2(c)(ii)(C)(a) to proposed Item 3 of Forms N–3 and N–4.

The prescribed assumptions largely mirror the Fee Table, with the exception of the sales load, which is not reflected because we are seeking to highlight the contract's ongoing expenses. Because registrants may charge different fees in different years (which may have the effect of making fees appear small under certain circumstances), we propose to base the cost estimate on the average cost of a contract over a 10-year period to level-set the calculation. *See* Instruction 2(c)(ii)(C)(a) to proposed Item 3 of Forms N–3 and N–4.

[132] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 2(c)(ii)(C)(a) to proposed Item 3 of Forms N–3 and N–4. Instruction 2(c)(ii)(C)(e) to proposed Item 3 of Forms N–3 and N–4 would direct that, unless otherwise stated, the least and most expensive combination of annual contract expenses and optional benefits available for an additional charge should be based on the disclosures provided in the Example in Item 4 (Fee Table), and that if a different combination of these items would result in different maximum or minimum fees in different years, the registrant must use the least or most expensive combination of these items each year.

[133] While the example in the Fee Table would include a similar cost estimate, it would reflect the most expensive combination of portfolio company operating expenses and optional benefits available for each contract class available under the contract. The Fee Table example also includes estimated costs for 1-, 3-, 5- and 10-year periods (not just for one year), and reflects different scenarios based on whether the contract is surrendered or annuitized. *See* proposed Item 4 of Forms N–3 and N–4.

[134] For example, since he or she would know the range of costs to be paid over one year, he or she could estimate the costs to be paid over five years.

[135] We would also encourage registrants to use design features (*e.g.,* multiple colors or shading patterns) that visually distinguish minimum and maximum fees, and lowest and highest annual cost estimates.

[136] Instruction 2(c) to proposed Item 3 of Form N–6.

[137] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 3 to proposed Item 3 of Forms N–3, N–4, and N–6.

[138] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 3(a) to proposed Item 3 of Forms N–3, N–4, and N–6 (''State that a contractowner can lose money by investing in the Contract.'').

[139] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 3(b) to proposed Item 3 of Forms N–3, N–4, and N–6 (''State that a Contract is not a short-term investment vehicle and is not appropriate for an investor who needs ready access to cash, accompanied by a brief explanation.'').

[140] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 3(c) to proposed Item 3 of Forms N–3, N–4, and N–6 (*e.g.,* from Form N–4, ''State that an investment in the Contract is subject to the risk of poor investment performance and can vary depending on the performance of the investment options available under the Contract (*e.g.,* Portfolio Companies and any fixed account investment options), that each investment option will have its own unique risks, and that the contractowner should review a Portfolio Company's prospectus before making an investment decision.'').

Because most variable annuity contracts typically offer fifty or more portfolio companies to which investors can allocate their purchase payments, we are not requiring that the Key Information Table include risk information specific to each portfolio company, as to do so would undermine the goal of brevity for this disclosure item.

solvency of the insurance company.[141] As part of these disclosures, the registrant would be required to state, if applicable, that additional information about the insurance company, including its financial strength ratings, may be obtained from the registrant.[142] In lieu of providing this statement, a registrant could include the insurance company's financial strength rating(s).[143]

A fifth line-item, which would only appear in the ''Risks'' section for variable life insurance contracts, is meant to focus on contract lapse, which is a key risk for variable life insurance investors (but not relevant to variable annuity contracts).[144] For example, a variable life insurance contract may lapse when sufficient premium payments are not made by the investor. Since inadvertent contract lapse could negate the insurance benefit of the variable life insurance contract, we believe this risk should be included in the Key Information Table.

Because the registrant may provide additional details about these and other risks in the statutory prospectus, we are also proposing a new requirement in Forms N–3 and N–4 that, like the current parallel requirement in Form N–6, would require the registrant to summarize the principal risks of purchasing a contract in a consolidated risk section within the statutory prospectus.[145] Registrants would have the flexibility to discuss any principal risks, and would not be limited to the risk topics, or the level of disclosure, when responding to this requirement.

(iii) Restrictions

The proposed Key Information Table also would require registrants to briefly disclose those features of a variable contract that commonly include restrictions or limitations, namely the investment options and optional benefits that the contract offers. We have designed this section of the table to include separate line-items for each of these topics under the heading ''Restrictions.'' [146] For example, many variable annuity contracts have optional benefits that restrict the percentage of assets that investors can allocate to certain investment options, such as more volatile categories of equity funds, in order to facilitate the insurance company's ability to reserve for the guarantees under the benefit.

The ''Investment Options'' line-item would require registrants to disclose whether there are any restrictions that may limit the investment options that an investor may choose and/or limitations on the transfer of contract value among portfolio companies, and if applicable, that the insurer reserves the right to remove or substitute portfolio companies as investment options.[147] The ''Optional Benefits'' line-item would require registrants to disclose whether there are any restrictions or limitations relating to optional benefits, as well as whether the registrant may modify or terminate an optional benefit.[148]

We are proposing to include these line-items in the Key Information Table to put investors on notice of restrictions and limitations associated with different options that are available under the contract. We are not proposing to require a description of the specific restrictions and limitations associated with each of the available investment options and optional benefits. Doing so would likely add significant length to the table. Instead, this information will be provided in other parts of the initial summary prospectus, as well as the statutory prospectus.[149]

(iv) Taxes

Because variable contracts are subject to a special tax regime, with both tax advantages and potential tax impacts in certain circumstances, we are proposing to require that the Key Information Table include tax-related disclosures. The ''Tax Implications'' line-item of the table, which would appear under the heading ''Taxes,'' would require a statement that investors should consult with a tax professional to determine the tax implications of an investment in, and payments received under, the variable contract.[150] A registrant also would be required to state that there is no additional tax benefit to the investor if the contract is purchased through a tax-qualified plan or individual retirement account (IRA), and that withdrawals will be subject to ordinary income tax and may be subject to tax penalties.[151]

The tax disclosure in the proposed Key Information Table is meant to alert investors to tax implications of their investment in a location and using a presentation we believe investors are most likely to see and understand. Similar to the other line-items in the proposed Key Information Table, additional detail about the tax implications of an investment in a variable contract would also be available in the statutory prospectus.[152]

[141] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 3(d) to proposed Item 3 of Forms N–3, N–4, and N–6 (*e.g.,* from Form N–4, ''State that an investment in the Contract is subject to the risks related to the Depositor, including the extent to which any obligations, guarantees, or benefits are subject to the claims-paying ability of the Depositor.'').

[142] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 3(d) to proposed Item 3 of Forms N–3, N–4, and N–6 (*e.g.,* from Form N–4, ''If applicable, further state that more information about the Depositor, including its financial strength ratings, is available upon request from the Registrant'').

[143] *See* Instruction to Instruction 3(d) to proposed Item 3 of Forms N–3, N–4, and N–6.

[144] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 3(e) to proposed Item 3 of Form N–6 (''Briefly state (1) the circumstances under which the Contract may lapse (*e.g.,* insufficient premium payments, poor investment performance, withdrawals, unpaid loans or loan interest), (2) whether there is a cost associated with reinstating a lapsed Contract, and (3) that death benefits will not be paid if the Contract has lapsed.'').

[145] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 1(c) to proposed Item 3; proposed Item 5 of Forms N–3, N–4, and N–6. While we understand that variable annuity statutory prospectuses today commonly discuss contract risks (although Form N–3 and Form N–4 do not currently require them to do so), this discussion can be dispersed throughout the prospectus.

[146] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 4 to proposed Item 3 of Forms N–3, N–4, and N–6. We recognize that there may be overlap between the proposed line-items for ''Investment Options'' and ''Optional Benefits,'' since many optional benefits limit the investment options available to investors.

[147] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 4(a) to proposed Item 3 of Forms N–3, N–4, and N–6 (''State whether there are any restrictions that may limit the investment options that a contractowner may choose, and/or whether there are any limitations on the transfer of Contract value among Portfolio Companies. If applicable, state that the insurer reserves the right to remove or substitute Portfolio Companies as investment options'').

[148] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 4(b) to proposed Item 3 of Forms N–3, N–4, and N–6 (''State whether there are any restrictions or limitations relating to optional benefits, and/or whether an optional benefit may be modified or terminated by the Registrant. If applicable, state that withdrawals may affect the availability of optional benefits by reducing the benefit by an amount greater than the value withdrawn, and/or could terminate a benefit.'').

[149] *See, e.g.,* proposed rule 498A(b)(5)(iv), proposed Item 12(a) of Form N–3, and proposed Item 11(a) of Forms N–4 and N–6 (all referencing the requirement that the table summarizing certain benefits available under the contract, which would appear in both the initial summary prospectus and the statutory prospectus, would be required to include a brief description of restrictions/limitations associated with each benefit); *see also* proposed rule 498A(b)(5)(ix), proposed Item 19 of Form N–3, and proposed Item 18 of Forms N–4 and N–6 (all referencing the requirement that, if the availability of one or more portfolio company varies by benefit offered under the contract, the appendix that would appear in the initial summary prospectus, updating summary prospectus, and statutory prospectus would be required to include a separate table indicating which portfolio companies are available under each of the benefits offered under the contract).

[150] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 5 to proposed Item 3 of Forms N–3, N–4, and N–6.

[151] *Id.*

[152] *See, e.g.,* proposed Item 16 of Form N–3, proposed Item 15 of Forms N–4 and N–6.

(v) Conflicts of Interest

The proposed Key Information Table would also include, if applicable,[153] line-items regarding conflicts of interest that may arise in the context of variable contracts, specifically with regards to investment professional compensation and exchanges. The ''Investment Professional Compensation'' line-item would require registrants to disclose, if applicable, that an investment professional may be paid for selling the contract to investors.[154] A registrant would be required to describe the basis upon which such compensation is typically paid (*e.g.,* commissions, revenue sharing, compensation from affiliates and third parties).[155] A registrant providing the required disclosure would be required to further state that investment professionals may have a financial incentive to offer or recommend the contract over another investment for which the investment professional is not compensated (or compensated less).[156] This proposed requirement reflects analogous disclosure that appears in mutual fund summary prospectuses [157] and is designed to address similar concerns, namely to alert investors to the existence of compensation arrangements for investment professionals and the potential conflicts of interest arising from these arrangements.

The ''Exchanges'' line-item would require the registrant to state, if applicable, that some investment professionals may have a financial incentive to offer a new contract in place of the one owned by the investor.[158] A registrant would further be required to state that investors should only exchange their contract if they determine, after comparing the features, fees, and risks of both contracts, that it is preferable for them to purchase the new contract rather than continue to own the existing contract.[159] When a contract owner purchases a new annuity contract to replace an existing one, the new contract is referred to as a replacement contract.[160] We understand that a significant proportion of variable contract sales stem from exchanges, and these disclosures are intended to alert investors to potential conflicts of interest that may arise in that context.

(vi) General Instructions

In addition to the proposed instructions specific to each line-item in the Key Information Table, the table would be subject to a set of general instructions. To streamline the disclosure and encourage registrants to use plain-English, investor-friendly principles when drafting the disclosures, the proposed general instructions would require registrants to disclose the required information in the tabular presentation reflected in the form, in the order specified. However, registrants would be permitted to exclude any disclosures that are not applicable or modify any of the statements that would be required to appear in the table so long as the modified statement contains comparable information.[161]

The proposed general instructions would also require registrants to provide cross-references or links to the location in the statutory prospectus where the subject matter required by the line-item is described in greater detail.[162] The cross-reference or link would not necessarily need to be a page number or page range; instead, a registrant could cross-reference or link a particular section or sub-section, or heading or sub-heading, in the statutory prospectus. As discussed below, we are separately proposing that any cross-reference that is included in an electronic version of a summary prospectus must be an active hyperlink.[163]

We believe that providing cross-references and links would help investors who seek additional information quickly find more detailed information that may be important to them. We recognize that certain line-items in the Key Information Table may more readily lend themselves to the inclusion of a single cross-reference or link because the information may be found in one location in the statutory prospectus.[164] On the other hand, other line-items may aggregate information that appears in multiple locations in the statutory prospectus, and therefore a registrant would need to include multiple cross-references or links as appropriate.[165]

Finally, in keeping with our goal of providing a brief tabular presentation of key facts that can be easily digested by investors, the proposed instructions provide that all disclosures in the Key Information Table should be short and succinct, consistent with the limitations of a tabular presentation.[166]

(vii) Requests for Comment on Key Information Table

We request comment generally on the Key Information Table that we propose would appear in the initial summary prospectus, and specifically on the following issues. We request specific comment about the table as it would appear in the updating summary prospectus and the statutory prospectus later in this release.

- Should we require the proposed Key Information Table to be included in the initial summary prospectus? Would this table provide a succinct summary of the contract's key terms and benefits and most significant risks, in a presentation that would improve readability and increase readership?
- Would the topics of the line-items that we propose to include in the Key Information Table be appropriate or useful for investors making an initial purchase of a variable contract? If not, why not? Should we require the table to include additional or different topics? Should we limit the topics and related disclosures to those that are required, or should we permit registrants to include additional topics at their discretion? Could this open the door to lengthy disclosure that might undermine the goal of a succinct presentation?
- Is the proposed tabular presentation useful and likely to facilitate investor

[153] A registrant may omit these line-items if neither the registrant nor any of its related companies pay financial intermediaries for the sale of the contract or related services. *See* Instruction to Instruction 6 to proposed Item 3 of Forms N–3, N–4, and N–6.

[154] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 6(a) to proposed Item 3 of Forms N–3, N–4, and N–6.

[155] *Id.*

[156] *Id.*

[157] *See* Item 8 of Form N–1A (requiring disclosure alerting investors who purchase a fund through a broker-dealer or other financial intermediary (such as a bank) that the fund and its related companies may pay the intermediary for the sale of fund shares and related services, and such payments may create a conflict of interest by influencing the broker-dealer or other intermediary and your salesperson to recommend the fund over another investment).

[158] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 6(b) to proposed Item 3 of Forms N–3, N–4, and N–6.

[159] *Id.*

[160] Replacement contracts usually occur in connection with a tax-free exchange of non-qualified contracts under section 1035 of the Internal Revenue Code, or because of a rollover or direct transfer of a qualified plan contract (*e.g.,* an individual retirement annuity) from one life insurance company to another. *See* 26 U.S.C. 1035; *see also* 26 CFR 1.1035–1.

[161] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 1(a) to proposed Item 3 of Forms N–3, N–4, and N–6.

[162] *See* proposed rule 498A(b)(5)(ii); *see also* General Instruction 1(b) to proposed Item 3 of Forms N–3, N–4, and N–6. The proposed instruction specifies that the cross-reference should be adjacent to the relevant disclosure, either within the table row, or presented in an additional table column.

[163] *See* proposed rule 498A(a)(i)(4); *see also infra* section II.A.5.

[164] For example, a more detailed description of the contract's fees and expenses would appear in the Fee Table section of the contract statutory prospectus. *See infra* section II.D.2.d.

[165] For example, it may not always be possible to provide a single cross-reference for the ''Restrictions'' line-items as they may be discussed in multiple sections of the statutory prospectus. *See supra* note 149.

[166] *See* proposed rule 498A(b)(5)(ii); *see also* Instruction 1(c) to proposed Item 3 of Forms N–3, N–4, and N–6.

understanding of key information about variable contracts? Would another presentation be better? If so, why, and what would a better alternate presentation be? Would the two-column presentation be effective for investors reading an electronic version of the initial summary prospectus? Should the form of presentation be required, or should it be left to the discretion of registrants? Would a standardized presentation facilitate comparison of different variable contracts?

- Should we require cross-references to the location (section or sub-section, or heading or sub-heading) in the statutory prospectus where the information provided in response to each line-item of the Key Information Table is discussed in greater detail? Instead of cross-referencing to the relevant location in the statutory prospectus, should we instead require the cross-reference to include a specific page number in the statutory prospectus where an investor could find the information? Would it confuse investors who receive the summary prospectus to see cross-references to the statutory prospectus? If so, should the table in the summary prospectus not include cross-references, or should we consider some other approach?
- If we require cross-references, should electronic versions of the summary prospectus be required to link directly to the relevant location in the statutory prospectus, as would be required by proposed rule 498A? If not, why not? Would requiring a cross-reference (or link) pose any particular technical, legal, or other challenges for registrants? If so, what would these challenges be, and how could we modify the proposed rule or provide guidance to mitigate these challenges? Instead of hyperlinks, are there other technological tools that would better help an investor find information that is cross-referenced in the Key Information Table, such as QR codes or similar technological tools? [167]
- Is the level of detail of the disclosure that we propose in each line-item of the Key Information Table appropriate, and does it strike the right balance between providing enough information to alert an investor to the most salient facts (including fees, expenses, and risks) of the variable annuity contract, but not too much, or too detailed information? If not, how should we modify the table?
- Should we impose a word or page limit on the proposed Key Information Table (*e.g.,* no more than two or three pages)? If so, what should the word limit or page limit be?
- Would the disclosure that a registrant would provide in response to the proposed ''Fees and Expenses'' line-items convey the appropriate amount of information to investors and concisely alert investors to the most important fees and expenses associated with the variable annuity contract? Are there any additional charges that should be included in these line-items? For example, we understand that in some instances an investment professional may charge fees for providing additional services that are directly deducted from the value of the investor's contract and which may be treated as a withdrawal from the contract, reduce the contract's benefits, and be subject to surrender charges. How common are such arrangements, and what disclosures, if any, would be appropriate to be included in the Key Information Table or elsewhere, such as in the fee table?
- Would the ''Surrender Charge'' line-item, as proposed, convey sufficient information for investors to understand the dollar amount that they could pay as a surrender charge if they make withdrawals in the first several years of their contract, and if not, how should we modify this line-item?
- Would the Minimum and Maximum Annual Fee and Lowest and Highest Cost tables convey information in a way that investors are likely to easily understand? Would these tables assist investors in understanding the costs of their investment and helping them compare the costs of investing in the variable annuity with the costs of investing in another product? Are the assumptions underpinning those tables appropriate? If not, why not? Are there any revisions that we should consider? Is $100,000 an appropriate figure to use as the basis for the cost example in the proposed table? Should we require that registrants use a different figure instead? If so, why? Should we require additional information to accompany the tables? For example, should the legend accompanying the tables inform investors that it is possible that the total fees associated with the contract may exceed the accumulated gains from the investment options selected by the investor? Should the Lowest and Highest Cost table include additional information such the hypothetical value of the contract (*e.g.,* in year 1 and year 10), the expenses incurred per year, and the value of the contract (*e.g.,* in year 1 and year 10) after expenses?
- Should we require registrants creating an electronic version of the initial summary prospectus to provide an interactive calculator for investors to determine how fees and expenses would affect their specific investments? If so, should the calculator include transaction charges?
- Should variable life insurance contracts also be required to show the lowest and highest possible combination of charges in the Form N–6 Key Information Table? Cost of insurance is often an important component of expenses for variable life insurance contracts (unlike variable annuities), and can vary significantly from one insured person to another depending on various demographic characteristics (*e.g.,* age, gender, health, smoking status). If the lowest and highest possible combinations of charges are shown, how should variations in cost of insurance be reflected?
- Would the disclosure that a registrant would provide in response to the proposed ''Risks'' line-items adequately convey an overview of the risks of investing in a variable contract? Are there other risks that we should require a registrant to disclose in the proposed Key Information Table? Should we revise or remove any of the proposed ''Risks'' line-items? For example, is it appropriate to allow registrants to include the insurance company's financial strength rating(s) in the line-item regarding the claims-paying ability of the insurance company? Should we revise the instructions associated with these proposed line-items to require different disclosures? Should we require a line-item for ''Other Principal Risks'' to provide registrants an opportunity to disclose risks related to investing in the contract that they would not otherwise be required to disclose in the Key Information Table? Should we instead provide flexibility by permitting registrants to disclose other risks at their discretion? Why or why not?
- Would the disclosure that a registrant would provide in response to the proposed ''Restrictions'' line-items appropriately convey the appropriate amount of information about certain restrictions that various contract options may entail, in light of the goals of the proposed Key Information Table? Should a registrant be required to disclose information about restrictions in the Key Information Table other than those associated with the contract's investment options and optional benefits? If so, what? Instead, should we provide flexibility by permitting registrants to disclose other restrictions at their discretion?
- Is the disclosure that a registrant would be required to provide in response to the proposed ''Tax Implications'' line-item appropriate, in light of the goals of the proposed Key Information Table? Should a registrant be required to emphasize more prominently that withdrawals will be subject to ordinary income tax, and not the capital gains rates? Should the line-item require disclosure of the specific tax penalties and requirements that variable contract investors may incur (*e.g.,* penalties for withdrawal before age 59½, or that purchases through a tax-qualified plan may be subject to required minimum distribution each year beginning at age 70½)?
- Are the disclosures that a registrant would be required to provide in response to the proposed ''Investment Professional Compensation'' line-items appropriate, in light of the goals of the proposed Key Information Table? Would these disclosures adequately apprise investors of the potential conflicts that arise when their investment professional is compensated for recommending an investment into a new or an exchange from an existing variable contract, and are these disclosures appropriately balanced? Should we revise these proposed disclosure requirements, and if so, how? Is it appropriate that these line-items appear under the heading ''Conflicts of Interest''? Is there another way that the summary prospectus could highlight the implications for investors of exchanges?
- Do the instructions associated with each of the proposed line-items clearly explain what a registrant would be required to disclose? In keeping with the structured format of a tabular presentation, we sought to promote concise disclosure by largely directing registrants to state, rather than to explain, certain information in response to the required line-items. Should the

[167] A QR code is a two-dimensional barcode capable of encoding information such as a website address, text information, or contact information. For example, when included on print materials, these codes can be read using the camera on a smartphone to take the user directly to a specific website address.

instructions prescribe specific language or should registrants have flexibility in drafting their responses? Are there any particular instructions that we should include or modify in any way, for clarity or for any other reason?

(c) Standard Death Benefit

The initial summary prospectus would be required to briefly describe the standard death benefit that the contract provides, under the heading ''Standard Death Benefit.'' [168] It would briefly describe the operation of the benefit.[169] Including this disclosure in the initial summary prospectus would highlight to investors important information about this benefit, such as information about the potential limitations on the standard death benefit and the possibility of its termination, that they might not otherwise receive through marketing materials and similar channels during the sales process.

Under the proposed registration form amendments, a registrant would include in the statutory prospectus these disclosures, as well as additional disclosures relating to when the death benefit is calculated and payable or the forms the benefit may take.[170] While this additional information provides detail that may help an investor who wants to understand the mechanics of how the standard death benefit operates later in the contract lifecycle, we are not requiring that it be included in the initial summary prospectus because we believe it would not be as critical to a basic initial understanding of the benefit, including any risks and limitations.

We request comment generally on the disclosure on the standard death benefit that we propose would appear in the initial summary prospectus, and specifically on the following issues:

- Are the proposed disclosure requirements in the initial summary prospectus under the ''Standard Death Benefit'' heading clear and appropriate in light of the goals of the initial summary prospectus?
- Would this disclosure be useful to investors in connection with an initial purchase of a variable contract? Should this proposed content requirement include any additional, or any different, disclosure about the standard death benefit? For example, would including one or more of the other disclosures required to be included in the statutory prospectus better assist investors in gaining a basic initial understanding of the standard death benefit?

(d) Other Benefits Available Under the Contract

Following the discussion of the standard death benefit, the initial summary prospectus would be required to summarize additional standard or optional benefits available to the investor under the variable contract. We understand that insurers commonly consider these types of benefits to be primary features of variable contracts.[171] These benefits are also often key differentiators between competing products, and we propose requiring specific disclosures in both the statutory prospectus and the initial summary prospectus. This information would appear in tabular form, under the heading ''Other Benefits Available Under the Contract.'' [172] This summary table would include information about any optional death benefits, as well as any optional or standard living benefits, that the contract offers.

Specifically, the summary table would include the name of each benefit, its purpose, whether the benefit is standard or optional, associated fees (as a stated percentage of contract value, benefit base, etc.), and a brief description of limitations or restrictions.[173] The table items include key factors investors may wish to consider when assessing these benefits. We also have designed the proposed table to include information that investors may be less likely to receive through other channels, such as concise disclosure about the restrictions and limitations associated with these benefits. The terms of optional benefits can be complex. Providing the required information in a uniform tabular presentation is designed to make these important disclosures easier for investors to read, understand, and compare.

Under the proposed form amendments, a registrant would include in the statutory prospectus the summary table, as well as additional disclosures in narrative form relating to optional benefits, such as further additional description of each benefit, and descriptions of benefits' limitations, restrictions and risks, and one or more examples illustrating the operation of each benefit.[174] We believe that requiring the initial summary prospectus to include only the summary table and not the additional narrative disclosures is appropriate for the scope of the initial summary prospectus.[175] Consistent with the layered disclosure approach, investors who want more information about optional benefits may refer to the more extensive narrative disclosures in the contract statutory prospectus.

We are also proposing instructions to allow registrants that offer multiple benefits of the same type (*e.g.,* death benefit, accumulation benefit, withdrawal benefit, long-term care benefit, etc.) to use multiple tables to provide the required information, if doing so might better permit comparisons of those benefits.[176] Registrants may also include appropriate titles, headings, or other information that might promote clarity and facilitate understanding of the table(s).[177] For example, if certain optional benefits are only available to certain investors, or are mutually exclusive, the table could include footnotes or headings to identify which optional benefits are affected and to whom they are available.[178] These instructions are designed to accommodate the variety of benefits currently offered or that might be offered in the future, and provide registrants flexibility in presenting this information.

We request comment generally on the disclosure relating to other benefits available under the contract that we propose would appear in the initial summary prospectus, and specifically on the following issues:

- Are the proposed initial summary prospectus disclosure requirements

[168] Proposed rule 498A(b)(5)(iii); *see also* proposed Item 11(a) of Form N–3; proposed Item 10(a) of Form N–4; proposed Item 10(a) of Form N–6.

[169] *Id.* For a discussion of the proposed disclosure requirements, *see infra* section II.D.2.j.

[170] *See* proposed Items 11(b) and (c) of Form N–3; proposed Items 10(b) and (c) of Form N–4; proposed Item 10(b) of Form N–6.

[171] *See supra* paragraph accompanying note 17 (regarding the prevalence of optional benefits).

[172] *See* proposed rule 498A(b)(5)(iv); *see also* proposed Item 12(a) of Form N–3; proposed Item 11(a) of Form N–4; proposed Item 11(a) of Form N–6.

[173] For example, the description of limitations or restrictions could include statements like ''benefit limits investment options available'' or ''withdrawals could terminate benefit.'' *See* Instruction 6 to proposed Item 12(a) of Form N–3; Instruction 6 to proposed Item 11(a) of Form N–4; Instruction 6 to proposed Item 11(a) of Form N–6.

[174] *See* proposed Item 12(b) and (c) of Form N–3 and Instruction to proposed Item 12(b) and (c); proposed Item 11(b) and (c) of Form N–4 and Instruction to proposed Item 11(b) and (c); proposed Item 11(b) and (c) of Form N–6 and Instruction to proposed Item 11(b) and (c).

[175] Registrants may, but would not be required to, provide in the initial summary prospectus cross-references or links to these additional narrative disclosures in the contract statutory prospectus.

[176] *See* Instruction 1(b) to proposed Item 12(a) of Form N–3; Instruction 1(b) to proposed Item 11(a) of Form N–4; Instruction 1(b) to proposed Item 11(a) of Form N–6.

[177] *See* Instruction 1(c) to proposed Item 12(a) of Form N–3; Instruction 1(c) to proposed Item 11(a) of Form N–4; Instruction 1(c) to proposed Item 11(a) of Form N–6.

[178] *Id.*

under the heading ''Other Benefits Available Under the Contract'' clear and appropriate in light of the goals of the initial summary prospectus?

• Are the proposed disclosure items in that table useful and appropriate for consideration by investors in connection with the initial purchase of a variable contract, or should we revise, supplement, or replace those items? Should the proposed summary table include any additional, or any different, disclosure about the standard death benefit or any other benefit? For example, should it include one or more of the other disclosures required to be included in the statutory prospectus? Or should we require that registrants add links or cross-references to these other disclosures? For the associated fee of each optional benefit, should the summary table permit a range of fees?

• Would investors find the proposed tabular presentation useful? Alternatively, would a different tabular presentation, a narrative presentation, or no presentation requirement for disclosure about any optional death benefits, as well as any optional or standard living benefits, be preferable?

• Are the proposed instructions clear, or should we modify them in any way? For example, should we require specific standardized disclosures in situations where certain optional benefits are only available to certain investors (*e.g.,* an additional column indicating any restrictions related to investors who invested during specific time periods), as opposed to permitting registrants to address this issue as they see fit?

(e) Buying the Contract (for Variable Annuity Contracts) and Premiums (for Variable Life Insurance Contracts)

The initial summary prospectus would be required to include a brief description of the procedures for purchasing the variable contract (and premiums, in the case of variable life insurance contracts), under the heading ''Buying the Contract'' for variable annuity contracts and ''Premiums'' for variable life insurance contracts.[179] For variable annuity contracts, this would include a concise explanation of the minimum initial and subsequent purchase payments required, any limitations on the amount of purchase payments (such as when the selection of certain optional benefits may limit additional purchase payments), as well as a statement of when such payments are credited.[180] For variable life insurance contracts this would include a description of the purchase procedures (including, among other things, the minimum initial and subsequent premium payments required, any limitations on the amount of such premium payments, and how to avoid contract lapse), premium amount, premium payment plans, premium due dates, and automatic premium loans.[181]

We believe this information should be included in the initial summary prospectus so investors have a clear understanding of how they can purchase the variable contract.[182] Additional information on purchases and premiums would appear in the statutory prospectus. For example, the statutory prospectus would also include information on the manner in which purchase or premium payments are credited, and the identity of each principal underwriter.[183]

We request comment generally on the disclosure on contract purchases that we propose would appear in the initial summary prospectus, and specifically on the following issues:

• Are the proposed disclosure requirements in the initial summary prospectus under the headings ''Buying the Contract'' (for variable annuity contracts) and ''Premiums'' (for variable life insurance contracts) clear and appropriate in light of the goals of the initial summary prospectus?

• Would this disclosure be useful to investors in connection with an initial purchase of a variable contract? Should this requirement include any additional, or any different, disclosure about purchases of variable contracts? For example, should it include one or more of the other disclosures required to be included in the statutory prospectus (*e.g.,* in the case of variable annuity contracts, explanations of the manner in which purchase payments are credited and how accumulation unit value is determined, or in the case of variable life insurance contracts, sub-account valuation and determination of risk classification)?

(f) Contract Lapse (for Variable Life Insurance Contracts)

The initial summary prospectus for a variable life insurance contract would be required to include certain information about the possibility of contract lapse, under the heading ''How Your Contract Can Lapse.'' [184] Specifically, the initial summary prospectus would briefly describe when and under what circumstances a variable life insurance contract will lapse, any lapse options, the effect of the lapse and under what circumstances such a contract may be reinstated. Because inadvertent contract lapse could negate the insurance benefit of a policy to an investor, possibly at significant cost,[185] understanding the risk of contract lapse is important when deciding to invest in a variable life insurance contract. This disclosure would include the same information on contract lapse that would appear in the contract statutory prospectus.

We request comment generally on the disclosure on contract lapse that we propose would appear in the initial summary prospectus, and specifically on the following issues:

• Are the proposed requirements in the initial summary prospectus under the heading ''How Your Contract Can Lapse'' clear and appropriate in light of the goals of the initial summary prospectus?

• Would this disclosure be useful to investors in connection with an initial purchase of a variable life insurance contract? Should this proposed content requirement include any additional, or any different, disclosure about the possibility of contract lapse?

(g) Surrenders or Withdrawals

The initial summary prospectus would be required to include certain information about contract surrenders or withdrawals, under the heading ''Surrendering Your Contract or Making Withdrawals: Accessing the Money in Your Contract.'' [186] This would include

[179] *See* proposed rule 498A(b)(5)(v); *see also* Item 11(a)(i) and (ii) of current Form N–3; proposed Item 13(a) of Form N–3; Item 10(a)(i) and (ii) of current Form N–4; proposed Item 12(a) of Form N–4. Although we have proposed renumbering certain provisions of this item, we have not proposed any substantive changes to this item in Forms N–3 and N–4.

[180] *Id.*

[181] *See* proposed rule 498A(b)(5)(v); *see also* Item 7(a) through (e) of current Form N–6; proposed Item 9(a) through (e) of Form N–6. We have not proposed any changes to this item in Form N–6.

Sub-accounts refer to the investment options, such as portfolio companies, available under the contract.

[182] This section of the summary prospectus for variable contracts is similar to the disclosure on purchasing fund shares that appears in mutual fund summary prospectuses. *See* rule 498(b)(2); Item 6 of Form N–1A.

[183] *See* proposed Item 13(b) through (f) of Form N–3; proposed Item 12(b) through (e) of Form N–4.

[184] *See* proposed rule 498A(b)(5)(vi); *see also* Item 11 of current Form N–6; proposed Item 14 of Form N–6. We have not proposed any changes to this item in Form N–6.

[185] For example, costs could occur in the form of premium payments that the investor previously paid into the policy, and which the investor cannot retrieve following contract lapse.

[186] *See* proposed rule 498A(b)(5)(vii); *see also* Item 12 of current Form N–3; proposed Item 14(a) of Form N–3; Item 11 of current Form N–4; proposed Item 13(a) of Form N–4; Item 9 of current Form N–6; proposed Item 12(a) of Form N–6. We have proposed certain changes to this item in Forms N–3 and N–4 to harmonize the requirements with

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a brief summary on how to surrender (or partially surrender or make withdrawals from) a variable contract, including any limits on the ability to surrender, how withdrawal and surrender proceeds are calculated, and when they are payable. Given that variable contracts are long-term investments that may entail high surrender fees, it is important to clearly explain the withdrawal and surrender terms to new variable contract investors. Additional information on surrenders and withdrawals would appear in the statutory prospectus. For example, the statutory prospectus would also include more detailed information on partial surrenders and withdrawals, sub-account allocation, involuntary redemptions, and revocation rights (free look period).[187]

We request comment generally on the disclosure on surrenders and withdrawals that we propose would appear in the initial summary prospectus, and specifically on the following issues:

- Are the proposed requirements in the initial summary prospectus under the heading ''Surrendering Your Contract or Making Withdrawals: Accessing the Money in Your Contract'' clear and appropriate in light of the goals of the initial summary prospectus?
- Would this disclosure be useful to investors in connection with an initial purchase of a variable contract? Should this proposed content requirement include any additional, or any different, disclosure about making contract surrenders and withdrawals? For example, should it include one or more of the other disclosures required to be included in the statutory prospectus (*e.g.,* information on partial surrenders and withdrawals and revocation rights)?

(h) Additional Information About Fees

The proposed rule would require the initial summary prospectus to include the full Fee Table (including, for variable annuity contracts, the expense example), that would appear in the statutory prospectus, under the heading ''Additional Information About Fees.'' [188] The Fee Table provides detailed information on the fees and expenses investors will pay when buying, owning, and surrendering the contract, as well as those paid each year during the time the investor owns the contract.[189] We are proposing certain amendments to the Fee Table for each type of variable contract as discussed below in section II.D.2.d.

We are proposing to include the Fee Table in both the statutory prospectus and the initial summary prospectus because investor understanding of variable contract fees is particularly important given these products' layered fee structure and typically higher costs relative to other investment products. The Fee Table is intended to complement and build upon the high-level summary of contract fees and expenses in the Key Information Table by providing additional detail for those investors who may wish to review more comprehensive fee and expense information.[190]

We understand that some registrants currently prepare supplements to the contract prospectus that detail and modify certain fees and rates under the variable contract applicable to new investors (''rate sheets''). Current fees, withdrawal rates, and crediting rates associated with various contract benefits (for new sales) can change so frequently as to make filing of post-effective amendments to the registration statement with each change impractical. Instead, updated disclosure of current levels of these fees and rates is accomplished by filing a rate sheet as a supplement under rule 497 under the Securities Act. We do not believe that the proposed summary prospectus framework will affect the current practice of using rate sheets.[191]

We request comment generally on the Fee Table that we propose would appear in the initial summary prospectus, and specifically on the following issues:

- Are the proposed requirements in the initial summary prospectus under the heading ''Additional Information About Fees'' clear and appropriate in light of the goals of the initial summary prospectus?
- Would this disclosure be useful to investors in connection with an initial purchase of a variable contract? Would including the full Fee Table be consistent with the goal of providing a succinct summary of the contract's key terms and benefits and most significant risks, in a presentation that would improve readability and increase readership? Are there any particular line-items of the Fee Table, for either variable annuities or variable life insurance that could be omitted? Would only including summary information of the type that we propose to appear in the Key Information Table, either with or without a cross-reference or link to the full Fee Table, be more useful or appropriate for investors? Alternatively, would including only the full Fee Table, and not also the summary fee information in the Key Information Table, be more useful or appropriate for investors?
- Would registrants who elect to use the initial summary prospectus continue to prepare rate sheets? Would there be any additional burdens preparing rate sheets in this context? Should the staff guidance be modified in any way to accommodate the summary prospectus framework?

(i) Appendix: Portfolio Companies/ Investment Options Available Under the Contract

Finally, an initial summary prospectus would be required to include an appendix, under the heading ''Appendix: [Portfolio Companies/ Investment Options] Available Under the [Contract],'' that provides summary information in a tabular form about the portfolio companies or investment options offered under the contract.[192]

The appendix would include separate columns for each portfolio company's type (*e.g.,* money market fund, bond fund, balanced fund, etc.) or investment objective, the name of the portfolio company and its adviser or subadviser (as applicable), the portfolio company's expense ratio (expenses/average assets and, in the case of Form N–3, explicitly excluding optional benefit expenses), and its average annual total returns over the past 1-year, 5-year, and 10-year periods (in the case of Form N–3, explicitly excluding optional benefit

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those of Form N–6. We have not proposed any changes to this item in Form N–6.

This proposed requirement is similar to the requirement for mutual fund summary prospectuses to include disclosure on procedures for redeeming shares. *See* rule 498(b)(2); Item 6 of Form N–1A.

[187] *See* proposed Item 14(b) through (f) of Form N–3; proposed Item 13(b) through (f) of Form N–4; proposed Item 12(b) through (e) of Form N–6.

[188] *See* proposed rule 498A(b)(5)(viii); *see also* Item 3 of Forms N–3, N–4, and N–6; proposed Item 4 of Forms N–3, N–4, and N–6.

The initial summary prospectus fee information would be the same as the Fee Table included in the contract statutory prospectus, modified as necessary to describe only a single contract that the registrant currently offers for sale. *See infra* section II.A.1.b.

[189] In addition, the Fee Table details the minimum and maximum total operating expenses the portfolio companies charge periodically, as well as an example intended to help the investor compare the cost of investing in different variable contracts.

[190] *See supra* section II.A.1.c.ii(b).

[191] For example, if the rate sheet is updating information in a summary prospectus or the statutory prospectus, the document should describe how the rate sheet works and the rate sheet itself should be affixed to the front of the document. The current rates should also be readily available on the website as part of the documents required to be posted online under proposed rule 498A and, as a best practice, separately on the website.

[192] *See* proposed rule 498A(b)(5)(ix); *see also* proposed Item 19 of Form N–3; proposed Item 18 of Form N–4; proposed Item 18 of Form N–6. Although these proposed Items would be new to Forms N–3, N–4, and N–6, each form currently requires disclosure of similar information.

expenses).[193] Registrants would be instructed to only include portfolio companies that are currently offered under the contract.[194] Additionally, if the availability of one or more portfolio companies varies by benefit offered under the contract, registrants would be required to include as another appendix a separate table indicating which portfolio companies were available under each of those benefits.[195]

A legend would precede the table. The first paragraph of the legend would state: ''The following is a list of [Investment Options/Portfolio Companies] currently available under the [Contract], which is subject to change as discussed in the [Statutory Prospectus for the Contract].'' [196] For registrants on Forms N–4 and N–6, the legend would also provide an internet address to a landing page, toll-free telephone number, and email address that investors could use to obtain portfolio company statutory and summary prospectuses.[197] For registrants on Form N–3, the legend would direct investors to the cover page of the initial summary prospectus to request the statutory prospectus for the registrant containing more information about the investment options.[198] The legend also could indicate, if applicable, that prospectuses and other information are available from a financial intermediary (such as an insurance agent or broker-dealer) distributing the contract.[199]

The second paragraph of the legend for variable contracts registered on Forms N–4 and N–6 would read as follows:

> The performance information below reflects fees and expenses of the [Portfolio Companies], but does not reflect the other fees and expenses that your contract may charge. Performance would be lower if these charges were included. Each [Portfolio Company's] past performance is not necessarily an indication of future performance.[200]

In contrast, because insurance charges are already reflected in the performance of the investment options for contracts registered on Form N–3, the second paragraph of the legend for variable annuities registered on Form N–3 would state:

> The performance information below reflects contract fees and expenses that are paid by each investor. Each [Investment Option's] past performance is not necessarily an indication of future performance. [201]

Because the investment experience of a variable contract investor will largely depend on his or her selection of portfolio companies (or investment options in the case of a variable annuity registered on Form N–3), we believe it is important for investors to receive an overview of the portfolio companies and investment options available under the contract in a uniform tabular presentation that promotes comparison.[202]

Investors in contracts registered on Forms N–4 and N–6 currently receive portfolio company prospectuses at or shortly after the point of sale, as well as each portfolio company's updated prospectus each year. As discussed below, we are proposing an optional delivery method, which would permit satisfaction of any portfolio company prospectus delivery obligations if the portfolio company summary and statutory prospectuses are posted at the website address specified on the variable contract summary prospectus.[203] The appendix is designed to complement the portfolio company prospectuses in a layered disclosure approach to provide the investor with an ability to choose the amount and type of information he or she prefers to review.

Alternatively, for variable contracts registered on Form N–3, registrants could omit the required appendix and instead provide more detailed disclosures for the investment options offered under the contract that would be required by proposed Item 20 of Form N–3.[204] Proposed Item 20 would require narrative disclosure for each investment option regarding its investment objectives and principal investment strategies, principal risks of investing in the investment option, and a bar chart and table showing the performance of the investment option modeled after the risk/return bar chart and table that Form N–1A currently requires.[205]

We request comment generally on the appendix that we propose would appear in the initial summary prospectus, and specifically on the following issues:

- Are the requirements of the proposed appendix, and the associated proposed instructions, clear and appropriate in light of the goals of the initial summary prospectus? Should we modify them in any way?
- Would the information included in the appendix and its proposed tabular presentation be useful to investors in connection with the initial purchase of a variable contract? Would other or additional information, or a different presentation, be more useful to investors?
- Are the particular disclosure items that we have proposed for inclusion in the appendix useful and appropriate for consideration by investors, or should we revise, supplement, or replace those items? Alternatively, or in addition, should we require any other disclosures contemplated by rule 482 (*e.g.,* a legend providing certain statements about the performance data and certain information about sales loads or performance fees)? [206]

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[193] *See* Instructions 2–5 to proposed Item 19 of Form N–3; Instructions 2–5 to proposed Item 18 of Form N–4; Instructions 2–5 to proposed Item 18 of Form N–6.

For purposes of this discussion, we use the term ''portfolio company'' throughout, even though the appendix for Form N–3 registrants would use the term ''investment option.''

[194] *See* Instruction 1(b) to proposed Item 19 of Form N–3; Instruction 1(a) to proposed Item 18 of Form N–4; Instruction 1(a) to proposed Item 18 of Form N–6.

[195] *See* Instruction 1(c) to proposed Item 19 of Form N–3; Instruction 1(c) to proposed Item 18 of Form N–4; Instruction 1(c) to proposed Item 18 of Form N–6.

[196] *See* proposed Item 19 of Form N–3; proposed Item 18 of Form N–4; proposed Item 18 of Form N–6; proposed rule 498A(b)(5)(ix).

[197] For registrants on Forms N–4 and N–6, the legend would read as follows:

''Before you invest, you should review the prospectuses for the [Portfolio Companies]. These prospectuses contain more information about the [Portfolio Companies] and their risks and may be amended from time to time. You can find the prospectuses and other information about the [Portfolio Companies] online at [____]. You can request this information at no cost by calling [____] or by sending an email request to [____].''

See Instruction 1(b) to proposed Item 18 of Forms N–4 and N–6. Registrants on Forms N–4 and N–6 not relying upon rule 498A(j) with respect to the portfolio companies that are offered under the contract may, but would not be required to, provide the next-to-last sentence of the first paragraph of the introductory legend to the table regarding online availability of the prospectuses.

[198] For registrants on Form N–3, the legend would read as follows:

''More information about the [Investment Options] is available in [the Statutory Prospectus for the Contract], which can be requested at no cost by following the instructions on [the front cover page or beginning of the Summary Prospectus].''

See proposed rule 498A(b)(5)(ix).

[199] *See* Instruction 1(b) to proposed Item 18 of Forms N–4 and N–6; proposed rule 498A(b)(5)(ix).

[200] *See* proposed Item 18 of Form N–4; proposed Item 18 of Form N–6.

[201] *See* proposed Item 19 of Form N–3.

[202] In the context of participant-directed individual account plans under the Employee Retirement Income Security Act of 1974 (which, similar to variable contracts, are long-term, tax-advantaged investment vehicles whereby the investor may direct his or her investment among investment alternatives), a similar disclosure requirement applies. *See* 29 CFR 2550.404a 5(d).

[203] *See infra* section II.B.

[204] *See* proposed rule 498A(b)(5)(ix).

[205] *See* text following note 525 (discussing proposed Item 20 of Form N–3); *see also* Item 4(b)(2) of Form N–1A.

[206] *See* rule 482(b)(3) (requiring, among other things: (1) A legend disclosing that the performance data quoted represents past performance; that past performance does not guarantee future results; that the investment return and principal value of an investment will fluctuate so that an investor's shares, when redeemed, may be worth more or less

Continued

• The proposed instructions would provide that if the availability of one or more portfolio companies varies by benefit offered under the contract, registrants must include as another appendix a separate table indicating which portfolio companies were available under each of those benefits. Should this information be provided in a separate table? Why or why not? Are there ways to present this information in a more streamlined and comprehensible manner for investors? If so, how?

• Under our proposal, an initial summary prospectus for a contract registered on Form N–3 could omit the appendix and instead include the more detailed disclosures about the investment options offered under the contract that would be required by proposed Item 20 of Form N–3. Alternatively, in order to increase comparability between initial summary prospectuses, should the appendix be required to be included in all initial summary prospectuses for contracts registered on Form N–3? Conversely, should the initial summary prospectus be required to contain the more detailed disclosures that would be required by proposed Item 20 of Form N–3?

d. General Requests for Comment on the Initial Summary Prospectus

In addition to the specific requests for comment above on the proposed scope and content requirements of the initial summary prospectus, we also request comment generally on the initial summary prospectus, and specifically on the following issues:

• Is an initial summary prospectus an appropriate vehicle to highlight the importance of key terms, benefits, and risks of a variable contract? What are the key considerations for an initial investment in the contract? Does the proposed initial summary prospectus capture key considerations that a typical contract investor would find salient? Should an initial summary prospectus include additional information an investor would need in order to make an informed investment decision, and if so, what would this information be? Would this defeat our goal of providing investors a succinct summary?

• Should we exclude any of the proposed initial summary prospectus disclosure? Should we require any additional information to appear in the initial summary prospectus, such as from the contract's statutory prospectus, SAI, or Part C (''Other Information'') of the registration statement?

• We are proposing to require an initial summary prospectus to contain the information required by the proposed rule, and only that information, in a specified order to facilitate comparability (similar to the mutual fund summary prospectus model). Should all items in the initial summary prospectus be presented in the same order, under the headings that the proposed rule specifies? Would this promote comparability across products, and is comparability as feasible for variable products as it is mutual funds? Why or why not? If the items are not listed in the same order, could investors or investment professionals still easily compare different variable contracts? Is the proposed order appropriate, or should we consider a different order? Should the rule require ordered navigation links for electronic versions of the summary prospectus?

• Should we, as proposed, limit the information to be included in the initial summary prospectus, or should we allow registrants to include other information that is not specifically called for? We recognize that variable contracts are complex investment products, and some may have product features that are not contemplated by the current disclosure items. Should we permit registrants to disclose information not specifically required by the proposed rule to provide sufficient flexibility for the disclosure of future product developments or otherwise enhance disclosures to investors? Would that undermine the goal of comparability, or contribute to investor confusion? Are there other ways we could provide this flexibility?

• Should we impose any page or word limits on the initial summary prospectus (*e.g.,* 10 pages or 2,500 words)? If so, what should the page or word limits be (*e.g.,* how many pages or words, and should these limits apply to the whole initial summary prospectus or include or exclude certain sections of it)? Would page or word limits disadvantage certain types of registrants (*e.g.,* variable contracts that offer a relatively high number of optional benefits) over others, or unduly limit investors' ability to receive important disclosure information? Are there other ways we could encourage concise and investor-friendly disclosure?

• Is the information that we propose to require in the body or appendix of the initial summary prospectus appropriate? Should we include any additional information or eliminate any of the information that we have proposed to include? Should any information in the body (*e.g.,* the ''Additional Information About Fees'' section) be moved from the body to an appendix or vice versa?

• Would investors be more likely to read an initial summary prospectus if we required the use of certain design elements—such as larger font sizes or greater use of white space, colors, or visuals—or provided additional guidance on such design elements? If so, what should this disclosure requirement be? Would any of the proposed content requirements particularly benefit from the use of such design elements?

• Should registrants creating electronic versions of the initial summary prospectus be required to include active hyperlinks for website addresses referenced in the electronic version, as would be required under our proposal? What concerns would be raised, if any, if those website addresses were third-party websites? Should registrants creating electronic versions of the initial summary prospectus be required to include active hyperlinks for any cross-references, as would be required under our proposal?

• Should registrants creating electronic versions of the initial summary prospectus be allowed to use alternatives to any tabular presentations, such as the table(s) included in Appendix: Portfolio Companies/Investment Options Available Under the Contract, provided the information is presented in an easy to read and comparable manner? If so, should there be additional conditions on the use of these alternatives? What should those conditions be?

• Should we offer registrants greater flexibility to design summary prospectuses that can be viewed on mobile devices, are interactive, have audio or video features, or otherwise make use of technology and research about effective disclosure methods? If so, how can we allow flexibility while ensuring that investors receive the information they need to make their investment decisions?

• To what extent is the information proposed to be required in the initial summary prospectus duplicative of information provided in other point-of-sale disclosure documents (including those required under other regulatory regimes)?

• Would the initial summary prospectus, as proposed, appropriately complement current disclosure practices by not unnecessarily duplicating disclosure topics investors receive through other channels, and

than their original cost; that current performance may be lower or higher than the performance data quoted; and (2) if a sales load or any other nonrecurring fee is charged, the maximum amount of the load or fee, and if the sales load or fee is not reflected, a statement that the performance data does not reflect the deduction of the sales load or fee, and that, if reflected, the load or fee would reduce the performance quoted).

highlighting key risks that investors may not learn about through other channels?

• Are there any aspects of the initial summary prospectus that should be made to conform to parallel provisions in the updating summary prospectus or potential changes to those proposed parallel provisions? Conversely, are there any potential changes to the proposed updating summary prospectus that should not be made to the proposed initial summary prospectus?

• Is the hypothetical initial summary prospectus in Appendix A useful and illustrative of the proposed requirements? Does it appropriately show the level of detail that firms might provide, and are any of the design elements that the hypothetical initial summary prospectus uses particularly effective (or if they could be made more effective, how so)?

2. Updating Summary Prospectus

a. Overview

Today, variable contract investors are typically sent a copy of the updated current contract statutory prospectus each year.[207] Proposed rule 498A would permit a person to satisfy contract prospectus delivery obligations with respect to existing investors by sending or giving an updating summary prospectus in lieu of the statutory prospectus.[208]

We are not proposing that registrants send an updated initial summary prospectus to investors each year, due in part to the cost to maintain and update separate initial summary prospectuses for currently-offered variable contracts and those no longer offered. Additionally, we believe that existing investors would benefit more from a brief summary of the changes to the contract reflected in the statutory prospectus than to the disclosures in the initial summary prospectus, which is designed for someone making an initial investment decision.

We have therefore designed the updating summary prospectus to provide a brief description of any important changes with respect to the contract that occurred within the prior year, which will allow investors to better focus their attention on new or updated information relating to the contract. Additionally, the updating summary prospectus would include certain of the information required in the initial summary prospectus that we consider most relevant to investors when making additional investment decisions or otherwise monitoring their contract.

Finally, a registrant may only use an updating summary prospectus if it uses an initial summary prospectus for each currently offered contract described under the contract statutory prospectus to which the updating summary prospectus relates.[209] We believe that making the use of the updating summary prospectus contingent on use of the initial summary prospectus for each currently offered contract will encourage registrants to utilize the summary prospectus framework and provide a more consistent disclosure experience to investors.

b. Scope of Disclosure To Be Included in Updating Summary Prospectus

The proposed rule would permit the updating summary prospectus to describe one or more contracts covered in the statutory prospectus to which the updating summary prospectus relates.[210] This scope is different than the initial summary prospectus, which the proposed rule would limit to only describing a single contract that the registrant currently offers for sale.[211] Similar to the initial summary prospectus, however, the proposed rule also would permit an updating summary prospectus to describe more than one class of a contract.[212]

Given the limited subset of information provided in the updating summary prospectus, we believe permitting registrants to combine multiple contracts would not cause investor confusion in the same way that combining disclosure about multiple contracts in the initial summary prospectus might. Furthermore, we understand that there are generally not a significant number of changes that occur to an individual contract year-over-year, and many of those changes (such as changes to the available portfolio companies or the addition of new optional benefits) typically apply across multiple contracts described in the same prospectus. We therefore believe the section describing contract changes, even if changes to multiple contracts are included, would not be overly lengthy, and would not prevent investors from reading or understanding the applicable disclosures.[213] Finally, combining multiple contracts could make the updating summary prospectus significantly more efficient for registrants to produce and distribute.[214]

We request comment generally on the proposed scope requirements for the updating summary prospectus, and specifically on the following issues:

• Is it appropriate to permit the updating summary prospectus to include multiple contracts under the statutory prospectus to which the updating summary prospectus relates? Would this approach promote operational efficiency? What other benefits would this approach entail? What drawbacks would this approach entail? Would this approach discourage investors from reading the updating summary prospectus? Would it confuse investors, and if so, should the proposed rule incorporate any additional provisions (or should we issue guidance) to help mitigate potential confusion? Would it prevent investors from reading or understanding the disclosures, and if so, what additional rule provisions or guidance could help mitigate this? Would the proposed disclosure requirement make clear to an investor whether a particular disclosure about year-over-year changes applies to that investor's contract? Should we require that an updating summary prospectus that includes disclosure about multiple contracts be formatted or presented in a certain way to help promote clarity to investors regarding whether a particular disclosure in the document concerns an investor's particular contract? Are there any other additions to the updating summary prospectus that would help promote clarity to investors on this point?

• Alternatively, what would be the benefits of requiring registrants to create a separate updating summary prospectus for each contract, similar to the requirement for the initial summary prospectus? Would this alternate approach be operationally burdensome, and if so, why? Would it enhance investor understanding? Would it reduce investor confusion?

• Should we restrict the number of contract classes that may be described in an updating summary prospectus? Why or why not?

c. Preparation of the Updating Summary Prospectus

The following chart outlines the information that would be required in an updating summary prospectus under proposed rule 498A. Along with specifying required cover page

[207] As discussed above, investors generally must be provided with a prospectus when they make additional purchase payments or reallocate variable contract value. *See supra* notes 27 through 29 and accompanying text. We are proposing to provide that an updating summary prospectus that complies with the rule will be deemed to be a prospectus that is permitted under section 10(b) of the Securities Act and section 24(g) of the Investment Company Act for the purposes of section 5(b)(1) of the Securities Act.

[208] Proposed rule 498A(c).

[209] Proposed rule 498A(c)(1).

[210] Proposed rule 498A(c)(2).

[211] *See supra* section II.A.1.b.

[212] Proposed rule 498A(c)(2); *see also supra* section II.A.1.b (an initial summary prospectus also can describe more than one class of a currently-offered contract).

[213] A registrant generally should indicate in this section, to the extent appropriate, whether certain described contract changes are only applicable to certain contracts in the statutory prospectus.

[214] Multiple updating summary prospectuses (with very similar sounding names) could also make it difficult for investors to locate their specific updating summary prospectus on the insurer's website.

disclosures, the proposed rule references particular disclosure items from Forms N–3, N–4, and N–6 (as proposed to be amended). The information would be required to appear in the same order, and under the relevant corresponding headings, as the proposed rule specifies.[215]

TABLE 3—OUTLINE OF THE UPDATING SUMMARY PROSPECTUS

Heading in updating Summary prospectus	Proposed item of Form N–3	Proposed item of Form N–4	Proposed item of Form N–6
Cover Page:			
Identifying Information			
Legends			
EDGAR Contract Identifier			
Table of Contents (optional)			
Content:			
Updated Information About Your Contract			
Important Information You Should Consider About the [Contract]	3	3	3
Appendix: Portfolio Companies Available Under the Contract	19 or 20[216]	18	18

i. Cover Page and Table of Contents

Identifying Information. Under the proposed rule, the following information would be required to appear on the front cover page or at the beginning of the updating summary prospectus:

- The depositor's name;
- the registrant's name;
- the name of the contract(s), and the class or classes, if any, to which the updating summary prospectus relates;
- a statement identifying the document as an ''Updating Summary Prospectus''; and
- the approximate date of the first use of the updating summary prospectus.[217]

Legend. The cover page or beginning of the updating summary prospectus would be required to include the following legend:

You should read this Summary Prospectus carefully, particularly the section titled Important Information You Should Consider About the [Contract].

An updated prospectus for the [name of Contract] is currently available online, which contains more information about the [Contract], including its features, benefits, and risks. You can find the prospectus and other information about the [Contract] online at [____]. You can also obtain this information at no cost by calling [____] or by sending an email request to [____].[218]

Additional general information about certain investment products, including [variable annuities/variable life insurance contracts], has been prepared by the Securities and Exchange Commission's staff and is available at *Investor.gov*.[219]

Like the cover page or beginning of the initial summary prospectus, the cover page or beginning of the updating summary prospectus would be required to include identifying information about the variable contract, as well as a legend including certain general information that would be applicable to all variable contracts. The portions of the proposed legend that describe how to obtain further information about the contract, as well as the *Investor.gov* website, are identical to the parallel portions of the legend that would appear on the cover page or beginning of the initial summary prospectus.[220] As with the initial summary prospectus, a registrant could modify this required legend so long as the modified legend includes comparable information.[221] Similar to the initial summary prospectus, if a registrant incorporates any information by reference into the updating summary prospectus, the proposed rule would require the registrant to include in the legend certain information about the document(s) from which the information was incorporated.[222] Like the initial summary prospectus, the cover page for the updating summary prospectus would also be required to include a legend indicating that the Securities and Exchange Commission has not approved or disapproved of the contract or the summary prospectus.[223]

We do not believe that the free look period legend that would appear on the cover page or beginning of the initial summary prospectus would be appropriate in the context of the updating summary prospectus, because the free look period is not applicable to additional investments after the initial purchase.

EDGAR Contract Identifier. We are also proposing to require that the EDGAR contract identifier for each contract covered by the updating summary prospectus be included on the bottom of the back cover page or last page of the updating summary prospectus in a type size smaller than that generally used in the prospectus (*e.g.,* 8-point modern type).[224]

Table of Contents. The proposed rule would permit an updating summary prospectus, like the initial summary prospectus, to include a table of contents.[225] A table of contents must show the page number of the various sections or subdivisions of the prospectus and must immediately follow the cover page in any prospectus delivered electronically.[226]

We request comment generally on the proposed requirements for the cover page of the updating summary prospectus, and specifically on the following issues:

- Is the information that we propose to require on the cover page or beginning of the updating summary prospectus appropriate? Should we include any additional information or eliminate any of the information that we have proposed to include in these parts of the updating summary prospectus?
- Is the proposed legend sufficient to notify investors of the availability and significance of the contract statutory prospectus and other information about the variable contract and how to obtain this information? For example, should the legend

[215] Proposed rule 498A(c)(6).

[216] Registrants on Form N–3 could omit the appendix specified by proposed Item 19 of Form N–3, and instead provide the more detailed disclosures about the investment options offered under the contract required by proposed Item 20 of Form N–3. *See infra* note 517 and accompanying text.

[217] Proposed rule 498A(c)(3)(i) through (v).

[218] *See supra* note 79 (discussing requirements of the registrant's internet address and contact information).

[219] Proposed rule 498A(c)(3)(vi).

[220] Proposed rule 498A(b)(2)(vi); *see also supra* note 79. The legend in the updating summary prospectus would note that ''an updated prospectus'' is available online, whereas the initial summary prospectus would note that it summarizes key features of the contract.

[221] Proposed rule 498A(c)(3)(vi); *see also* proposed rule 498A(b)(2)(vi)(A).

[222] *See infra* section II.A.6.

[223] Proposed rule 498A(c)(3)(vii); *see also supra* note 86.

[224] Proposed rule 498A(c)(4). As in the case of the initial summary prospectus, this requirement is intended to enable Commission staff and others to more easily link the updating summary prospectus with other filings associated with the contract.

[225] Proposed rule 498A(c)(5).

[226] Rule 481(c).

include greater detail about the information that is available?

- Does the proposed legend adequately inform investors of the various means for obtaining additional information about a variable contract? For example, are the proposed requirements for the website address where additional information is available adequate to ensure that the website and the additional information will be easy to locate?
- As proposed, should we permit registrants to modify the required legend, provided the modified legend includes comparable information?
- Should the requirement in proposed rule 498A to include the EDGAR contract identifier for each contract covered by the updating summary prospectus on the bottom of the back cover page or last page of the updating summary prospectus be revised to list another identifier? If so, what identifier should be listed, and why?
- Should registrants be permitted to include a table of contents in the updating summary prospectus? Instead, should a table of contents be required for any updating summary prospectus? Does rule 481(c) under the Securities Act provide appropriate requirements for a table of contents included in an updating summary prospectus?

ii. Content of the Updating Summary Prospectus

Proposed rule 498A specifies the content and order thereof required in an updating summary prospectus.[227] An updating summary prospectus must contain the information required by the proposed rule in the specific order detailed in section II.A.2.c. Similar to the initial summary prospectus and the summary prospectus for mutual funds, adhering to these content requirements is one condition that an updating summary prospectus must satisfy in order to be deemed to be a prospectus that is permitted under section 10(b) of the Securities Act and section 24(g) of the Investment Company Act for the purposes of section 5(b)(1) of the Securities Act.[228] To aid market participants in understanding the types of disclosures we propose to require, Appendix B to this release contains a hypothetical updating summary prospectus for a variable annuity separate account with a registration statement filed on Form N–4. This hypothetical updating summary prospectus is provided solely for illustrative purposes and is not intended to imply that it reflects a ''typical'' updating summary prospectus.

(a) Description of Changes to the Contract

The updating summary prospectus would be required to include a concise description of any change with respect to the contract made after the most recent updating summary prospectus or statutory prospectus was sent or given to investors that has affected the availability of portfolio companies (or investment options under a variable annuity registered on Form N–3) under the contract,[229] or the statutory prospectus disclosure relating to the Fee Table,[230] the standard death benefit,[231] and the other benefits available under the contract.[232] The updating summary prospectus also could include a concise description of any other changes to the contract that the registrant wishes to disclose, provided they occurred within the same time period.[233]

These contract changes would be described under the heading ''Updated Information About Your [Contract].'' [234] This legend would be required to follow the heading:

> The information in this [Updating Summary Prospectus] is a summary of certain [Contract] features that have changed since the [Updating Summary Prospectus] dated [date]. This may not reflect all of the changes that have occurred since you entered into your Contract.[235]

We designed this disclosure requirement in light of the fact that disclosures in a contract statutory prospectus do not change frequently, and we believe providing investors with notice and a brief description of any changes that do occur may be more informative than repeating all the disclosures year-over-year. We believe that notice of these changes is particularly helpful, given that currently investors must determine which, if any, disclosures relevant to their particular contract have changed each year they receive the contract statutory prospectus. After receiving notice and a brief description of certain changes, an investor who then wishes to obtain more information on specific changes can consult the contract statutory prospectus to review related disclosures in more detail. We believe that highlighting certain key changes with respect to the contract in the updating summary prospectus will provide important information to investors that they can use in considering whether to continue making additional purchase payments or reallocate contract value.

We would require the disclosure of changes with respect to these particular disclosure topics (Fee Table, the standard death benefit, other benefits available under the contract, and portfolio companies available under the contract) because these are the areas where we understand contract-related changes are most likely to occur, and that may be of most interest to investors. We believe that permitting—but not requiring—a concise description of any additional changes will provide flexibility to registrants to highlight for investors any additional changes. The requirement to disclose contract-related changes to investors is particularly relevant for variable contracts, since the length of statutory prospectus disclosure may hinder investors in identifying important year-over-year changes to contract features.

In providing a concise description of a contract-related change in the updating summary prospectus, registrants must provide enough detail to allow investors to understand the change and how it will affect them.[236] For example, this could include stating that a fee has changed from 1.5% to 1.7%, rather than stating that the fee has changed or increased, or specifically identifying each optional benefit that has changed (with a brief explanation of how), rather than generically stating that certain optional benefits are new or no longer available. As another example, if a portfolio company's expense ratio has changed, a registrant generally should describe this in the body of the updating summary prospectus even though expense ratio information would also appear in the required appendix to the updating summary prospectus, in order to highlight this change to investors.

We request comment generally on the brief description of certain contract-related changes that we propose would appear in the updating summary prospectus, and specifically on the following issues:

- Would this proposed disclosure requirement be useful to investors? Would understanding the information that would appear in an updating summary prospectus in response to the proposed requirement be

[227] Proposed rule 498A(c)(6).

[228] *See supra* note 93.

[229] Proposed rule 498A(c)(6)(i). A change that has affected availability of portfolio companies (or investment options) would include changes in the portfolio companies (or investment options) offered under the contract or available in connection with any optional benefit. *See also* proposed Item 19 of Form N–3, and proposed Item 18 of Forms N–4 and N–6.

[230] Proposed rule 498A(c)(6)(i); *see also* proposed Item 4 of Forms N–3, N–4, and N–6.

[231] Proposed rule 498A(c)(6)(i); *see also* proposed Item 11 of Forms N–3; proposed Item 10 of Forms N–4 and N–6.

[232] Proposed rule 498A(c)(6)(i); *see also* proposed Item 12 of Forms N–3; proposed Item 11 of Forms N–4 and N–6.

[233] Proposed rule 498A(c)(6)(ii). Any additional information included should not, by its nature, quantity, or manner of presentation, obscure or impede understanding of the information that the proposed rule would require.

[234] Proposed rule 498A(c)(6)(i).

[235] Proposed rule 498A(c)(6)(i)(A).

[236] Proposed rule 498A(c)(6)(i)(B).

relevant and helpful to an investor who is considering whether to continue making additional purchase payments, or reallocate contract value? Would disclosure of changes to multiple contracts confuse the reader or discourage reading the document, and if so, what additional rule provisions or guidance could help mitigate this?

- Is the scope of changes that a registrant may discuss in the updating summary prospectus appropriate? Are there other topics that should be described in the updating summary prospectus (*e.g.,* changes that affect the contract's risks or potential conflicts of interest)? Should the proposed rule instead require a registrant to provide a concise description of ''significant changes,'' ''material changes,'' or some other standard instead of prescribing specific disclosure topics? Is there a better way of identifying these specific disclosure topics, and if so, what would this be?
- Is it appropriate to allow registrants to discuss any other changes that have been made to the contract during the same time period in this section? Should registrants also be allowed to discuss matters that do not directly involve the contract (*e.g.,* upcoming tax law changes or merger and acquisition activity involving the registrant)? Why or why not?
- Is the proposed requirement that a registrant include a ''concise description'' of each change clear and appropriate? Would registrants understand what level of disclosure they should include? Would any additional clarification in the rule text or Commission guidance be helpful?

(b) Key Information

The updating summary prospectus also would be required to include the same Key Information Table that would appear in the initial summary prospectus.[237] As discussed above, this table would streamline certain important concepts about the variable contract in a presentation that is designed to be easy to read and navigate.[238]

Because investors may make additional investments in the variable contract, we propose to require this disclosure in the updating summary prospectus to remind them of the contract's fees and expenses, risks, restrictions, tax implications, and investment professional compensation. Furthermore, we believe that an investor who continues to make investments in the variable contract (or to reallocate contract value)—not just an initial investor in the contract—should receive the benefit of this disclosure in a presentation that is intended to improve readability and readership.

Besides the brief description of contract-related changes and portfolio company/investment option appendix discussed below, an updating summary prospectus would include only this Key Information Table as summary disclosure about the contract's key information, and would not also include the additional disclosure that the initial summary prospectus would include (for example, additional information about standard and optional contract benefits, or the contract Fee Table). We believe this is appropriate in the context of an updating summary prospectus for several reasons.

First, unless the investor invested prior to the registrant relying on rule 498A, the investor already will have received the initial summary prospectus (and have had access to the statutory prospectus), which includes this extra detail. Additionally, the updating summary prospectus draws on layered disclosure concepts, where the investor can access the more detailed statutory prospectus electronically (or in paper format on request) to complement the disclosure included in the updating summary prospectus.

An updating summary prospectus that describes multiple contracts could contain a separate Key Information Table for each of the contracts, or use a different presentation approach that consistently discloses the required information for each contract in the required order. For example, if the only Key Information Table disclosure that would vary by contract were the fee information, a prospectus that describes multiple contracts could include a single Key Information Table that discloses separate fee information in the ''Fees and Expenses'' line-items for each contract.

We request comment generally on including the Key Information Table in the updating summary prospectus, and specifically on the following issues:

- Should we require including the proposed Key Information Table in the updating summary prospectus? Would this table provide a succinct summary of the contract's key information for investors who make ongoing purchase payments, or who reallocate contract value? If not, why not?
- Is the location of the proposed Key Information Table within the updating summary prospectus appropriate? If not, where should it be located?
- Should the table include, as proposed, the same line-items as the Key Information Table that would appear in the initial summary prospectus? Instead should we require a modified version of the table in the updating summary prospectus, and if so, how should we modify the table? For example, is it appropriate or necessary for the table that appears in the updating summary prospectus to include a line-item on investment professional compensation? Is it important to require the disclosure that investors should only exchange their contract if they determine, after comparing the features, fees, and risks of both contracts, that it is preferable for them to purchase the new contract rather than continue to own the existing contract?
- Should the presentation of the proposed table in the updating summary prospectus differ from the proposed presentation for the initial updating prospectus? If so, why, and what would be a better alternate presentation?
- Should we mirror the approach taken with the initial summary prospectus where cross-references in the Key Information Table for electronic versions of the updating summary prospectus would link directly to the location in the statutory prospectus where the subject matter is discussed in greater detail? If so, why? What would be a better approach?
- Are there any particular instructions for the Key Information Table that we should modify for the updating summary prospectus?

(c) Appendix: Portfolio Companies Available Under the Contract

Finally, the updating summary prospectus would be required to include an appendix, under the heading ''Appendix: [Portfolio Companies/Investment Options] Available Under the [Contract],'' that provides summary information about the portfolio companies offered under the contract.[239] This requirement for the appendix would be identical to the requirement for the appendix in the initial summary prospectus.[240] Like the proposed requirement for the initial summary prospectus appendix, Form N–3 registrants could omit this appendix and instead provide the more detailed disclosures about the investment options offered under the contract that would be required by proposed Item 20 of Form N–3.[241]

Because the selection of portfolio companies or investment options will directly affect the performance, and

[237] Proposed rule 498A(c)(6)(iii). This disclosure would be the same information required by Item 3 of Forms N–3, N–4, and N–6.

[238] *See supra* section II.A.1.c.ii.*(b).*

[239] Proposed rule 498A(c)(6)(iv). This information on portfolio companies or investment options would be the same information required by proposed Item 19 of Form N–3 and proposed Item 18 of Forms N–4 and N–6.

[240] Paralleling a similar requirement for the initial summary prospectus, if the appendix includes the information required by Item 19 of Form N–3, the appendix would also include the following introductory legend: ''The following is a list of [Investment Options] currently available under the [Contract], which is subject to change as discussed in the [Statutory Prospectus for the Contract]. More information about the [Investment Options] is available in [the Contract Statutory Prospectus], which can be requested at no cost by following the instructions on [the front cover page or beginning of the Summary Prospectus].'' *See* proposed Item 19 of Form N–3; proposed rule 498A(c)(6)(iv).

[241] *See* proposed rule 498A(c)(6)(iv); *see also* text following note 525 (discussing proposed Item 20 of Form N–3).

often the available optional benefits, of the contract, we believe that it is necessary to provide basic information about the portfolio companies to ongoing investors in variable contracts. This disclosure is intended to remind investors of one of the most important decisions they face during the life cycle of a contract—that is, whether and where to allocate additional purchase payments and reallocate contract value among the portfolio companies or investment options available to them.

We request comment generally on the appendix that we propose to require in the updating summary prospectus, and specifically on the following issues:

- Are the requirements of the proposed appendix clear and appropriate in light of the goals of the updating summary prospectus?
- Would the information that would be included in this appendix be useful to an investor who is considering whether to continue making additional purchase payments, or reallocate contract value? Would other or additional information be more useful to investors? For example, should the appendix identify portfolio companies that have been added, or portfolio companies that have been removed or closed to additional investment, during the period covered by the update?
- Should we, as proposed, permit a Form N–3 registrant to omit the appendix and instead include the more detailed disclosures about the investment options offered under the contract that would be required by proposed Item 20 of Form N–3? Are the considerations regarding the inclusion of the appendix in a Form N–3 registrant's updating summary prospectus the same or different as in the context of the initial summary prospectus?

d. General Requests for Comment on the Updating Summary Prospectus

In addition to the specific requests for comment above on the proposed content requirements and scope of the updating summary prospectus, we also request comment generally on the updating summary prospectus, and specifically on the following issues:

- Should we consider any alternative approaches to the proposed framework of two distinct summary prospectuses (the initial summary prospectus and the updating summary prospectus)? For example, should all variable contract investors receive a summary prospectus with identical content? As another example, should the proposed rule provide that only initial contract purchasers would receive a summary prospectus, and afterwards, investors who make additional purchase payments, or who reallocate contract value, would receive no summary prospectus (or receive only a notice that the statutory prospectus is available online)?
- Should we permit the use of an updating summary prospectus if a registrant does not use an initial summary prospectus for each currently offered contract described under the contract statutory prospectus to which the updating summary prospectus relates?
- Does the information in the proposed updating summary prospectus capture the information that is most likely to change from year to year, and that is most important for investors when considering whether to make additional purchase payments, or reallocate contract value? Should any of the information that we propose to require in the updating summary prospectus not be required? Should we require disclosure of any additional information (such as additional information that we propose to include in the initial summary prospectus) in the updating summary prospectus?
- Should we consider changing the proposed order in which the disclosure items would appear in the updating summary prospectus?
- Should we impose any page or word limits on the updating summary prospectus (*e.g.,* 10 pages or 2,500 words)? If so, what should the page or word limits be (*e.g.,* how many pages or words, and should these limits be on the whole updating summary prospectus or certain sections of it)? Are there other ways we could encourage concise and investor-friendly disclosure?
- Is the information that we propose to require in the body and appendix of the updating summary prospectus appropriate? Should we include any additional content requirements or modify or eliminate any of the content requirements? Should any information in the body be moved to an appendix, or vice versa?
- Would investors be more likely to read an updating summary prospectus if we required the use of certain design elements—such as larger font sizes or greater use of white space, colors, or visuals—or provided additional guidance on such design elements? Would any of the proposed content requirements particularly benefit from the use of such design elements?
- Would the updating summary prospectus, as proposed, appropriately complement current disclosure practices by not unnecessarily duplicating disclosure topics investors receive through other channels, and highlighting key risks that investors may not learn about through other channels?
- Should registrants creating electronic versions of the updating summary prospectus be required to include active hyperlinks for website addresses referenced in the electronic version, as would be required under our proposal? What concerns would be raised, if any, if those website addresses were third-party websites? Should registrants creating electronic versions of the initial summary prospectus be required to include active hyperlinks for any cross-references, as would be required under our proposal?
- Should we offer registrants greater flexibility to design summary prospectuses that can be viewed on mobile devices, are interactive, have audio or video features, or otherwise make use of technology and research about effective disclosure methods? If so, how can we allow such flexibility while still ensuring that investors receive the information they need to make their investment decisions?
- Are there any aspects of the updating summary prospectus that should be made to conform to parallel provisions in the initial summary prospectus or potential changes to those proposed parallel provisions? Conversely, are there any potential changes to the proposed initial summary prospectus that should not be made to the proposed updating summary prospectus?
- Is the hypothetical updating summary prospectus in Appendix B useful and illustrative of the proposed requirements? Does it appropriately show the level of detail that firms might provide?

3. Legal Effect of Use of Summary Prospectus for Variable Contracts

Section 5(b)(2) of the Securities Act makes it unlawful to carry or cause to be carried a security for purposes of sale or for delivery after sale ''unless accompanied or preceded'' by a statutory prospectus.[242] Proposed rule 498A would provide that, for variable contract securities in an offering registered on Forms N–3, N–4, or N–6, the use of a summary prospectus could satisfy this section 5(b)(2) obligation under certain conditions. As under rule 498, use of the summary prospectus to satisfy a registrant's section 5(b) obligation would be voluntary.[243]

First, a person relying on the proposed rule would be required to send or give a summary prospectus to an investor no later than the time of the ''carrying or delivery'' of the contract security.[244] This summary prospectus would be an initial summary prospectus in the case of an initial purchase of a variable contract, or an updating summary prospectus in the case of additional investments in a variable contract previously purchased.[245]

Second, the summary prospectus could not be bound together with any other materials, except that we are permitting portfolio company summary and statutory prospectuses to be bound together with the contract summary

[242] 15 U.S.C. 77e(b)(2) (stating that it shall be unlawful for any person to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of Securities Act section 10(a)); *see also supra* note 27 (noting that the term ''statutory prospectus'' means a prospectus that meets the requirements of section 10(a) of the Securities Act).

Because the requirements of section 5(b)(2) of the Securities Act are applicable to ''any person,'' its obligations are applicable to financial intermediaries through whom variable contracts are sold, as well as variable contract issuers.

[243] *See supra* notes 60 through 63 and accompanying text.

[244] *See supra* note 242 (discussing the prohibition against carrying or delivering a security without otherwise accompanying it or preceding it with a statutory prospectus).

[245] Proposed rule 498A(f)(1); *see also supra* note 207 and accompanying text.

prospectus,[246] subject to certain conditions.[247] Third, the summary prospectus also would be required to meet the proposed rule's content requirements for an initial summary prospectus or updating summary prospectus (as appropriate).[248] Finally, the initial summary prospectus, updating summary prospectus, contract statutory prospectus, and contract SAI must be publicly accessible, free of charge, on a website in the manner that the proposed rule specifies.[249] Failure to comply with any of these requirements would prevent a person from relying upon the proposed rule to meet its section 5(b)(2) prospectus delivery obligations. Absent satisfaction of the section 5(b)(2) obligation by other available means, a section 5(b)(2) violation would result.[250]

The proposed rule also would provide that a communication relating to an offering registered on Forms N–3, N–4, or N–6 that a person sends or gives after the effective date of a variable contract's registration statement (other than a prospectus that section 10 of the Securities Act permits or requires) would not be deemed a prospectus under section 2(a)(10) of the Securities Act if:

(1) It is proved that prior to or at the same time with such communication a summary prospectus was sent or given to the person to whom the communication was made;

(2) the summary prospectus meets the same binding requirements that we discuss in the immediately-preceding paragraph;

(3) the summary prospectus that was sent or given satisfies the requirements for the initial summary prospectus or the updating summary prospectus, as applicable; and

(4) the initial summary prospectus, updating summary prospectus, contract statutory prospectus, and contract SAI are publicly accessible, free of charge, on a website in the manner that the proposed rule specifies.[251]

Section 2(a)(10) of the Securities Act provides that certain communications accompanied or preceded by a statutory prospectus are not deemed to be ''prospectuses'' for purposes of the Securities Act.[252] This provision of the proposed rule, which is modeled on a corresponding provision of rule 498,[253] extends similar treatment to communications accompanied or preceded by a summary prospectus if all the provision's conditions are met. These communications remain subject to the general antifraud provisions of the federal securities laws.[254]

Because we believe that all investors should receive the benefit of the succinct, investor-friendly disclosure that is included in the variable contract summary prospectus, all of the disclosure items that would appear in the summary prospectus also would be required to appear in the statutory prospectus. In that respect, all variable contract investors, regardless of whether the product they choose has a summary prospectus, would have the benefit of improved disclosures in the statutory prospectus.

We request comment generally on the proposal to permit a new option for prospectus delivery for variable contracts, and specifically on the following issues (in addition, we are requesting comment on certain parallel provisions of rule 498):

- Should we permit a person to satisfy its prospectus delivery obligations under the Securities Act with respect to variable contracts in the manner provided in the proposed rule? Would this approach provide investors with material information about the variable contract while providing adequate protections?
- Are there other delivery approaches that would be more effective than the proposed approach? For example, should we permit a person to satisfy its prospectus delivery obligations by filing a statutory prospectus with the Commission and by posting it online without using a summary prospectus?
- Is the proposed approach appropriate given the current demographics of variable contract investors? For example, does the proposed approach adequately protect investors who have no internet access or limited internet access or who prefer not to receive information about their variable contract investments over the internet? As another example, given the high percentage of investors who use an investment professional when purchasing a variable contract (and who might learn about the contract through discussions with investment professionals), is there another approach that would be more effective? Should we make any other changes with respect to prospectus delivery obligations? Does the proposed approach appropriately balance the objectives of the proposed summary prospectus framework with protecting investors who have no or limited access to the internet?
- Should investors have the ability to opt out of the rule permanently and thereafter receive a paper copy of any statutory prospectus? How could this be implemented in practice? For example, how would a registrant that had no prior relationship with an investor be apprised of the investor's decision to opt out?
- The proposed rule would not permit the summary prospectus to be bound together with any materials other than prospectuses for the portfolio companies that are available under the contract. This approach is modeled on rule 498(c). Do registrants currently rely on rule 498(c) to bind the variable contract's statutory prospectus with the prospectuses or summary prospectuses for the underlying portfolio companies? Since reliance on the proposed rule would be optional, should we continue to permit binding to be consistent with rule 498(c)? Since we anticipate that most registrants will rely on the optional delivery method for portfolio company prospectuses as described in section II.B below, should the rule permit a variable contract summary prospectus to be bound with prospectuses and summary prospectuses of portfolio companies, or is such a provision unnecessary?
- Under proposed rule 498A, use of the summary prospectus would be voluntary. Should we make use of the summary prospectus regime mandatory for all variable contract registrants? If so, why? Would inconsistent use of the summary prospectus create confusion, or make comparison of variable contract products more difficult for investors? Would a mandatory approach adequately protect investors who have no or limited internet access or who prefer not to receive information about their investments over the internet? Should we first adopt the voluntary summary prospectus regime and consider whether the summary prospectus should be mandated in the future, and if so, what methods or approaches should we consider? What would be registrants' primary considerations in determining whether to adopt the proposed voluntary summary prospectus regime? Would registrants be more likely to adopt the regime if the portions of the statutory prospectus that are also summary prospectus disclosures were segregated and placed at the beginning of the statutory prospectus?
- If we were to adopt a summary prospectus framework for variable contracts,

[246] Proposed rule 498A(f)(2).

[247] Proposed rule 498A(f)(2)(i) and (ii). The rule would permit binding these materials together so long as: (1) All of the underlying portfolio companies whose prospectuses are bundled together are available to the investor to whom they are sent or given; and (2) a table of contents identifying each portfolio company summary and/or statutory prospectus that is bound together (and the page number on which each document is found), is included at the beginning or immediately following a cover page of the bound materials.

[248] Proposed rule 498A(f)(3).

[249] Proposed rule 498A(f)(4) (in addition, a Form N–3 registrant would also be required to post its most recent annual and semi-annual reports to shareholders to the website); *see also infra* section II.A.4.

[250] As discussed below, the proposed rule also includes additional requirements (such as the requirement to send a copy of the contract statutory prospectus upon request) whose violation would result in a violation of the proposed rule, but would not result in a violation of section 5(b)(2). *See infra* note 298 and accompanying text.

[251] Proposed rule 498A(g).

[252] Section 2(a)(10) of the Securities Act [15 U.S.C. 77b(a)(10)(a)] provides that a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of section 10) shall not be deemed a prospectus if it is proved that prior to or at the same time with the communication a written prospectus meeting the requirements for a statutory prospectus at the time of the communication was sent or given to the person to whom the communication was made.

[253] *See* rule 498(d).

[254] *See, e.g.,* section 17(a) of the Securities Act [15 U.S.C. 77q(a)]; section 10(b) of the Exchange Act [15 U.S.C. 78j(b)]; section 34(b) of the Investment Company Act [15 U.S.C. 80a-33(b)].

how should we evaluate the effectiveness of the new framework? What methods or approaches should we use to evaluate the rule, and what areas of the new framework should we focus on in any such review?

- Should registrants that elect to rely on rule 498A be required to send current investors a notice explaining the new delivery approach before sending the first updating summary prospectus? Would investors benefit from receiving such a notice? If so, should investors receive a separate notice about the transition, or should different methods of notifying investors be permitted? For example, should registrants be permitted to add the notice as an insert or legend to other documents they are already sending investors?

4. Online Accessibility of Contract Statutory Prospectus and Certain Other Documents Relating to the Contract

The proposed rule would permit investors who receive a succinct, user-friendly initial or updating summary prospectus to access more detailed information about the variable contract, either by reviewing the information online, or by requesting the information to be sent in paper or electronically. These provisions parallel provisions in the rule governing the use of mutual fund summary prospectuses.[255] In our experience, layered disclosure for mutual funds has benefitted both investors and registrants, and we are proposing a similar framework for variable contracts. We believe that permitting variable contract investors to access the contract statutory prospectus in several ways (online and by physical or electronic delivery) maximizes the accessibility and usability of the information, as indicated by investors' preference for access to both online and paper resources.[256]

a. Required Online Contract Documents

Under the proposal, a variable contract's current initial summary prospectus, updating summary prospectus, statutory prospectus, and SAI, and, in the case of a registrant on Form N–3, the registrant's most recent annual and semi-annual reports to shareholders under rule 30e–1 under the Investment Company Act (together, the ''required online contract documents''), would be required to be available online. This approach operationalizes the layered disclosure framework that undergirds the proposed rule, with the summary prospectus provided in paper (or electronically) to investors, and additional information about the contract securities available online. The required online contract documents generally comprise the same set of documents that the mutual fund summary prospectus rules require to be posted online, and provide additional important detail about the contract that investors can access if they wish. The required online contract documents only reference the registrant's annual and semi-annual shareholder reports for Form N–3 registrants because Form N–4 and Form N–6 registrants do not have their own shareholder reports, but instead transmit the portfolio companies' annual and semi-annual shareholder reports to the investors in their trust accounts.

As with similar provisions in the mutual fund summary prospectus rule, these required online contract documents would be required to be publicly accessible, free of charge, at the website address that the cover page of the summary prospectus specifies, on or before the time that the person relying on the proposed rule provides the summary prospectus to investors.[257] Moreover, a current version of each of the required online contract documents would be required to remain on that website for at least 90 days following either:

- The time of the ''carrying or delivery'' of the contract security if a person is relying on the proposed rule to satisfy its section 5(b)(2) prospectus delivery obligations; or
- If a person is relying on the proposed rule to send communications that will not be deemed to be prospectuses, the time that the person sends or gives the communication to investors.[258]

This requirement is designed to provide continuous access to the information from the time the summary prospectus is sent or given until at least 90 days after the date of delivery of a security or communication in reliance on the proposed rule. This is the timeframe for the availability of online information under the mutual fund summary prospectus rule, and we are proposing that it be the same in the proposed rule because of market participants' familiarity with this timeframe, and because there may be operational efficiencies for certain registrants in having the timeframe be the same under both summary prospectus frameworks. Moreover, we believe this proposed timeframe appropriately balances the costs of maintaining information online with investors' interests in having the flexibility to access this online information after receiving the summary prospectus (for example, if they would like to review a topic presented therein in more detail in the statutory prospectus that is available online, after they have had the opportunity to read and digest the summary prospectus).

b. Formatting Requirements for Required Online Contract Documents

The proposed rule would direct that the required online contract documents be presented in a manner that is human-readable and capable of being printed on paper in human-readable format.[259] This formatting requirement is a condition to reliance on the rule to satisfy a person's delivery obligations under section 5(b)(2) of the Securities Act and the provision that a communication shall not be deemed a prospectus under section 2(a)(1) of the Securities Act. The rule governing mutual fund summary prospectuses also requires this formatting approach.[260] The ''human-readable'' presentation requirement is designed to impose a minimum standard of usability comparable to that of a paper document, although we understand that the electronic version could include additional features that might enhance the usability of the electronic version relative to the paper version.[261] For example, regarding usability, all portions of the document should be human-readable such that when an investor views the document on an internet browser, the text does not get cut off based on the screen size.

In addition, the proposed rule would mandate that the online materials be presented in a format that is convenient for both reading online and printing on paper.[262] The failure to comply with these ''convenient for reading and printing'' formatting requirements would not, however, be a condition of reliance on the rule, because whether a particular format is convenient for

[255] *See* rule 498(c)(4), (d)(4), (e), and (f).

[256] *See* 2012 Financial Literacy Study, *supra* note 39, at iv, xix.

[257] Proposed rule 498A(h)(1); *see also* rule 498(e)(1).

[258] Proposed rule 498A(h)(1).

[259] Proposed rule 498A(h)(2)(i).

[260] Rule 498(e)(2)(i).

[261] As in the parallel provisions of the rule governing mutual fund summary prospectuses, the ''human-readable'' condition is intended to make clear that posted information must be presented in human-readable text, rather than machine-readable software code, when accessed through an internet browser and that it must be printable in human-readable text. This condition does not impose any further requirements relating to user-friendliness of the presentation. *See* 2009 Summary Prospectus Adopting Release, *supra* note 33, at 85; *see also infra* note 274 and accompanying and following text (discussing provisions that are meant to enhance investors' understanding of special terms when they view the summary prospectus online, as well as other technological tools associated with online disclosure (*e.g.,* fee calculators, pop-up explanations) that would present further opportunities to promote investor understanding).

[262] Proposed rule 498A(i)(3); *see also* rule 498(f)(3) (parallel provision in the rule governing the use of mutual fund summary prospectuses).

reading online and printing depends on a number of factors and must be decided on a case-by-case basis.[263] In order to provide certainty to market participants, we are therefore not proposing that this requirement be a condition of reliance on the rule, and thus the failure to comply with this requirement would not negate a person's ability to rely on the rule in order to satisfy a person's delivery obligations under section 5(b)(2) of the Securities Act.[264] Such a failure could, however, constitute a violation of Commission rules.

c. Linking Within and Between Documents

The proposed rule also includes requirements for linking within the electronic versions of the contract statutory prospectus and SAI that are available online, and also for linking between electronic versions of contract summary and statutory prospectuses that are available online.[265] The proposed requirements, which are substantively identical to parallel provisions in the rule governing mutual fund summary prospectuses,[266] are designed to promote the usability of the information that appears in these documents.

The first linking requirement would allow the reader to move directly between a table of contents of the contract statutory prospectus or SAI and the related sections of that document, by a single mouse click or mobile-device tap.[267] The second linking requirement would allow the reader to move back and forth between each section of the summary prospectus and any related section of the contract statutory prospectus and contract SAI that provides additional detail.[268] This back-and-forth movement could occur either directly from the summary prospectus to the relevant section of the statutory prospectus or SAI, or indirectly by linking from the summary prospectus to a table of contents in the statutory prospectus or SAI, in which case two mouse clicks or mobile-device taps would be required.[269]

d. Definitions of Special Terms, and Online Viewing of Special Terms

The summary prospectus content requirements reference information that is required to appear in the contract statutory prospectus, which in turn must be written using plain English principles.[270] We recognize, however, that it may be particularly challenging to accurately describe a variable contract without using certain terms that, while technically accurate, may be confusing or unfamiliar to retail investors.

Accordingly, the proposed rule would require a summary prospectus to define any ''special terms'' elected by the registrant, using any presentation that clearly conveys their meaning to investors.[271] This requirement reflects the proposed instructions in Forms N–3, N–4, and N–6 (as well as current, similar instructions in these forms to define ''special terms'' in a glossary or index).[272] The registrant would determine which terms would constitute special terms. We generally believe that a special term is a term with which a new contract investor typically may not be familiar, and that would be important for the investor to understand key features of the contract.

We believe the proposed requirement for special terms in the contract summary prospectus, like the current and proposed requirements for special terms in the contract statutory prospectus, is appropriate in the context of variable contracts, as variable contract disclosure documents tend to include industry-specific language in order to describe the sometimes complex features of these products.[273] Glossaries or other means of defining these terms could help a retail investor better understand these products' terms and features, as discussed further below.

In order to leverage technology to help investors understand the variable contract, the proposed rule includes provisions that are meant to enhance investors' understanding of special terms when they view the summary prospectus online. Specifically, the proposed rule would require that investors either be able to view the definition of each special term used in an online summary prospectus upon command,[274] or to move directly back and forth between each special term and the corresponding entry in any glossary or list of definitions that the summary prospectus includes.[275] This approach, which today is a common convention for many electronically-available documents, is an example of how technology can enhance our layered approach to disclosure and help investors who access the document online grasp the complexities of variable contract features. Registrants may wish

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[263] *See* 2009 Summary Prospectus Adopting Release, *supra* note 33, at nn.272 and 273 and accompanying text (relevant factors include the manner in which the online version renders charts, tables, and other graphics; the extent to which the online materials include search and other capabilities of the internet to enhance investors' access to information and include access to any software necessary to view the online version; and the time required to download the online materials).

[264] Proposed rule 498A(i)(4); *see also* rule 498(f)(5) (parallel provision in the rule governing the use of mutual fund summary prospectuses).

[265] Proposed rule 498A(h)(2)(ii) and (iii).

[266] *See* rule 498(e)(2)(ii) and (iii). As discussed below, the parallel provisions of proposed rule 498A also include similar linking requirements for the portfolio company documents that the proposed rule would require to appear online if a person were to rely on the rule's new delivery option for portfolio company prospectuses.

In this release, the term ''substantively identical'' is meant to refer to sets of provisions that do not include the same words verbatim, but where the only differences between the provisions are those that do not affect the substance of the requirement at issue. For example, parallel provisions in rule 498 and 498A where only the internal cross-references differ.

[267] Proposed rule 498A(h)(2)(ii). The linked table of contents may be outside the document (*e.g.,* in a separate section or panel of the screen), and need not be the table of contents that is contained within the document itself, as long as the linked table of contents for the statutory prospectus conforms to our rules' requirements for the table of contents that would be required to appear within the document). *See* rule 481(c) under the Securities Act.

Mutual funds commonly implement this feature using a left navigation or ''bookmark'' design style. While such design styles continue to be popular (and we anticipate that some insurers relying on proposed rule 498A might also employ this design style), the increased use of mobile devices and applications has led to the development of new and evolving design styles. Any navigation style should provide the functionality that is required by the rule.

[268] Proposed rule 498A(h)(2)(iii).

[269] *Id.* Under the latter option, links would either have to be available at both the beginning and end of the summary prospectus, or would be required to remain continuously visible to persons accessing the summary prospectus. This requirement is designed to promote the links' prominence and accessibility to investors.

[270] Rule 421(d) of the Securities Act; *see also* proposed General Instruction B.4(c) to Form N–3; proposed General Instruction B.4(c) to Form N–4; proposed General Instruction B.4(c) of Form N–6.

[271] Proposed rule 498A(e). For example, the summary prospectus could include a glossary or a list of definitions of special terms that appear throughout the document. Or, as another example, if a special term appears in only one section of the summary prospectus, the summary prospectus could include a definition for this term on the page, or in the section, where this term appear (for example, in a box to the side of the main text, or at the bottom of the page). Additionally, there are certain technological solutions that are available for electronic versions of the summary prospectus, such as moving or ''hovering'' the computer's pointer or mouse over the term, or linking directly back and forth between each special term and the corresponding entry in a glossary or list of definitions. *See infra* note 274 and accompanying and following text.

[272] *See* proposed General Instruction C.3(d) to Form N–3; proposed General Instruction C.3(d) of Form N–4; proposed General Instruction C.3(d) to Form N–6; *see also* Item 2 of current Forms N–3 and N–4.

[273] Because variable contract prospectuses must describe the products' insurance and investment features, they generally contain more technical terms than mutual fund disclosure documents, which only describe investment features.

[274] For example, investors could view the definitions of special terms by moving or ''hovering'' the computer's pointer or mouse over the term, or selecting the term on a mobile device.

[275] Proposed rule 498A(h)(2)(iv).

to consider whether other technological tools associated with their online disclosure (*e.g.,* fee calculators, pop-up explanations) would present further opportunities to promote investor understanding.

e. Ability To Retain Documents

The proposed rule also would require that persons accessing the website that appears on the summary prospectus cover page be able to permanently retain, free of charge, an electronic version of each of the required online contract documents. Like the online version of these documents, the retainable version of the documents must be in a format that is: (1) Human-readable and capable of being printed on paper in human-readable format; and (2) permits persons accessing the downloaded documents to move directly back and forth between each section heading in a table of contents of that document and the section of the document referenced in that section heading.[276] The permanently retained document does not have to be in a format that allows an investor to move back and forth between the summary prospectus and the statutory prospectus and SAI, because of possible technical difficulties associated with maintaining links between multiple downloaded documents. These proposed conditions are substantively identical to parallel provisions in the rule governing mutual fund summary prospectuses.[277]

In addition, the proposed rule would mandate that the electronic versions of the documents that may be permanently retained must be in a format that is convenient for both reading online and printing on paper.[278] Like the ''convenient for reading and printing'' online formatting requirements,[279] the failure to comply with these formatting requirements for retained electronic documents would not be a condition for reliance on the rule.[280] Since the convenience of these formatting requirements must be decided on a case-by-case basis, we believe this proposed approach would help provide certainty to market participants who seek to rely on the proposed rule to satisfy prospectus delivery obligations.[281]

f. Safe Harbor for Temporary Noncompliance

Compliance with the conditions in the proposed rule regarding the online availability of the required online contract documents (including the formatting and linking requirements for these documents, the requirements associated with the use of special terms in these documents, and the ability to retain these documents permanently) is generally required in order to rely on the proposed rule to meet prospectus delivery obligations under section 5(b)(2) of the Securities Act.[282] Such a failure to comply with any of these conditions could result in a violation of section 5(b)(2) unless the contract statutory prospectus is delivered by means other than reliance on the rule.

We recognize, however, that there may be times when, due to events beyond a person's control, the person may temporarily not be in compliance with the proposed rule's conditions regarding the availability of the required online contract documents.[283] The proposed rule therefore contains a safe harbor provision for temporary noncompliance, which is substantively identical to a parallel provision in the rule governing mutual fund summary prospectuses.[284]

This provision provides that the conditions regarding the availability of the required online contract documents will be deemed to be met, even if the required online contract documents are temporarily unavailable, provided that the person has reasonable procedures in place to ensure that those materials are available in the required manner. A person relying on the proposed rule to satisfy prospectus delivery obligations would be required to take prompt action to ensure that those materials become available in the manner required as soon as practicable following the earlier of the time when the person knows, or reasonably should have known, that the documents were not available in the manner required.[285]

We request comment generally on the conditions in the proposed rule regarding the availability of the required online contract documents, and specifically on the following issues:

- Should we require the online posting of the required online contract documents in the manner that the proposed rule specifies? Should we require that the required online contract documents be available on the insurance company's website as opposed to a third-party website? Should the website include an archive of older versions of these documents (not just the current versions)? If so, what information should be in the archive, and how long should such materials be required to be archived online?
- Should we require, as proposed, that persons accessing this website be able to permanently retain, through downloading or otherwise, free of charge, an electronic version of such documents? Should we require that downloaded documents retain links that enable a user to move readily between related passages of multiple documents? Would these requirements pose any technological, financial, or other challenges for persons relying on the proposed rule?
- Does the proposed 90-day timeframe for the availability of online information appropriately balance the costs of maintaining information online with investors' interests in having the flexibility to access this online information after receiving the summary prospectus? Would there be operational efficiencies for certain registrants in having the timeframe be the same under the variable contract summary prospectus framework and the mutual fund summary prospectus framework? How long do registrants typically maintain information online that is required under the mutual fund summary prospectus rules? As a matter of practice, is information generally maintained for a full year from the date of the summary prospectus?
- Should we provide additional guidance regarding what might constitute a ''human-readable'' format for providing the required online contract documents, as well as a ''convenient'' format for both reading these documents online and printing them on paper? [286] Or should persons relying on the proposed rule have the flexibility to determine how best to comply with this or other technological requirements that the proposed rule contemplates? Is it necessary for the proposed rule to include separate provisions regarding the ''human-readable'' website presentation of the required online contract documents, as well as the ''convenient for reading and printing'' presentation? Is it appropriate that, of these two provisions, the former should be a condition to relying on the rule to satisfy section 5(b)(2) prospectus delivery requirements, whereas the latter should not? If we were to modify these provisions, should we also propose to modify the parallel provisions in the rule governing mutual fund summary prospectuses? Should we instead retain one of these provisions, and if so which? If the final rule retains only one of these provisions, should we propose to modify rule 498 to similarly only retain just that provision?
- Although the proposed rule specifies that the materials posted online must be in

[276] Proposed rule 498A(h)(3).

[277] *See* rule 498(e)(3).

[278] Proposed rule 498A(i)(3).

[279] *See supra* note 262 and accompanying text.

[280] Proposed rule 498A(i)(4).

[281] *See supra* notes 263 and 264 and accompanying text.

[282] Proposed rule 498A(f)(4) (section 5(b)(2) transfer of the contract security is satisfied if, among other things, the conditions in proposed rule 498A(h) are satisfied).

[283] Such events might, for example, include system outages or other technological issues, natural disasters, acts of terrorism, or pandemic illnesses.

[284] Proposed rule 498A(h)(4); *see also* rule 498(e)(4).

[285] *Id.; see also* 2009 Summary Prospectus Adopting Release, *supra* note 33, at nn.92 and 93. This safe harbor generally would not be available to a registrant that repeatedly fails to comply with the rule's website posting requirements or that is not in compliance with the requirements over a prolonged period. *Id.* at n.293.

[286] *See supra* notes 261 and 263 and accompanying text.

a human-readable format, should we also require that the materials be posted online in a machine-readable format to promote the gathering and dissemination of information by data aggregators, or to facilitate the review, analysis, and comparison by investors and other data users? For example, should we require the materials to be posted online to use Inline XBRL, as we are proposing to require for certain disclosures in statutory prospectuses that are filed with the Commission?[287] Why or why not?

- Are the proposed linking requirements appropriate and useful? Will these requirements help investors to navigate effectively within and between these documents? If not, why not? Are there other ways we can improve the usability of these documents? What are some options for enabling the linking requirements? Are the proposed linking requirements sufficiently technology-neutral and flexible enough to accommodate future technological developments?
- Should persons accessing the summary prospectus be able to view the definition of special terms upon command? Is the term ''special terms'' sufficiently clear, and is the proposed requirement that the document permit a person to ''view the definition of each special term . . . upon command'' sufficiently clear? Are the examples in the proposed rule text of what it means to view a term upon command (*e.g.,* by moving or ''hovering'' the computer's pointer or mouse over the term, or selecting the term on a mobile device) helpful? What are some options for enabling the 'upon command' features? Are there other examples we should include?
- Should we require both the initial summary prospectus and the updating summary prospectus to define special terms? Should the updating summary prospectus, for example, be exempt from this requirement given that such documents are likely to be relatively brief and may only include a few defined terms? Are there other considerations that would create operational complications to requiring the updating summary prospectus to define special terms, such as any burden associated with updating definitions from year to year?
- Should we require registrants to electronically format the summary prospectus to allow investors to move directly back and forth between each defined term and the corresponding entry in a ''glossary'' section, if any? Should we extend this requirement to the contract statutory prospectus, or other required online contract documents? Is this functionality appropriate and useful? Is there a reason we should permit this capability, but not require it? What are some technology options that would enable investors to move directly back and forth between each term and the glossary?
- How can we encourage insurers to make fuller use of innovative technology to enable more interactive, user-friendly summary prospectus disclosure, while still creating a short, easy-to-read document that includes the proposed content? Are there potential tools that we should encourage or require insurers to use in order to make their disclosures more interactive and understandable? Should the proposed rule incorporate any additional requirements for technological tools to promote further investor understanding? For example, should we require that the required online contract documents be accompanied with any other technological tools (*e.g.,* additional embedded hyperlinks, fee calculators, pop-up explanations, tools to sort or compare optional benefits or portfolio companies) that encourage interactivity and could help investors understand the features and risks of their contracts?
- Should we mandate that the required online contract documents be available in formats that are compatible with mobile devices such as smartphones and tablets, or that are optimized for use with these types of technology platforms? Is the language of the proposed rule broad enough to contemplate current and future technology platforms? Should we incorporate any special provisions in the proposed rule, or provide guidance, regarding design features that could promote investor understanding of information that investors view on smartphones and tablets—for example, placement and prominence of certain disclosure (*e.g.,* in terms of size, color, and graphic treatment), designing disclosure so that ''scrolling'' is not necessary in order to find certain disclosure elements, and including certain explicit instructions on disclosure that appears online and on mobile device platforms (*e.g.,* ''click here'' or ''see below'') to assist investors in navigating the required online contract documents? Should we require persons relying on the proposed rule to make available the information in formats that serve individuals that may be visually impaired, or other formats that promote accessibility, including alternatives that use languages other than English? Should we consider other ways to provide for greater accessibility, portability, and utility of the required online contract documents?
- Does the proposed rule appropriately provide a safe harbor to address the possibility of inadvertent technological problems? Should persons relying on the proposed rule who have technological issues that prevent them from complying with the online posting requirements of the rule for a period of time be required to disclose on the website that the information was not available for a time in the manner required and explain the reasons for the failure to comply? If not, why not?
- Are those aspects of the proposed rule that mirror the approaches taken in the rule governing the use of mutual fund summary prospectuses (*e.g.,* required online documents, formatting requirements, linking, ability to retain online documents, safe harbor for temporary noncompliance) appropriate in the context of variable contract disclosure? Are there differences between the respective disclosure frameworks for mutual funds versus variable contracts, or operational aspects associated with these different types of investment products, that warrant a different approach? If so, what modifications should we consider?
- How else could we modify the proposed summary prospectus regime to take greater advantage of modern technology to modernize current disclosure practices for variable contracts? For example, should insurers consider employing technology to require a retail investor to scroll through the entirety of the summary prospectus before entering the next stage in the sales process, accessing a different part of the insurer's website to obtain more information, or checking a box to submit the application to purchase a variable contract? Are there other ways that technology could be used to encourage investors to read the summary prospectus?
- Does the proposal sufficiently encourage electronic design and delivery? Are there other ways we can modify the requirements to make clear that paper-based delivery is not the only permissible or desired delivery format?
- Are there other requirements that we should consider for insurers that are offering variable contracts to retail investors? Should we require that certain disclosures be presented in a manner reasonably calculated to draw retail investor attention to it? Are there other ways to ensure that retail investors receive the information they need to clearly understand the features, costs and risks of the variable contract they are considering?

5. Other Requirements for Summary Prospectus and Other Contract Documents

Under the proposed rule, an investor who receives a contract summary prospectus and who would also like to review the required online contract documents would be able to choose whether to review these documents online or to receive that information directly, in paper or electronic format as requested by the investor. Accordingly, the proposed rule would require a registrant (or financial intermediary distributing the contract) to send a paper or electronic copy of the required online contract documents to any person requesting such a copy.[288] The person must send requested paper documents at no cost to the requestor, by U.S. first class mail or other reasonably prompt means, within three business days after receiving the request. The proposed rule also would require a registrant or intermediary to send electronic copies of these documents upon request within three business days.[289] The proposed rule

[287] *See infra* section II.E.

[288] Proposed rule 498A(i)(1) (permitting an investor to request either a paper copy of the required online contract documents, or an electronic copy of such documents); *see also* rule 498(f)(1) (parallel provision in the rule governing the use of mutual fund summary prospectuses); proposed Item 1(b)(1) of Forms N–3, N–4, and N–6 (requiring the prospectus to provide a toll-free telephone number for investors to call to request the SAI, to request other information about the contract, and to make investor inquiries).

[289] Proposed rule 498A(i)(1).

would also provide that the requirement to send an electronic copy of a document may be satisfied by sending a direct link to the online document; provided that a current version of the document is directly accessible through the link from the time that the email is sent through the date that is six months after the date that the email is sent and the email explains both how long the link will remain useable and that, if the recipient desires to retain a copy of the document, he or she should access and save the document.[290]

Collectively, these requirements are intended to ensure that an investor has prompt access to the required information in a format that he or she prefers. The three-business-day time period for sending the required online contract documents mirrors the parallel provision of the mutual fund summary prospectus rule.[291]

Under the proposed approach, investors who prefer paper copies of prospectuses but do not have ready access to the internet (or the ability to print out the statutory prospectus that is made available online) would not be able to elect in advance to receive paper copies of all future statutory prospectuses unless a registrant chose to give investors that option. Assuming no such accommodation, investors would need to follow the summary prospectus legend's instruction on how to request paper delivery each time a summary prospectus is available. Those that do not take the additional step of requesting paper delivery would not receive the statutory prospectus in their preferred format. While we recognize that this could provide a challenge for these investors, we nonetheless believe that the proposed approach appropriately balances the interests of the number of variable contract investors whom we believe would benefit from the convenience of online documents against the number of those whom we believe prefer paper.

In addition to the requirement to provide certain documents upon request in paper or electronically, the proposed rule also requires that a contract summary prospectus must be given greater prominence than any materials that accompany the summary prospectus.[292] We believe that this requirement is important to prevent any accompanying sales or other materials from obscuring the contract summary prospectus, and to highlight for investors the concise presentation of the summary prospectus, and the salience of the information included therein.[293] Generally, we believe that the greater prominence requirement would be satisfied if the placement of the contract summary prospectus makes it more conspicuous than any accompanying materials (*e.g.,* the summary prospectus is on top of a group of papers that are provided together, or listed first if presented on a website together with other materials related to the contract).[294]

The proposed rule would also require any website address or cross-reference that is included in an electronic version of the summary prospectus (*i.e.,* electronic versions sent to investors or available online) to be an active hyperlink.[295] This instruction is intended to ensure that investors viewing electronic versions of the prospectus are able to easily access website addresses and cross-referenced materials that are referenced in the prospectus. This requirement would not apply to summary prospectuses that are filed on the EDGAR system.[296]

The failure to comply with each of these additional requirements would not be a condition of reliance on the rule, in order to provide greater certainty to market participants who seek to rely on the rule. For example, market participants could be concerned that the three-business-day requirement could be violated on account of weather issues or other forces outside of the control of a person seeking to rely on the rule. Similarly, market participants could be concerned if compliance with the greater prominence requirement were a condition to rely on the proposed rule, because whether one is in compliance with this requirement could entail a certain degree of subjectivity.[297] Thus, we are proposing that the failure to comply with either requirement would not negate a person's ability to rely on the rule to satisfy a person's delivery obligations under section 5(b)(2) of the Securities Act.[298] This failure would, however, constitute a violation of Commission rules.

We request comment generally on the requirements we discuss in this section, and specifically on the following issues:

- Should persons relying on the proposed rule be required to send the required online contract documents to any person requesting such documents within three business days after receiving such a request? Would a different period be appropriate? Should compliance with this requirement be a condition to reliance on the proposed rule? If not, why not?
- Does the proposed rule effectively promote investors' ability to request paper copies of the required online contract documents? Are there any changes to the proposed rule that we should consider to make the process for requesting paper copies of such documents more convenient for investors? Should we require registrants to make available to investors a way to opt into the automatic annual delivery of future statutory prospectuses in a paper format without having to specifically request the documents each year? What would be the operational challenges of this approach to registrants? Should we allow registrants to give investors the option of automatic delivery of future statutory prospectuses in paper?
- Should the rule require that the summary prospectus be given greater prominence that any materials that accompany the summary prospectus? If not, why not? Does this requirement pose any challenges to registrants? How might a summary prospectus be given greater prominence than any materials that accompany the summary prospectus when being delivered or made available electronically?
- Should compliance with any or all of the proposed requirements discussed in this

[290] *Id.*

[291] *See* rule 498(f)(1). We understand that persons relying on rule 498 have effective processes in place to handle requests for paper or electronic delivery of mutual fund materials that are available online, within the three-business-day time period that the rule specifies. *See* Comment Letter of the Investment Company Institute on Investment Company Reporting Modernization, File No. S7–08–15 (Mar. 14, 2016) (stating that fund firms have ''specific, highly effective processes in place to handle requests under Rule 498''); *see also* Investment Company Reporting Modernization, Investment Company Act Release No. 31610 (May 20, 2015) [80 FR 33590 (June 12, 2015)] (''Investment Company Reporting Modernization Proposing Release'').

[292] Proposed rule 498A(i)(2); *see also* rule 498(f)(2) (parallel provision in the rule governing the use of mutual fund summary prospectuses).

[293] The Commission's rationale was similar for the parallel provision in the rule governing mutual fund summary prospectuses. *See* 2009 Summary Prospectus Adopting Release, *supra* note 33, at n.217 and accompanying text.

[294] *See* similar discussion in 2009 Summary Prospectus Adopting Release, *supra* note 33, at n.220 and accompanying text.

[295] *See* proposed rule 498A(i)(4). A parallel requirement would also apply to statutory prospectuses. *See* proposed General Instruction C.3.(i) to Forms N–3, N–4, and N–6.

[296] *Id.; see also* rule 105 of Regulation S–T [17 CFR 232.105] (prohibiting hyperlinking to websites, locations, or other documents that are outside of the EDGAR system).

[297] Commenters expressed this concern about the parallel requirement in the rule governing mutual fund summary prospectuses, when it was proposed. *See* Comment Letter of the Investment Company Institute on Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, File No. S7–28–07 (Feb. 28, 2008).

[298] Proposed rule 498A(i)(5); *see also* rule 498(f)(5) (parallel provision in the rule governing the use of mutual fund summary prospectuses). The proposed rule's requirements would mandate that (1) the required online documents be presented in a format that is convenient for reading and printing, and (2) a person be able to retain electronic versions of these documents in a format that is convenient for reading and printing, also are not conditions to relying on the rule to satisfy prospectus delivery obligations. *See supra* notes 262 and 278 and accompanying text.

section be a condition of reliance on the rule? That is, should failure to comply with these requirements result in a violation of section 5(b)(2) of the Securities Act? Alternatively, should the failure to comply with these requirements be a violation of Commission rules that does not result in an inability to rely on the rule or a violation of section 5(b)(2)?

- The proposed rule would require any website address or cross-reference that is included in an electronic version of the summary prospectus (*i.e.,* electronic versions sent to investors or available online) to be an active hyperlink. To what extent, if any, would this requirement present challenges or add costs or burdens with respect to the use of summary prospectuses, given that active links are not required in EDGAR filings (and active links to websites, locations, and documents outside of the EDGAR system are expressly prohibited pursuant to rule 105 of Regulation S–T [17 CFR 232.105])?

6. Incorporation by Reference

a. Permissible Incorporation by Reference

The proposed rule would permit a registrant to incorporate by reference into the summary prospectus information contained in the contract statutory prospectus and SAI, subject to certain conditions.[299] Much like with the mutual fund summary prospectus, we do not intend the variable contract summary prospectus to be a self-contained disclosure vehicle, but rather one element in a layered disclosure regime.[300] Any information incorporated by reference would be separately made available to investors, either electronically or in paper. A Form N–3 registrant also could incorporate by reference into the summary prospectus information from its reports to shareholders that the registrant has incorporated by reference into its statutory prospectus.[301] A registrant would not be permitted to incorporate by reference into the summary prospectus information from any other source. Moreover, a registrant could not incorporate by reference any information that would be required to appear in the contents of the initial summary prospectus or the updating summary prospectus.[302]

Information could be incorporated by reference into the summary prospectus only by reference to the specific document that contains the information, and not by reference to another document that incorporates the information by reference.[303] For example, if a contract statutory prospectus were to incorporate the contract SAI by reference, the summary prospectus could not incorporate information in the SAI simply by referencing the statutory prospectus but would be required to reference the SAI directly.[304]

The proposed rule would permit incorporation by reference only if the registrant satisfies the rule's conditions that prescribe the means by which the required online contract documents must be made available to investors.[305] In addition, if a registrant incorporates information by reference into a summary prospectus, the summary prospectus legend must specify the type of document (*e.g.,* statutory prospectus) that contains the incorporated information and the date of the document.[306] If a registrant incorporates a part of a document by reference into the summary prospectus, the summary prospectus legend must clearly identify the part by page, paragraph, caption, or otherwise.[307] The legend would also explain that the incorporated information may be obtained, free of charge, in the same manner as the contract statutory prospectus.[308]

The conditions on the availability of information that is incorporated by reference into the contract summary prospectus, and on identifying the information that is incorporated by reference, are intended to facilitate access to this information. Parallel conditions exist in the rule governing mutual fund summary prospectuses. Based on our experience, we believe that investors have found this approach to be useful. Therefore, we are proposing similar conditions for incorporation by reference for variable contract summary prospectuses.[309]

A registrant that fails to comply with any of the above conditions is not permitted to incorporate information by reference into its summary prospectus. A registrant that does comply with these conditions, however, including the conditions for providing the documents that include the incorporated information online, would not also be required to send or give the incorporated information to investors together with the summary prospectus.[310] The contract summary prospectus, together with information incorporated therein by reference, would be subject to liability under sections 12(a)(2) and 17(a)(2) of the Securities Act.

[299] Proposed rule 498A(d)(2); *see also* rule 498(b)(3)(ii).

[300] *See* 2009 Summary Prospectus Adopting Release, *supra* note 33, at paragraph accompanying n.327.

[301] Proposed rule 498A(d)(2) references rule 30e–1, which applies only to management companies (Form N–3 registrants). While Form N–4 and Form N–6 registrants must transmit the portfolio companies' annual and semi-annual shareholder reports to the investors in their trust accounts (*see* rule 30e–2 under the Investment Company Act), we would not expect a registrant would wish to incorporate by reference information from a portfolio company shareholder report into the contract prospectus even if such information by reference was permissible. Accordingly, we do not reference rule 30e–2 in the proposed rule.

[302] Proposed rule 498A(d)(2)(ii); *see also supra* sections II.A.1 (describing proposed content requirements for the initial summary prospectus) and II.A.2 (describing proposed content requirements for the updating summary prospectus).

[303] Proposed rule 498A(d)(2)(iii).

[304] *Cf.* Item 10(d) of Reg. S–K [17 CFR 229.10(d)] (''Except where a registrant or issuer is expressly required to incorporate a document or documents by reference . . . reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information or financial statements to be incorporated by reference includes an incorporation by reference to another document.''). General Instruction D.2 to current Form N–6 makes Item 10(d) of Regulation S–K applicable to incorporation by reference into a variable life insurance contract's statutory prospectus.

[305] Proposed rule 498A(d)(2)(i) (referencing proposed rule 498A(h), among other paragraphs in the proposed rule); *see also supra* section II.A.4.

[306] Proposed rule 498A(b)(2)(vi)(C) and 498A(c)(3)(vi).

[307] *Id.* This requirement mirrors the requirements of rule 498(b)(1)(v)(B), and is similar to the requirements of rule 411(d) under the Securities Act [17 CFR 230.411(d)], which requires that information incorporated by reference ''be clearly identified in the reference by page, paragraph, caption or otherwise.'' Rule 411 is also subject to the 2017 FAST Act Modernization rulemaking proposal (which includes proposed amendments to the Commission's rules on incorporation by reference). *See* FAST Act Modernization and Simplification of Regulation S–K, Securities Act Release No. 10425 (Oct. 11, 2017) [82 FR 50988 (Nov. 2, 2017)] (''2017 FAST Act Proposal''). We requested that comments on the 2017 FAST Act Proposal be submitted by January 2, 2018.

[308] *Id.; see also supra* discussion in section II.A.4 and 5.

[309] *See supra* note 300 and accompanying text.

[310] Proposed rule 498A(d)(1); *see also* rule 498(b)(3)(i) (parallel provision in the rule governing the use of mutual fund summary prospectuses); General Instruction G of current Forms N–3 and N–4; General Instruction D of current Form N–6 (permitting a registrant to incorporate by reference all or part of the SAI into the prospectus without delivering the SAI with the prospectus).

b. Effect of Incorporation by Reference

Rule 159 under the Securities Act provides that any information ''conveyed'' to a purchaser after the time of sale will not be taken into account, for purposes of determining whether a prospectus or oral statement included an untrue statement of material fact at the time of sale for purposes of sections 12(a)(2) and 17(a)(2) of the Act.[311] The proposed rule would provide that, for purposes of rule 159, information is conveyed to a person not later than the time the person receives a summary prospectus, if that information is incorporated by reference into the summary prospectus in accordance with the proposed rule's conditions.[312] This addresses the question of when information that is incorporated by reference into the contract summary prospectus is conveyed for purposes of liability under sections 12(a)(2) and 17(a)(2) of the Securities Act.[313]

We request comment generally on the proposal to permit incorporation by reference into the summary prospectus and specifically on the following issues:

- Should we permit the contract statutory prospectus, SAI, and shareholder reports to be incorporated by reference into the summary prospectus? Are there special considerations in the case of variable contracts that warrant different incorporation by reference provisions than those under rule 498? For example, is there any other information we should permit registrants to incorporate by reference into the proposed contract summary prospectuses? Should we permit a registrant to incorporate by reference any information that is required to be included in the summary prospectuses? If so, should this approach vary based on the type of summary prospectus (initial summary prospectus versus updating summary prospectus)?
- Should we require, as proposed, that materials incorporated by reference into the summary prospectuses be available online? Are there additional or different conditions we should impose on the ability to incorporate by reference into the summary prospectus?
- The proposed rule would provide that, for purposes of rule 159, information is conveyed to a person not later than the time the person receives a summary prospectus, if that information is incorporated by reference into the summary prospectus in accordance with the proposed rule's conditions. Is this proposed provision, which mirrors the approach taken in the rule governing mutual fund summary prospectuses, also appropriate for variable contracts? Are there differences between mutual funds and variable contracts that warrant an alternative approach? If so, what modifications should be considered? Should the proposed provision apply to both types of summary prospectus (initial and updating)? Are there any modifications that would be appropriate depending on the type of summary prospectus?

7. Filing Requirements for the Summary Prospectus

a. Preliminary Form of Summary Prospectus

We are proposing to require that registrants file a preliminary form of any contract summary prospectus (initial or updating summary prospectus) that the registrant intends to use on or after the effective date of the registration statement as an exhibit to the registration statement (''preliminary summary prospectus'').[314] Registrants would only be required to provide the preliminary summary prospectus exhibit in connection with the filing of an initial registration statement, or in connection with a pre-effective amendment or a post-effective amendment filed in accordance with paragraph (a) of rule 485 under the Securities Act.

We believe that it is important that Commission staff have the opportunity to review a variable contract's summary prospectus for compliance with the proposed rule and the relevant form requirements prior to its first use. However, we note that this approach differs from the approach regarding mutual fund summary prospectuses. The Commission elected not to require the filing of a mutual fund summary prospectus prior to first use because the content of the summary prospectus would be essentially identical to the content of the summary section of the statutory prospectus, which is filed prior to its first use.[315]

In contrast, the proposed rule does not require the variable contract statutory prospectus to contain a stand-alone summary section from which a summary prospectus is created. In addition, while some variable contract summary prospectus disclosures would be identical to those in the statutory prospectus,[316] others would include only part of the information required in the statutory prospectus.[317] For example, the proposed rule would require an initial summary prospectus only to describe the features and options of the contract that the registrant currently offers, while the statutory prospectus could include information regarding contracts that the registrant no longer sells to new investors.

The initial summary prospectus and updating summary prospectus would also present certain information in a different order than might appear in the contract statutory prospectus.[318] Furthermore, certain disclosure requirements differ depending on whether the summary prospectus is an initial summary prospectus or an updating summary prospectus. We do not believe that registrants would need to visually identify or otherwise segregate those portions of the statutory prospectus that are also summary prospectus disclosures, and we recognize that doing so could impede the effective presentation of information in a contract statutory prospectus to investors.

[311] *See* rule 159 under the Securities Act.

Under section 12(a)(2) of the Securities Act, sellers have liability to purchasers for offers or sales by means of a prospectus or oral communication that includes an untrue statement of material fact or omits to state a material fact that makes the statements made, based on the circumstances under which they were made, not misleading. Section 17(a)(2) of the Securities Act is a general antifraud provision, which makes it unlawful for any person in the offer and sale of a security to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

[312] Proposed rule 498A(d)(3); *see also* rule 498(b)(3)(iii) (parallel provision in the rule governing the use of mutual fund summary prospectuses); 2009 Summary Prospectus Adopting Release, *supra* note 33, at nn.106 through 110.

[313] *See* 2009 Summary Prospectus Adopting Release, *supra* note 33, at nn.109 and 110 (discussing further considerations of liability under sections 12(a)(2) and 17(a)(2) of the Securities Act, as well as reliance under section 19(a) of the Securities Act).

[314] *See* proposed Item 34(r) of Form N–3; proposed Item 28(o) of Form N–4; proposed Item 29(r) of Form N–6. The filing process and format of these documents would be dictated by current Commission rules, including its rules on electronic submissions and exceptions. *See, e.g.,* rule 101 of Regulation S–T [17 CFR 232.101] (providing, among other things, that registration statements and prospectuses filed pursuant to the Securities Act shall be submitted in electronic format).

[315] *See* 2009 Summary Prospectus Adopting Release, *supra* note 33, at n.73. The contents of a mutual fund summary prospectus consist of the information required or permitted by Items 2–8 of Form N–1A, which constitutes the summary section of the statutory prospectus. *See* rule 498(b)(2).

[316] *See, e.g.,* Items 2 and 3 of Forms N–3, N–4, and N–6.

[317] *See, e.g.,* proposed Item 11(a) of Form N–3; proposed Item 10(a) of Form N–4; proposed Item 10(a) of Form N–6; proposed Item 12(a) of Form N–3; proposed Item 11(a) of Form N–4; proposed Item 11(a) of Form N–6. (These are the proposed ''Standard Death Benefit'' and ''Other Benefits Available Under the Contract'' disclosure items for Forms N–3, N–4, and N–6.). While only certain information of the statutory prospectus is required to be included in the summary prospectus, proposed rule 498A permits the summary prospectus to incorporate by reference some or all of the information contained in the statutory prospectus or SAI.

[318] For example, in the initial summary prospectus, the Fee Table would be located towards the end of the prospectus, with more summary type of fee information would be provided earlier in the summary prospectus as part of the Key Information Table. In contrast, the Fee Table in the statutory prospectus is closer to the front of the document, where it has been traditionally located.

b. Definitive Form of Summary Prospectus

In addition to requiring registrants to file a preliminary summary prospectus with the Commission prior to use, we are also proposing amendments to rule 497 under the Securities Act that would require a registrant to file a definitive form of summary prospectus after it is first used.[319] This would ensure that the Commission receives a copy of every summary prospectus in use.[320] This is consistent with the filing requirement for mutual fund summary prospectuses under rule 497.[321]

c. Investor Protection and Liability Under Section 11 of the Securities Act

Section 10(b) of the Securities Act provides that a prospectus permitted under that section must, unless Commission rules provide otherwise, be filed as part of the registration statement but would not be deemed a part of the registration statement for purposes of section 11 of the Securities Act.[322] Accordingly, a summary prospectus that is filed as part of the registration statement (*e.g.,* as an exhibit or otherwise) would not be deemed a part of the registration statement for purposes of section 11 of the Securities Act.[323]

Some commenters in connection with the mutual fund summary prospectus proposal expressed concerns that the mutual fund summary prospectus would not be subject to section 11 liability, suggesting that this would result in a diminution of funds' liability under that section.[324] The Commission stated in response that while section 11 prescribes that the mutual fund summary prospectus will not itself be deemed a part of the registration statement for purposes of section 11, all of the information in the summary prospectus will be subject to liability under section 11, either because the information is the same as information contained in the statutory prospectus or because the information is incorporated by reference from the registration statement. The Commission noted that: (1) The final rule required the information contained in a summary prospectus that is used to satisfy prospectus delivery obligations must be the same as the information contained in the summary section of the fund's statutory prospectus; [325] and (2) information may be incorporated by reference into a summary prospectus only if it is contained in the fund's statutory prospectus, SAI, or has been incorporated into the statutory prospectus from the shareholder report.[326]

For similar reasons, it is our view that while a variable contract summary prospectus under the proposed rule would not itself be deemed a part of the registration statement for purposes of section 11, the information in the summary prospectus will generally be subject to liability under section 11. While proposed rule 498A would not have a comparable provision to that in rule 498 requiring that the information in the summary prospectus must be the same as in the statutory prospectus, we believe that the substance of the information itself would be the same, even though the language in both documents relating to the information may not be identical. For example, the language of the initial summary prospectus could differ from the language used in the statutory prospectus because proposed rule 498A requires that the initial summary prospectus may only describe a single contract that the registrant currently offers for sale, whereas we understand that certain contract statutory prospectuses include disclosure about contract features and options that the registrant may no longer offer to new investors. Nevertheless, the substance of the information for any currently-offered features and options would be the same.[327] In addition, proposed rule 498A would have the same provisions regarding information permitted to be incorporated into the summary prospectus as those in rule 498.[328]

The summary prospectus would be subject to liability under section 12(a)(2) of the Securities Act [329] and the general antifraud provisions of the federal securities laws.[330] In addition, a summary prospectus would be subject to the stop order and other administrative provisions of section 8 of the Securities Act.[331] This is in addition to the Commission's power under section 10(b) of the Securities Act to prevent or suspend the use of the summary prospectus, regardless of whether or not it has been filed.[332]

We request comment generally on the proposed filing requirements for the variable contract summary prospectus and specifically on the following issues:

- Should we require filing of the preliminary form of any contract summary prospectuses? If not, what alternatives should we consider to facilitate staff review of the summary prospectus disclosures, and would investors be adequately protected if staff did not have the opportunity to review a summary prospectus pre-use? Should we only require the initial summary prospectus (or updating summary prospectus) to be filed prior to first use?
- Should we require post-use filing of the summary prospectus? Should only the initial summary prospectus (or updating summary prospectus) be filed after use?
- If the updating summary prospectus includes a description of a contract change that is not similarly described in the related

[319] Proposed amended rule 497(k).

[320] A summary prospectus filed with the Commission would be publicly available; however, a registrant could not rely on this availability to satisfy the requirements to post the document online. *See supra* section II.A.4.

[321] S*ee* rule 497(k).

[322] 15 U.S.C. 77j(b) and 77k. Under section 11 of the Securities Act [15 U.S.C. 77k], purchasers of an issuer's securities have private rights of action for untrue statements of material facts or omissions of material facts required to be included in the registration statement or necessary to make the statements in the registration statement not misleading. Congress provided a specific exception from liability under section 11 for summary prospectuses under section 10(b) of the Securities Act in order to encourage the use of summary prospectuses. L. Loss & J. Seligman, Securities Regulation, § 2–b–5 (3d ed. 2006) (citing S. Rep. 1036, 83d Cong., 2d Sess. 17–18 (1954) and H.R. Rep. 1542, 83d Cong., 2d Sess. 26 (1954)).

[323] Section 10(b) of the Securities Act (''A prospectus permitted under this subsection shall, except to the extent the Commission by rules or regulations deems necessary or appropriate in the public interest or for the protection of investors otherwise provides, be filed as part of the registration statement but shall not be deemed a part of such registration statement for purposes of section 11.'').

[324] *See* 2009 Summary Prospectus Adopting Release, *supra* note 33, at n.344 and accompanying text.

[325] *Id.* at nn.111 and 112; *see also* rule 498(f)(4).

[326] *See* rule 498(b)(3).

[327] *See supra* section II.A.1.b.

The updating summary prospectus could include information that does not appear in the related contract statutory prospectus if the updating summary prospectus discloses changes to the contract that the issuer has made after the most recent updating summary prospectus or statutory prospectus was sent or given to investors. *See supra* section II.A.2.b.ii(a); *see also* proposed rule 498A(c)(6)(i) and (ii). This information that only appears in the updating summary prospectus therefore would not be deemed a part of the registration statement for purposes of section 11 of the Securities Act.

For example, if a particular fee has changed from x% to y%, while the disclosure of the current fee rate (y%) would appear in both the updating summary prospectus and the related statutory prospectus, the earlier fee rate (x%) and the fact that the fee was changed would likely not be disclosed in the statutory prospectus.

[328] *See* proposed rule 498A(d); *see also* rule 498(b)(3) (parallel provisions in the rule governing the use of mutual fund summary prospectuses).

[329] *See* section 12(a)(2) of the Securities Act; *see also* discussion *supra* note 311.

[330] *See, e.g.,* section 17(a) of the Securities Act; section 10(b) of the Exchange Act; section 34(b) of the Investment Company Act.

[331] 15 U.S.C. 77h; H.R. Rep. 1542, 83d Cong., 2d Sess., 1954 U.S.C.C.A.N. 2973, 2982 (1954) (noting that the Commission's authority to suspend the use of a defective summary prospectus under section 10(b) ''is intended to supplement the stop-order powers of the Commission under [S]ection 8'').

[332] 15 U.S.C. 77j(b).

statutory prospectus (for example, the updating summary prospectus describes the fact that there was a change and the nature of the change), or otherwise includes content or wording differences compared to the statutory prospectus, would this adversely affect investor protection (for example, if certain information were not deemed to be part of the registration statement for purposes of section 11 of the Securities Act), and if so, how? Should we require the statutory prospectus to include the same description of contract changes contained in the related updating summary prospectus? Why or why not?

- Should the summary prospectus be subject to the stop order and other administrative provisions of section 8 of the Securities Act? Why or why not?
- Should the contract summary prospectus be deemed a part of the registration statement for purposes of section 11 of the Securities Act? Why or why not?

8. Definitions in the Proposed Rule

Proposed rule 498A includes a section of definitions for certain terms used throughout the rule.[333] These definitions generally: (1) Identify specific prospectuses described in the proposed rule (*e.g.,* ''initial summary prospectus''); (2) mirror the existing definitions used in Forms N–3, N–4, and N–6 (*e.g.,* ''variable annuity contract'' as used in Forms N–3 and N–4) or other rules (*e.g.,* ''statement of additional information'' as used in rule 498); or (3) combine other defined terms in the proposed rule (*e.g.,* ''summary prospectus''). In addition, in recognition that today a variable contract may offer classes with the same currently-available features and options but different characteristics (*e.g.,* differences in the length of the surrender periods) and/or different pricing structures, we are also proposing to define ''class'' to mean a class of a contract that varies principally with respect to distribution-related fees and expenses.[334]

We request comment generally on the definitions used in the proposed rule and specifically on the following issues:

- Should we include any additional, or exclude any proposed, defined terms?
- Should we modify the definitions of any defined terms? For example, does the proposed definition of ''class'' adequately distinguish among classes of a variable contract?

[333] Proposed rule 498A(a).

[334] Proposed rule 498A(a)(1). We understand that this is how the term is commonly used in industry practice. *See also* rule 18f–3 (permitting registered investment companies to issue multiple classes of voting stock); Part A (''Definitions'') of the General Instructions to Form N–1A (defining ''class'' as ''a class of shares issued by a Multiple Class Fund that represents interests in the same portfolio of securities under rule 18f–3 [17 CFR 270.18f–3] or under an order exempting the Multiple Class Fund from sections 18(f), 18(g), and 18(i) [15 U.S.C. 80a–18(f), 18(g), and 18(i)]'').

B. Optional Method To Satisfy Portfolio Company Prospectus Delivery Requirements

1. Current Delivery Practices for Portfolio Company Prospectuses

The Commission has interpreted section 5(b)(2) of the Securities Act to require the delivery of a portfolio company prospectus to any variable contract investor that allocates his or her purchase payments to that portfolio company, including on any exchange of contract value from one portfolio company to another.[335] Since variable contracts generally offer exchange privileges permitting an investor to reallocate his or her investment from one underlying portfolio company to another, we understand that, typically, prospectuses for all underlying portfolio companies are delivered to investors to avoid the administrative burden of tracking whether an investor has already received the current prospectus.[336] We also understand that summary prospectuses, as opposed to statutory prospectuses, for the underlying portfolio companies are typically delivered. As with contract prospectuses, portfolio company prospectuses may be delivered electronically pursuant to the Commission's guidance.[337]

Because the identity of investors is known by the insurance company and not the underlying portfolio companies, delivery of prospectuses for underlying portfolio companies is typically effected by the insurance company rather than the portfolio company.[338] Based on a staff review of participation agreements between insurance companies and underlying portfolio companies, we understand that there is diversity in practice as to whether the insurance company or portfolio company bears the printing and mailing costs associated with portfolio company prospectus deliveries.

[335] *See* Forms N–3 and N–4 Adopting Release, *supra* note 28, at n.49 and accompanying text (''Of course, delivery of a prospectus of an underlying company in which a contractowner actually invests will be required pursuant to section 5(b)(2) of the 1933 Act'').

[336] We understand that while some insurers have invested in infrastructure to deliver only those prospectuses to which an investor allocates contract value, most insurers have not.

[337] *See supra* note 32 and accompanying text.

[338] *See, e.g.,* Forms N–3 and N–4 Adopting Release, *supra* note 28, at n.48 and accompanying text (suggesting that under certain circumstances, the prospectus delivery obligation for underlying portfolio companies would rest with the insurance company); *see also* rule 22c–2(c)(1) under the Investment Company Act (defining a ''financial intermediary'' for purposes of the rule to include a UIT that invests in a fund in reliance on section 12(d)(1)(E) under the Investment Company Act) [17 CFR 270.22c–2(c)(1)].

2. New Option To Satisfy Prospectus Delivery Requirements

a. Overview

The proposed rule would provide an optional method for satisfying portfolio company prospectus delivery obligations by making portfolio company summary and statutory prospectuses available online, with certain key information about the portfolio companies provided in the contract's summary prospectus.[339] This new option would be available to Form N–4 and Form N–6 registrants, but would not be available to Form N–3 registrants because they do not have underlying portfolio companies.

As proposed, this option would allow satisfaction of prospectus delivery obligations with respect to a portfolio company, if: (1) An initial summary prospectus is used for each currently offered contract described under the related registration statement; [340] (2) a summary prospectus is used for the portfolio company (only if the portfolio company is registered on Form N–1A); [341] and (3) the portfolio company's current summary prospectus, statutory prospectus, SAI, and most recent shareholder reports are posted online under similar posting requirements for the variable contract's summary prospectuses and other documents.[342] In addition, the proposed rule would provide that any communication related to a portfolio company, other than a prospectus permitted or required under section 10 of the Securities Act, would not be deemed a prospectus if the above conditions are satisfied.[343]

As discussed above, we are concerned that the volume of disclosure materials variable contract investors currently receive may prevent them from reading the materials or fully understanding these products. While the proposed variable contract summary prospectus framework is intended to provide investors with key information relating to the contract's terms, benefits, and risks in a concise and more reader-friendly format, we are concerned that investors may not read or understand information if the variable contract summary prospectus is accompanied by hundreds of pages of underlying

[339] Proposed rule 498A(j).

[340] Proposed rule 498A(j)(1)(i).

[341] Proposed rule 498A(j)(1)(ii).

[342] Proposed rule 498A(j)(1)(iii).

[343] Proposed rule 498A(j)(2).

portfolio company prospectuses.[344] To address this issue, the proposed option for satisfying portfolio company prospectus delivery requirements would provide investors with certain key summary information about underlying portfolio companies in an appendix to the contract summary prospectus.[345] If an investor desires more detailed information about a particular portfolio company, prospectuses and other documents relating to the portfolio company would be available online and in paper or electronically upon request.

The vast majority of investors purchase variable contracts from sales persons, as opposed to purchasing directly from insurance companies.[346] We understand these sales agents assist investors in many ways, including providing information about underlying portfolio companies and sometimes recommending that investors allocate their contract value into specific portfolio companies. We anticipate that this would continue following our proposal, and that sales agents would assist investors in understanding key facts about the portfolio companies, obtaining portfolio company prospectuses, and understanding the proposed portfolio company prospectus delivery framework. For this reason, we believe that sales agents would play a significant role in continuing to provide information about portfolio companies to investors, even if investors were to no longer receive paper copies of portfolio company prospectuses.

b. Conditions

As a condition to relying on the new option, we would require the related variable contract to use an initial summary prospectus for each currently offered contract described under the related registration statement.[347] We believe that this condition would help promote the use of contract summary prospectuses. Also, the initial summary prospectus content requirements (as well as the requirements for the updating summary prospectus) would ensure that investors receive disclosure regarding: (1) The online availability of the portfolio company prospectuses; [348] and (2) key summary information about each of the portfolio companies.[349]

As a second condition, a portfolio company that is registered on Form N–1A must use a summary prospectus.[350] If we were to permit the satisfaction of delivery obligations by making portfolio company prospectuses (and other documents) available online, portfolio companies that are mutual funds and ETFs would have less incentive to use a summary prospectus.[351] We believe it is important to make available both a summary prospectus and the statutory prospectus for a portfolio company to continue the current layered disclosure approach for portfolio companies whereby investors have the option to choose the amount and type of information to review. This condition also would continue to provide investors with summary information about the portfolio company that we believe they are more likely to use and understand.[352]

Finally, to rely on the new option, the portfolio company's current summary and statutory prospectus, SAI, and most recent annual and semi-annual shareholder reports would be required to be posted online under similar conditions for the posting of variable contract materials:

- The materials are publicly accessible, free of charge, at the website address specified on the cover page or beginning of the summary prospectuses for the variable contract, for the time period specified in proposed rule 498A(h)(1); [353]
- The materials are presented on the website in a format, or formats, that are human-readable and capable of being printed on paper in human-readable format,[354] and permit persons accessing the materials to move directly back and forth between each section heading in a table of contents and the corresponding section of the document; [355]
- Persons accessing the materials must be able to permanently retain, free of charge, an electronic version of such materials in a format, or formats, that is human-readable and permits persons accessing the materials to move directly back and forth between each section heading in a table of contents and the corresponding section of the document; [356]
- Requested materials must be sent in paper or electronically upon request within three business days after receiving a request; [357] and
- The safe harbor specified in paragraph (h)(4) of the proposed rule would be available if the required materials are temporarily unavailable at the specified website.[358]

c. Interim Amendments to Portfolio Company Prospectuses

When a portfolio company supplements or otherwise amends its summary or statutory prospectus between annual updates, the amendment is typically filed with the Commission pursuant to rule 497 under the Securities Act.[359] In addition, we understand that the amendment is typically delivered to investors, either

[344] Variable annuity contracts offer an average of 59 portfolio companies as investment options. *See supra* note 8. While we intended mutual fund summary prospectuses to be three to four pages in length, rule 498 does not provide page length or similar restrictions and some summary prospectuses have been as long as 19 pages. *See* Request for Comment on Fund Retail Investor Experience, *supra* note 39, at n. 27 and accompanying text. If we conservatively estimate that each portfolio company summary prospectus is four pages in length, an investor who purchases a variable contract that offers 59 portfolio companies would receive 236 pages of portfolio company disclosure materials, in addition to the contract prospectus.

[345] A contract summary prospectus would include an appendix that would provide for each portfolio company its name, type or investment objective, adviser and subadviser, expense ratio, and average annual returns for the past year, five years, and ten years. *See supra* discussion at section II.A.1.c.ii(i); *see also infra* section II.D.2.r (discussing our proposal to include this appendix also in variable contracts' statutory prospectuses). Registrants on Form N–3, who would not be relying upon this optional method to satisfy portfolio company prospectus delivery obligations, would have the option of omitting the appendix and instead providing more detailed disclosures for the investment options offered under the contract that would be required by proposed Item 20 of Form N–3. *See supra* note 204 and accompanying text.

In addition, each summary prospectus would also include a Key Information Table that would provide certain disclosures about portfolio company risks and investment restrictions. *See supra* discussion at section II.A.1.c.ii(b)(ii); *see also infra* section II.D.2.c (discussing the Key Information Table in proposed Forms N–3, N–4, and N–6).

[346] Approximately 97% of sales of variable annuities are made through sales agents. *See* IRI Fact Book, *supra* note 8, at 168. Only a small percentage of investors purchase their variable contracts directly from the issuing insurance company. *See* Insurance Information Institute, *Facts + Statistics: Distribution Channels, available at https://www.iii.org/fact-statistic/facts-statistics-distribution-channels* (in 2013, 4% of new individual life insurance sales were directly sold). In comparison, only 50% of households owning mutual funds purchased their funds through sales agents. *See* Investment Company Institute, *Profile of Mutual Fund Shareholders, 2017* (Oct. 2017), at Fig. 3.1, *available at https://www.ici.org/pdf/rpt_17_profiles17.pdf.*

[347] Proposed rule 498A(j)(1)(i).

[348] *See supra* note 198 and accompanying text.

[349] *See supra* section II.A.1.c.(ii)(i).

[350] Proposed rule 498A(j)(1)(ii).

[351] For example, this online option would reduce—or fully eliminate—the cost savings associated with printing and mailing a summary prospectus as opposed to the statutory prospectus, since those summary prospectuses would be posted online instead of being printed and mailed.

[352] *See* 2009 Summary Prospectus Adopting Release, *supra* note 33, at paragraph accompanying n.195.

[353] Proposed rule 498A(j)(1)(iii).

[354] Proposed rule 498A(h)(2)(i); proposed rule 498A(j)(1)(iii). In addition, the materials must be presented on the website in a format or formats that are convenient for reading online and printing on paper. Proposed rule 498A(i)(3)(i); proposed rule 498A(j)(1)(iii).

[355] Proposed rule 498A(h)(2)(ii).

[356] Proposed rule 498A(j)(1)(iii); proposed rule 498A(h)(3). In addition, persons must be able to permanently retain these materials in a format or formats that are convenient for reading online and printed on paper. Proposed rule 498A(j)(1)(iii); proposed rule 498A(i)(3)(ii).

[357] Proposed rule 498A(j)(1)(iii); proposed rule 498A(i)(1).

[358] Proposed rule 498A(j)(1)(iii); proposed rule 498A(h)(4).

[359] Rule 497 under the Securities Act.

by special mailing or by including it with another mailing, such as with the account statement or confirmation.[360]

As discussed above, the proposed new option for satisfying portfolio company prospectus delivery requirements would require that current portfolio company summary prospectuses and statutory prospectuses be posted online. If a portfolio company amends its prospectus between annual updates, the updated prospectus must be posted online.

The proposed rule would not, however, include any separate requirement to deliver portfolio company prospectus amendments to investors. We believe that requiring delivery of prospectus amendments to investors who had not been delivered the prospectus itself could cause investor confusion. Instead, the proposed legend to the summary prospectus appendix listing all the portfolio companies available under the contract would include a statement that investors should review the prospectuses before making an investment decision and that they may be amended from time to time.[361] In addition, we note that if an interim amendment to a portfolio company prospectus affects the information provided in the variable contract summary prospectus (*e.g.,* a change to the type/investment objective or expense ratio of the portfolio company provided in the required appendix to the contract summary prospectus), then investors would receive notice of the change through an amendment to the contract summary prospectus which would be delivered to investors.[362]

We request comment generally on the proposal to permit a new option for satisfying portfolio company prospectus delivery requirements, and specifically on the following issues (in addition, we are requesting comment on certain parallel provisions of rule 498):

- Should the rule permit the use of the new option for satisfying portfolio company prospectus delivery requirements? Should this aspect of the proposed rule be optional as proposed or required if the variable contract uses a summary prospectus?
- The rule as proposed would only permit the use of the new option for portfolio company prospectuses if the related variable contract uses an initial summary prospectus for each currently offered contract described under the related registration statement. Should we permit the use of the new option even if the related variable contract does not use a summary prospectus? Why or why not?
- The rule as proposed would only permit the use of the new option if the portfolio company uses a summary prospectus. This would effectively require a portfolio company to use a summary prospectus if it does not already do so. If we were to permit the satisfaction of delivery obligations by making portfolio company prospectuses (and other documents) available online, would portfolio companies still have an incentive to use a summary prospectus? Should we permit the use of the new option even if the portfolio company does not otherwise use a summary prospectus? Why or why not?
- Should we modify any of the proposed conditions related to the new option for satisfying portfolio company prospectus delivery requirements, or add any additional conditions? For example, should we—as proposed—specify that these materials must be available at the same website address as the variable contract materials that appear online, or should there be flexibility regarding the website address on which the portfolio company materials appear? As another example, although the proposed rule specifies that the materials posted online must be in human-readable format, should we also require that the materials be posted online in machine-readable format to promote the gathering and dissemination of information by data aggregators?
- If we change any of the proposed conditions related to the new option, should we make parallel changes regarding the use of contract summary prospectuses? Should we similarly make any changes to rule 498 under the Securities Act governing mutual fund summary prospectuses for consistency or other reasons?
- Should we modify the proposed linking requirements in any way with respect to portfolio company documents encompassed by the online accessibility and delivery upon demand requirements of the proposed rule?
- Do the separate requirements of rule 498 regarding mutual fund summary prospectus documents create any confusion that should be addressed by proposed rule 498A?
- Under the rule as proposed, persons relying on the new delivery option would not be required to deliver interim prospectus supplements to investors. Should we instead require that interim prospectus supplements be delivered? Would confusion result if investors were to receive prospectus supplements when they had not previously received portfolio company prospectuses? Are there ways to mitigate any such confusion?
- Would the proposed legend on the initial and updating summary prospectuses provide sufficient notice to investors that portfolio company prospectuses may be amended from time to time? Why or why not? Should we revise the legend to include alternate or additional information? Should a similar legend also appear on the cover page of the contract summary prospectus, as well as in the appendix to the summary prospectus as proposed? Alternatively, should we require that a separate notice be given to investors to alert them of the online availability of prospectus supplements? If so, what information should that notice contain? Should that notice be filed with the Commission?
- Should the final rules provide that a communication relating to a portfolio company (other than a prospectus permitted or required under section 10 of the Securities Act) is not deemed to be a prospectus under section 2(a)(10) of the Securities Act under the conditions specified by the rule? Should we amend any of the conditions related to this provision?

C. Discontinued Variable Contracts

An insurance company may choose to stop offering a variable contract to new investors while continuing to accept additional payments from existing investors. Each additional purchase payment under a variable contract is considered a ''sale'' under section 5 of the Securities Act requiring delivery of a current prospectus, and variable contract issuers generally maintain current prospectuses for their products through the filing of annual post-effective amendments to the registration statements.[363]

As the number of contracts outstanding declines over time, the proportion of fixed costs per contract and other burdens associated with maintaining a current registration statement and mailing prospectuses increase over a diminishing asset base. Unlike other types of registered investment companies that can liquidate

[360] For investors who received a summary prospectus for a portfolio company, we understand that amendments are typically delivered to investors only if the amendments relate to the summary prospectus and summary section portion of the statutory prospectus.

[361] The appendix would include the following legend: ''The following is a list of [Portfolio Companies] currently available under the [Contract], which is subject to change as discussed in [the Statutory Prospectus for the Contract]. Before you invest, you should review the prospectuses for the [Portfolio Companies]. These prospectuses contain more information about the [Portfolio Companies] and their risks and may be amended from time to time. You can find the prospectuses and other information about the [Portfolio Companies] online at [____]. You can also request this information at no cost by calling [____] or by sending an email request to [____].'' *See* proposed Item 18 of Forms N–4 and N–6.

[362] The proposed rule would not affect the requirements to deliver other materials specified under other rules or terms of exemptive orders. *See, e.g.,* rule 35d–1 under the Investment Company Act (requiring a registered investment company with a name suggesting investment in certain investments or industries, or investment in countries or geographic regions, to adopt a policy to invest at least 80% of its net assets (plus the amount of any borrowings for investment purposes) in investments suggested by its name, and if not a fundamental policy, to provide investors with at least 60 days prior notice of any change in that investment policy.

[363] *See supra* note 28 and accompanying text.

when assets are reduced to such a level that continuing the fund is not viable, an insurance company is unable to liquidate or otherwise terminate a variable contract. We understand that an insurance company may sometimes seek to encourage investors to exchange into new contracts or make buyout offers, but it cannot unilaterally terminate an investor's contract.

Staff No-Action Letters

Beginning in 1977, the staff of the Division of Investment Management issued a series of no-action letters stating that the staff would not recommend enforcement action if issuers did not update the variable contract registration statement and deliver updated prospectuses to existing investors, so long as certain conditions were met, including sending alternative disclosures to investors (each, a ''Staff Letter,'' and collectively, the ''Staff Letters'').[364] The last Staff Letter was issued in 1995.[365]

The Staff Letters generally were limited to Securities Act registration statements for contracts that are no longer offered to new purchasers and that have fewer than 5,000 investors (or participants in the case of group contracts).[366] The Staff Letters also identified a set of circumstances in which the staff would not recommend enforcement action once the registration statement is no longer updated:[367]

- There are no material changes made to the contract;
- Investors are provided the following disclosures:
  - The portfolio companies' current prospectuses (or summary prospectuses) and any updates thereto, annual and semi-annual reports, proxy materials, and any other periodic reports or other shareholder materials for the portfolio companies;
  - Confirmations of transactions in accordance with rule 10b–10 under the Exchange Act;
  - Within 120 days after the close of the fiscal year, updated audited financial statements of the registrant, and in the case of variable life insurance contracts, the depositor's updated audited financial statements;[368] and
  - At least once a year, a statement of the number of units and values in each investor's account.
- The registrant files periodic reports with the Commission pursuant to section 30 of the Investment Company Act (*i.e.,* reports on Form N–CEN);[369] and
- New contracts are not offered to the public, and the registrant does not contemplate such an offering in the future.

Liability

As of the end of calendar year 2017, we understand that more than half of variable contract Securities Act registration statements may provide the alternative disclosures that the Staff Letters describe:[370]

Status[371]	Variable annuity	Variable life insurance	Grand total
Registration Statements That Are Updated Annually	500	221	721
Registration Statements Operating Under Staff Letters	521	334	855
Total Number of Registration Statements	1,021	555	1,576

Providing the alternative disclosures described in the Staff Letters may have the effect of potentially limiting issuers' liability under certain provisions of the federal securities laws requiring a registration statement or prospectus to contain whatever information may be necessary or appropriate to avoid material misstatements or omissions.[372] Although these alternative disclosures may not be subject to liability under sections 11 or 12 of the Securities Act, or section 34(b) of the Investment Company Act, they are subject to provisions prohibiting material misstatements in the offer or sale of a security.[373]

Commission Position on Existing Contracts Whose Issuers Provide Alternative Disclosures to Investors

In proposing the new variable contract summary prospectus disclosure framework, we acknowledge the industry practice of providing alternative disclosures (which are

[364] *See, e.g.,* Great-West Life and Annuity Insurance Company, SEC Staff No-Action Letter (pub. avail. Oct. 23, 1990) (''1990 Letter''); MML Bay State Life Ins. Co., SEC Staff No-Action Letter (pub. avail. Apr. 12, 1990); Transamerica Occidental Life Insurance Co., SEC Staff No-Action Letter (pub. avail. Mar. 16, 1990); Connecticut Mutual Life Insurance Company, SEC Staff No-Action Letter (pub. avail. Mar. 7, 1990).

The staff declined to extend its no-action position to variable annuities funded by managed separate accounts. *See* Provident National Assurance Company, SEC Staff No-Action Letter (pub. avail. June 2, 1987); Great-West Life Assurance Company, SEC Staff No-Action Letter (pub. avail. June 4, 1987).

[365] *See* Metropolitan Life Insurance Co., SEC Staff No-Action Letter (pub. avail. Apr. 26, 1995) (''Metropolitan Letter'').

[366] In the 1990 Letter, the staff stated that it would no longer respond to no-action requests ''in this area unless they raise novel issues or involve more than 5,000 variable annuity or variable life insurance contracts.'' However, there are four Staff Letters concerning contracts where the number of investors exceeded 5,000. *See* Metropolitan Letter (42,910 investors); Monarch Life Insurance Co., SEC Staff No-Action Letter (pub. avail. June 9, 1992) (''Monarch Letter'') (5,900 investors); New York Life Insurance and Annuity Corp., SEC Staff No-Action Letter (pub. avail. Nov. 15, 1989) (13,713 investors); Security Benefit Life Insurance Company, SEC Staff No-Action Letter (pub. avail. July 2, 1987) (28,019 investors).

[367] Some of the circumstances identified in which the staff would not recommend enforcement action varied slightly across the Staff Letters over time, specifically with respect to the delivery and availability of the insurance company's audited financial statements. The circumstances discussed below reflect those identified in the most recent Staff Letters.

[368] With respect to variable annuities, the depositor's updated audited financial statements would be available upon request. *See, e.g.,* Metropolitan Letter; Monarch Letter.

[369] The Staff Letters specifically identified a registrant's filing of reports on Form N–SAR as one of the set of applicable circumstances. Form N–SAR was recently rescinded and succeeded by Form N–CEN. *See* Investment Company Reporting Modernization, Investment Company Act Release No. 32314 (Oct. 13, 2016) [81 FR 81870 (Nov. 18, 2016)] (''Investment Company Reporting Modernization Adopting Release''), at n.744 and accompanying text.

[370] Our understanding is based on staff review of filings with the Commission and discussions with industry participants.

[371] The number of registration statements is based on a count of unique Securities Act registration statements and amendments filed on EDGAR. The number of registration statements representing contracts that provide alternative disclosures instead of the contract statutory prospectus, as described in the Staff Letters, was based on the number of Form N–4 and Form N–6 filers that did not file a registration statement or amendment in 2017, but made other regulatory filings, such as filings on Form 24f–2 (the form used by variable insurance contracts to pay registration fees to the Commission).

[372] Sections 11 and 12(a)(2) of the Securities Act and section 34(b) of the Investment Company Act. *See supra* discussion at notes 311 (discussing section 12(a)(2) liability) and 322 (discussing section 11 liability). In addition, section 34(b) of the Investment Company Act also imposes liability for misstatements in a registration statement, however, unlike sections 11 and 12(a)(2), there is no private right of action available to aggrieved investors. *See Bellikoff* v. *Eaton Vance Corp.,* 481 F.3d 110 (2d Cir. 2007).

[373] *See, e.g.,* section 17(a) of the Securities Act; section 10(b) and rule 10b–5 under the Exchange Act. There may also be additional remedies for investors, for example, under state insurance law, state securities law, and contract law.

significantly different from the requirements of the proposed summary prospectus regime) under specific circumstances that the Staff Letters identify. In light of this proposal as well as other developments with respect to layered disclosure, we believe that it is useful to consider the appropriate disclosure framework for the types of contracts that have historically relied on the alternative disclosures.

If the proposed summary prospectus framework is adopted, the Commission would take the position that if an issuer of an existing contract that provides alternative disclosures does not file post-effective amendments to update a variable contract registration statement and does not provide updated prospectuses to existing investors, this would not provide a basis for enforcement action so long as investors receive the alternative disclosures. The Commission would take this position in recognition of the industry's practice that has developed in light of the Staff Letters, the costs and burdens that issuers of contracts operating in accordance with the Staff Letters currently incur, and the costs and burdens that issuers would incur under the proposed summary prospectus framework. Therefore, under the Commission's position, the Commission would permit contracts operating in the manner that the Staff Letters describe as of the effective date of any final summary prospectus rules (hereinafter referred to as the ''Alternative Disclosure Contracts'') to continue to operate in such manner.[374] For all other contracts, the Commission's position would not be applicable, and therefore variable contract issuers would be required to file post-effective amendments to update their registration statements and provide updated prospectuses under current regulatory requirements, and could avail themselves of the summary prospectus framework as adopted.

As a general matter, we believe that all variable contract investors should receive the same information. In this regard, our position with respect to Alternative Disclosure Contracts would be limited to the current universe of Alternative Disclosure Contracts, which will diminish in number over time. Our position is also based on our belief that the proposed summary prospectus framework could give investors more pertinent information to monitor their contract investment than the alternative disclosures. For example, the updating summary prospectus would include a brief description of certain changes to the contract that occurred during the previous year, as well as certain key information about the contract. We believe that investors could find this document to be more useful and user-friendly than the separate account financial statements that investors receive under the alternative disclosures.

Additionally, under the proposed summary prospectus regime, investors would receive key summary information about the portfolio companies (with the portfolio company prospectuses available online) instead of receiving the portfolio company prospectuses as they do currently.[375] This proposed layered disclosure approach could provide an additional tool to investors to access the level of information about portfolio companies that best serves their information needs.

We solicit comment on the following issues regarding the Alternative Disclosure Contracts:

- Would adoption of a summary prospectus framework and related form amendments effectively relieve some of the current burdens and costs on variable contract issuers of updating registration statements, and delivering updated prospectuses, such that the Commission's position on Alternative Disclosure Contracts would not be necessary? If not, to what extent would the burdens and costs of maintaining an updated registration statement and compliance with the proposed summary prospectus regime (to the extent that a registrant chooses to rely on proposed rule 498A) exceed that of providing the disclosure related to the Alternative Disclosure Contracts?
- Does the proposed summary prospectus regime give investors more pertinent information to use to help them make informed investment decisions, compared to the information investors holding Alternative Disclosure Contracts would receive?
- Are fees and charges for variable contracts currently established based on an expectation that the insurer will be able to provide alternative disclosures at some point, such as if a product launch is unsuccessful or if the insurer stops selling new contracts so that the number of investors diminishes over time? Would the Commission's position on Alternative Disclosure Contracts have other effects relating to new variable contracts? For example, would it cause insurers to be less willing to introduce new products?
- Would the Commission's position on Alternative Disclosure Contracts result in any variable contract design changes? Would the length of registration statements or prospectuses increase or decrease? If so, why? What would be the effect, if any, on contract disclosure?
- Under the Commission's position on Alternative Disclosure Contracts, which contracts should be able to provide alternative disclosures? For example, should the Commission's position be limited to Alternative Disclosure (*i.e.,* contracts operating in the manner that the Staff Letters describe) as of the effective date of the adoption of final variable contract summary prospectus rules? Should the ability to provide alternative disclosures be limited to contracts with a maximum of 5,000 investors (or participants in the case of group contracts)? [376] Instead of limiting the number of investors, should a different approach be considered, such as limiting relief based on aggregate contract value, the length of time since a contract was last offered to new investors, the costs of updating a registration statement per contract, or the expected cost of updating a registration statement per $1,000 of contract value? If so, what limits should be imposed and why, and what is the benefit of these alternatives over using the number of investors? Alternatively, should the ability to provide alternative disclosures apply to all contracts outstanding at (1) the time of adoption, (2) the effective date, or (3) the compliance date, for final variable contract summary prospectus rules? Why?
- What percentage of insurers currently delivers the alternative disclosures for at least one contract? What percentage of the variable contract business (in terms of number of contact owners and aggregate contract value) provides alternative disclosures? What are the size ranges of registration statements for those contracts that deliver alternative disclosures (both in terms of number of investors and in terms of aggregate contract value)?
- What number of investors, or aggregate contract value, would make providing alternative disclosures more cost-effective than annually updating a registration statement under the current variable contract prospectus delivery regime?
- What are the cost savings, if any, associated with providing alternative disclosures? What are the sources of the cost savings?
- Which current items of variable annuity and variable life insurance registration

[374] The Commission's position on Alternative Disclosure Contracts would be an agency statement of general applicability with future effect designed to implement, interpret, or prescribe law or policy. This position would be consistent with the Staff Letters up to the effective date of any final rule and effectively would moot those letters. The Commission's longstanding position is that all staff statements are nonbinding and create no enforceable legal rights or obligations of the Commission or other parties. *See, e.g.,* Statement by Chairman Jay Clayton Regarding Staff Views. Securities and Exchange Commission (Sept. 13, 2018), available at *https://www.sec.gov/news/public-statement/statement-clayton-091318.*

We note, however, that if a material change is made with respect to an Alternative Disclosure Contract, the registration statement for that contract would be required to be updated, and the contract would no longer be permitted to operate as an Alternative Disclosure Contract.

[375] Under proposed rule 498A, investors would not receive the portfolio company prospectuses if the registrant were to elect to rely on the new optional method to satisfy portfolio company prospectus delivery requirements. *See supra* section II.B.2.

[376] *See supra* note 366.

statements are the most difficult or time-consuming for variable contract issuers to update? Why are these items difficult or time-consuming to update?

• How frequently do material changes to the variable contract occur that would require an issuer that is delivering alternative disclosures to update its registration statement? What specific types of contract changes are considered to be material? What types of contract changes are considered to be non-material, such that the issuer would not update its registration statement in response to this condition? How are investors notified of any non-material changes? Are there types of contract changes where it is difficult to determine whether an issuer should update its registration statement? If so, please identify those types of changes.

• Do insurers currently host on their websites the alternative disclosure documents that are delivered to investors? Why or why not?

• Do investors that receive alternative disclosures contact their insurance company looking for information at a greater frequency than investors who receive a prospectus annually? What information are these investors looking for?

• Some of the circumstances that the Staff Letters identify vary depending on the no-action letter.[377] Under which circumstances are issuers providing alternative disclosures?

We request comment generally on how investors and financial professionals view the alternative disclosures, and specifically on the following issues:

• Investors that have variable contracts with registrants that provide alternative disclosures would receive different disclosure documents, and hence different sets of information, than they would receive under the proposed summary prospectus regime. Which approach do you believe is most beneficial for investors and why?

• To the extent that there are no material changes to a variable contract, what information about the contract—if any—do investors need to receive on an ongoing basis to monitor their investments in the contract and understand how the contract operates? If there are no material changes, would it be useful to investors to receive disclosure repeating key information of the contract each year, and/or to receive summary information about the portfolio companies each year?

• Are investors able to effectively understand financial statements that are provided as alternative disclosures, and are they useful in helping investors monitor their investments?

• An updated contract statutory prospectus, which investors typically receive annually, describes the variable contract but does not include insurance company or separate account financial statements. Investors holding contracts whose issuers provide alternative disclosures, however, receive the separate account financial statements annually, and in some cases the insurance company's financials. Assuming there are no changes to the contract in a given year, do investors have a preference as to which information they would rather receive? Is there other information that investors would like to receive?

Other Approaches to the Framework for Discontinued Contracts

If the Commission takes the position described in the prior subsection with respect to Alternative Disclosure Contracts, it would permit continued operation of Alternative Disclosure Contracts (*i.e.,* issuers with contracts that are operating as described in the Staff Letters on the effective date of the final rules permitting use of a variable contract summary prospectus). All other variable contract issuers would operate under the new summary prospectus framework. That is, they would be required to file post-effective amendments to update their registration statements and provide updated prospectuses under current regulatory requirements, and could avail themselves of the summary prospectus framework as adopted.

We are also considering two alternative approaches for discontinued contracts. Each of these alternative approaches would involve modifying, and codifying by rule, the disclosure framework the Staff Letters identify. Each of these alternative approaches could be implemented in two different ways:

• *Method One (Apply New Approach Only to Discontinued Contracts Going Forward):* Permit Alternative Disclosure Contracts to continue operating as they currently do under the Commission position described above. For future discontinued contracts, adopt final rules codifying certain practices the Staff Letters identify and apply those rules on a going forward basis.

• *Method Two (Apply New Approach to All Discontinued Contracts):* Adopt final rules codifying certain practices the Staff Letters identify and apply those rules to all discontinued contracts (including Alternative Disclosure Contracts).

We request comment on the Commission position described above, as well as the proposed approaches described below. We also request comment on whether an alternative approach should be implemented using method one or method two.

Approach 1 (Codification of Practices under Staff Letters with Modifications): Under Approach 1, the Commission would adopt final rules providing that a registrant would not have to comply with certain requirements to update the variable contract registration statement and deliver updated contract prospectuses to existing investors, so long as the registrant complies with the following conditions:

• Investors would receive an annual notice that includes information that is comparable to that which would be provided in an updating summary prospectus. Specifically, this notice would include: (1) The Key Information Table that would appear in an updating summary prospectus; (2) a brief description of any material [378] changes to the offering relating to fees, the standard death benefits, other benefits available under the contract, and portfolio companies available under the contract; [379] (3) a table that would include the same information about portfolio companies that would appear in the proposed appendix to the updating summary prospectus; and (4) legends informing investors that additional information about their contract—including the registrant's financial statements (the depositor's financial statements in the case of variable life insurance contracts) and portfolio company prospectuses and periodic reports to shareholders—is available online. Because this notice would not be a section 10(b) prospectus, it (unlike a summary prospectus under proposed rule 498A) would not be subject to liability under section 12(a)(2) of the Securities Act, although it would remain subject to the general antifraud provisions of the federal securities laws.[380] The notice would be posted to the insurance company's website.

• The financial statements provided to investors under the alternative disclosures in the Staff Letters would be filed with the Commission, posted to the insurance company's website, and delivered to an investor upon request;

• Registrants would be permitted to use the optional method to satisfy portfolio company prospectus delivery requirements as provided under proposed rule 498A; and

• Investors would continue to receive portfolio company shareholder reports and proxy materials.

Issuers would be able to rely on Approach 1 if the contract is no longer offered to new purchasers, there are under 5,000 investors, and there have been no material changes during the period since the most recent update. Approach 1 reflects our belief that the proposed summary prospectus framework could give investors more pertinent information to use to help them make informed investment decisions, compared to the information

[377] *See supra* note 367.

[378] The changes that would necessitate disclosure under this alternative are broader than one of the circumstances that the Staff Letters identify—that there be no material changes to the contract. With respect to the annual notice, even if there are no changes to the contract between the insurance company and the investor, there may still be material changes to the offering that must be disclosed, such as changes in investment options, investment restrictions, fees, and other matters.

[379] As under proposed rule 498A, a registrant also could provide a concise description of any other change that has been made to the contract, in addition to the changes that the proposed rule would require be described. *See* proposed rule 498A(c)(6)(ii); *see also supra* note 233 and accompanying text.

[380] *See supra* note 329 and accompanying text (discussing the liability provisions applicable to summary prospectuses under proposed rule 498A).

under the circumstances that the Staff Letters identify.[381] This approach seeks to provide many of the benefits to investors associated with the summary prospectus framework while limiting the burden of updating registration statements relating to contracts that are only offered to a limited number of investors.

Approach 2 (Permit Registration Statements to be Updated via Forward Incorporation by Reference). As a variation on the framework for Approach 1, we also request comment on whether the Commission should adopt final rules that would:

- Permit the registrant to rely on a modified version of rule 498A that would:
  - Require that investors receive an annual notice that includes information that is comparable to that which would be provided in an updating summary prospectus, as described in Approach 1;
  - Require that the contract statutory prospectus and SAI be made available online and delivered to an investor upon request; and
  - Permit registrants to use the proposed rule's optional method to satisfy portfolio company prospectus delivery requirements;
- Require the filing of separate account (including accumulation unit values for variable annuities) and depositor financials with the Commission, permit issuers to incorporate these documents by reference into the registration statement (even if they are filed after the effective date of the registration statement),[382] and require these financial statements to be posted to the insurance company's website, and delivered to an investor upon request; and
- Require that investors receive portfolio company shareholder reports and proxy materials.

As with Approach 1, issuers would be able to rely on Approach 2 if the contract is no longer offered to new purchasers, there are under 5,000 investors, and there are no material changes to the contract. Also, like Approach 1, Approach 2 reflects our belief that the proposed summary prospectus framework could give investors more pertinent information to use to help them make informed investment decisions, compared to the alternative disclosures received by investors under the circumstances that the Staff Letters identify.[383]

However, Approach 2 would be more similar to the proposed summary prospectus regime in certain respects, in terms of the requirements for the information that is (1) delivered to all investors (with the annual notice under Approach 2 substituting for the summary prospectus), (2) made available online, and (3) delivered to those investors who so request.[384] This approach seeks to provide many of the benefits to investors associated with the summary prospectus framework and reduce the burden of updating registration statements for contracts that are only offered to a limited number of investors.

Approach 2 differs from Approach 1 chiefly in that Approach 2 would require a registrant to maintain a current registration statement and make the statutory prospectus and SAI available online. However, under Approach 2, the registrant would only update the registration statement when there are material changes to the offering, since updated financial statements would be permitted to be forward incorporated by reference into the registration statement.[385] Approach 2 therefore could reduce some of the burdens associated with maintaining a current registration statement.

Since Approach 2 would entail the maintenance of a current registration statement, the liability provisions available under the federal securities laws would apply to Approach 2 to the same extent as under the current variable contract prospectus delivery regime[386] and under the proposed summary prospectus regime for registrants that choose to rely on proposed rule 498A.[387] While the disclosures required under Approaches 1 and 2 are similar and both include certain protections under the federal securities laws against material misstatements or omissions, disclosures under Approach 2 may not limit potential issuer liability to investors.

The following Table 4 summarizes the frameworks under the Staff Letters, Approaches 1 and 2, and the proposed summary prospectus framework under proposed rule 498A for certain documents to either be: (1) Delivered to all investors; (2) made available online; or (3) delivered to those investors who so request.

TABLE 4—DOCUMENTS AVAILABLE TO VARIABLE CONTRACT INVESTORS

	Staff letters and commission position	Approach 1	Approach 2	Summary prospectus framework under proposed rule 498A
Contract Statutory Prospectus *.	N/A[388]		Required to be available online and delivered (in paper or electronic format) upon request.	
Contract SAI *	N/A		Required to be available online and delivered (in paper or electronic format) upon request.	
Contract Part C Information *.	N/A		Filed with registration statement (available on EDGAR).	
Initial Summary Prospectus	N/A			Delivered to all new investors.

[381] *See supra* paragraph following note 374.

[382] *See, e.g., supra* note 364. Certain registrants that file on Forms S–1 or S–3 are permitted to update their registration statements by reference to Exchange Act reports filed after the effective date of the registration statement (''forward incorporation by reference'').

[383] *See supra* paragraph following note 374.

[384] *See supra* sections II.A.4 through 6. We assume for purposes of this discussion that the relevant requirements in these sections—for example, the formatting requirements and relevant linking requirements discussed in these sections—would be requirements under Approach 2.

[385] One important distinction is that, under the Staff Letters, one of the set of circumstances in which the staff has stated that it would not recommend enforcement action is if there are no material changes to the contract between the investor and insurance company. However, even if there are no material changes to the contract, there may still be material changes to the offering that is described in the registration statement. *See supra* note 378. These material changes to the offering generally should be described in any updating summary prospectus or similar notice.

See supra note 29 (discussing current requirements for updating variable contract registration statements).

[386] *See supra* note 372 and accompanying text (noting that providing the alternative disclosures described in the Staff Letters may have the effect of potentially limiting issuers' liability under certain provisions available under the federal securities laws).

[387] *See supra* section II.A.3.

TABLE 4—DOCUMENTS AVAILABLE TO VARIABLE CONTRACT INVESTORS—Continued

	Staff letters and commission position	Approach 1	Approach 2	Summary prospectus framework under proposed rule 498A
Updating Summary Prospectus *.	N/A			Delivered to all existing investors.
Alternative Notice to Investors *.	N/A	Delivered to all investors (would include information that is comparable to that which would be included in the updating summary prospectus).		N/A.
Financial Statements * [389]	Delivered to all investors	Required to be available online and delivered (in paper or electronic format) upon request, and also available on EDGAR.[390]		
Portfolio Company Prospectuses *.	Delivered to all investors	Delivered to investors, or, if the new option to satisfy portfolio company prospectus delivery is relied-upon,[391] required to be available online and delivered (in paper or electronic format) upon request.		
Portfolio Company Shareholder Reports.	Delivered to all investors	Delivered to all investors, or, if the new option to satisfy portfolio company prospectus delivery is relied-upon,[392] required to be available online and delivered (in paper or electronic format) upon request.		
Portfolio Company Proxy Materials.	Delivered to all investors.			

* Updated at least annually.

We request comments on the framework for discontinued contracts:[388] [389] [390] [391] [392]

- Should the Commission codify either Approach 1 or Approach 2? Why or why not? If so, which approach should the Commission codify? Would either of Approach 1 or Approach 2 facilitate the disclosure of useful information to investors in a better way than the information they would receive under the proposed summary prospectus regime? What are the benefits and drawbacks for investors of permitting Approach 1 or Approach 2, instead of requiring issuers to update the registration statement consistent with the proposed summary prospectus regime?
- Would either of Approach 1 or Approach 2 provide more useful information to investors than the information investors holding Alternative Disclosure Contracts would receive? If so, how?
- What number of investors or aggregate contract value would make reliance on Approach 1 or Approach 2 more cost-effective than annually updating a registration statement, both under current disclosure requirements and under the proposed summary prospectus regime?
- What are the expected cost savings, if any, associated with reliance on Approach 1 or Approach 2 as compared to: (1) The current disclosure regime; (2) the disclosures provided with respect to Alternative Disclosure Contracts; and (3) the proposed summary prospectus regime? What are the anticipated sources of the cost savings? Are there challenges that issuers would face in preparing and providing the information to investors that each alternative would require, and if so, what would these challenges (and any associated costs) be? Are there changes to the alternatives that we should consider in order to address those challenges? If so, what changes, and how would those changes affect investors' ability to make informed decisions?
- Under Approach 1 and Approach 2, investors would annually receive a notice that is substantially similar to the proposed updating summary prospectus. Should this notice be modified in any way? If so, how?
- Under Approach 1 and Approach 2, should the conditions incorporate a more precise definition of material changes that would require a registration statement to be updated? If so, what should the definition of material changes be? For changes to a registration statement that are not a material change to the contract, should we include a condition that the changes be posted on the insurance company's website and filed with the Commission? If so, what would be the costs associated with this condition? If not, why not?
- Under Approach 1, should the most-recently-updated prospectus and registration statement be made available to investors either by request or online? If not, why not? If we did require these documents to be made available online or by request, what kind of legend should appear on the cover page of these documents to make it clear to investors that these documents have not been updated, and that the contract has undergone no material changes, since the date of the document? Is there other information we should also require to be made available online (such as current investment restrictions associated with optional benefits, or a current Fee Table that shows both maximum and current contract fees)?
- Under Approach 1, certain materials would be required to be made available online. Should the web posting requirements be the same as those that proposed rule 498A would prescribe? Are there modifications that should be considered with respect to contracts relying on Approach 1? If so, what are those modifications and why are they necessary?
- Should a condition of Approach 1 be that audited financial statements of the registrant (and in the case of variable life insurance contracts, the depositor's audited financial statements) be filed with the Commission? If not, why not? What would be the additional costs associated with this condition?
- The approach in Approach 2, where a registration statement can refer to financial information that may be filed in the future avoiding the need to annually file a post-effective amendment to a registration statement, is permitted by other SEC registration forms, such as Form S–3. However, Securities Act rules still require that an updated registration statement be filed with the Commission once every three years.[393] Should such a requirement apply under Approach 2? Why? Instead, should we require a new prospectus to be filed every

[388] While the contract prospectus (and SAI and Part C information) would have been filed with the Commission earlier in the contract's life cycle, under the Staff Letters' framework and Approach 1, these documents are not updated annually, and registrants would not make these documents available to investors either online or in paper format.

[389] These include updated audited financial statements of the registrant, and in the case of variable life insurance contracts, the depositor's updated audited financial statements. *See supra* note 368 and accompanying text.

[390] The financial statements are part of the contract SAI, and proposed rule 498A would require a registrant relying on the rule to make the SAI available online. *See* proposed rule 498A(h)(1); proposed Item 26 of Form N–4; proposed Item 27 of Form N–6.

Approaches 1 and 2 separately would require financial statements to be filed with the Commission, posted to the insurance company's website, and delivered to an investor upon request. *See supra* text following note 380; *supra* note 382 and accompanying text.

[391] *See supra* section II.B.2; *see also supra* bullets accompanying notes 378–382.

[392] *See id.*

[393] *See* rule 415(a)(5) under the Securities Act.

three years? If not, why not? In between updates to a registration statement, issuers typically file stickers reflecting certain changes.[394] Instead of requiring updated registration statements or prospectuses after a certain period of time, should we limit the number of stickers before an updated registration statement or prospectus must be filed? If so, what should be the limit?

- Should Approach 2 be permitted for all registration statements even if the contract is still offered to new purchasers, has over 5,000 investors, or may have had material changes since the most recent prospectus update? What would be the benefits to registrants and investors of permitting forward incorporation by reference, as under Approach 2, for all variable contract registration statements? Or, would this result in changes to variable contract disclosure practices that would impede investors' ability to understand their variable contracts in any way?

Other Considerations

- How do Approach 1 and Approach 2 compare to the requirement to update a registration statement, and to the circumstances that the Staff Letters identify, with respect to the liability provisions available to investors under the federal securities laws? Are there changes to Approach 1 and Approach 2 that should be considered to further protect investors?
- Approaches 1 and 2 contemplate that the codified relief would be available only to Form N–4 and Form N–6 registrants (as the conditions associated with portfolio company disclosure would be applicable only to Form N–4 and Form N–6 registrants, and not also Form N–3 registrants).[395] Should the Commission's position on Alternative Disclosure Contracts or Approaches 1 or 2 be extended to managed separate accounts? If yes, how should the conditions be modified to accommodate managed separate accounts? For example, should we consider an approach similar to rule 8b–16(a) under the Investment Company Act where updated information about the contract (including audited financial statements for the insurance company) and the investment options are included in the separate account's annual shareholder report?
- Should the Commission's position on Alternative Disclosure Contracts or Approaches 1 or 2 be extended to annuity contracts registered with the Commission under the Securities Act only and filed on Forms S–1 and S–3? If yes, how should the conditions be modified to accommodate these contracts?
- If the Commission were to codify Approach 1 or Approach 2, should issuers that are operating in the manner described in the Staff Letters, as of the effective date of the adoption of final variable contract summary prospectus rules, be permitted to continue operating in this manner? Or should the Commission instead require all issuers—including those that are operating in the manner described in the Staff Letters as of the effective date of the adoption of final variable contract summary prospectus rules—to satisfy the conditions under Approach 1 or Approach 2? If commenters believe that the latter approach is appropriate, should Approach 1 or Approach 2 be available to only those contracts that are no longer offered to new purchasers, make no material changes, for contracts with fewer than a certain number of investors, or for some other group of contracts? Why?

D. Proposed Amendments to Registration Forms

We are proposing amendments to Forms N–3, N–4, and N–6 to update and enhance the disclosures to investors in variable contracts, and to implement the proposed summary prospectus framework. These proposed amendments include new disclosure requirements to reflect the evolution of variable contract features, including, in particular, the prevalence of optional benefits that insurers offer under these contracts. In addition, we are proposing amendments to provide greater consistency among the registration forms for variable contracts. Form N–6, which was adopted in 2002 and is the newest variable contract form, served as a model for many of the proposed revisions to Forms N–3 and N–4. Accordingly, we are proposing fewer changes to Form N–6 than the other forms.

Certain investors who are considering variable annuities may also be considering variable life insurance (and vice versa). We believe a consistent presentation could reduce investor confusion and promote investor understanding through common disclosure across types of variable products on elements that we consider useful in explaining variable contracts' features and risks. Also, we believe that more uniformity of disclosures across variable contract types may make it easier for investors to compare similar products. Similarly, we believe that increasing consistency of disclosure requirements among registration forms could increase efficiencies among sponsors of variable contracts that register on multiple of these registration form types, and other market participants.

1. General Instructions

We are proposing amendments to the General Instructions of Forms N–3, N–4, and N–6 regarding the preparation and filing of registration statements. The proposed General Instructions would, like the General Instructions in current Form N–6,[396] be structured to include four parts: (A) Definitions; (B) Filing and Use of Form; (C) Preparation of the Registration Statement; and (D) Incorporation by Reference.[397] With the exception of General Instruction C.3, these amendments are organizational in nature and incorporate minor changes that are not intended to significantly alter the content of the current General Instructions for these forms.

Proposed General Instruction C.3 would provide substantive requirements for the preparation of the registration statement, including instructions relating to the organization, presentation, and prospectuses permitted to be included in a registration statement. The instruction would parallel Instruction C.3 of current Form N–6 in substance, except as described below.

Proposed General Instruction C.3.(a) would require that the disclosures in response to Item 2, Item 3, and Item 4 of the registration forms appear in numerical order at the front of the prospectus, and not be preceded by anything other than a cover page (Item 1), a glossary, or a table of contents. We believe that these disclosures should appear at the beginning of the prospectus because they contain the most salient information about a variable contract's key features, costs, and risks.[398] Additionally, the instruction would provide that, if the discussion of the information that Items 2 or 3 requires also responds to disclosure requirements in other items of the prospectus, a registrant need not include additional disclosure that repeats this information.

Proposed General Instruction C.3.(b) would provide that, except in response to Items 2 and 3, a registrant would be

[394] *See supra* note 29 and accompanying text.

[395] Under the Staff Letters, one of the set of circumstances under which the staff has stated that it would not recommend enforcement action is that investors are provided prospectuses for the underlying portfolio companies. However, because a managed separate account prospectus describes both the offering of the contract and the investment options, it is not possible to provide the investment option prospectuses separate from the separate account prospectus.

[396] While the proposed General Instructions in Forms N–3 and N–4 would be structured like the General Instructions in current Form N–6, there are certain new instructions that we are proposing to add to each of the forms. *See, e.g.,* proposed General Instructions C.3.(a), C.3.(b), C.3.(c), C.3.(e), and C.3.(h) to Forms N–3, N–4, and N–6, each described *infra.*

[397] In 2017, the Commission proposed amendments to its rules on incorporation by reference as part of a broader proposal to modernize and simplify certain disclosure requirements in Regulation S–K (and related rules and forms) to implement Section 72003 of the Fixing America's Surface Transportation Act. *See* 2017 FAST Act Proposal, *supra* note 307. We would amend any references to these rules in the General Instructions to Forms N–3, N–4, and N–6 to reflect any rules that the Commission may adopt based on that proposal.

[398] The disclosure that proposed Items 2 and 3 would require also would appear at the beginning of the initial summary prospectus. *See supra* note 75 and accompanying text.

permitted to include information in the prospectus or SAI that is not otherwise required, so long as it is not incomplete, inaccurate, or misleading and does not, because of its nature, quantity, or manner of presentation, obscure or impede understanding of the information that is required to be included. This instruction is intended to provide flexibility to registrants to include contextual and other information that could aid investors' understanding of variable contracts and assist them in making informed investment decisions.

Proposed General Instruction C.3.(c) would encourage registrants to use, as appropriate, question-and-answer presentations, tables, side-by-side comparisons, captions, bullet points, numeric examples, illustrations or similar presentation methods.[399] We believe that these alternative ways of presenting information could increase readability and that this proposed instruction could encourage registrants to use these presentation options, where appropriate.

Proposed General Instruction C.3.(d) includes in substance the requirements of Item 2 (Definitions) of current Forms N–3 and N–4. The changes conform this instruction to the language in the parallel current General Instruction of Form N–6, which we believe will improve readability and consistency across form types.

Proposed General Instruction C.3.(e) would provide new guidance in each of the forms addressing when a registrant may describe multiple contracts in a single prospectus, and include multiple prospectuses in a single registration statement. First, proposed General Instruction C.3.(e)(i) would provide that registrants may describe multiple contracts in a single prospectus when the contracts are ''essentially identical.'' Whether the contracts are essentially identical would depend on the facts and circumstances. The proposed instruction includes examples to provide guidance on this point.[400] Similarly, proposed General Instruction C.3.(e)(ii) would further provide that a registrant may combine multiple prospectuses in a single registration statement when the prospectuses describe contracts that are essentially identical. The proposed instruction also includes examples to provide guidance on this point.[401] We believe these examples are generally consistent with current industry practice.

While proposed paragraph (a) of General Instruction C.3 requires registrants to disclose the information required by Items 2, 3, and 4 in numerical order at the front of the prospectus and generally not to precede the items with other information, proposed General Instruction C.3.(e)(iii) would provide that, as a general matter, registrants providing disclosure in a single prospectus for more than one contract, or for contracts sold in both the group and individual markets, may depart from this requirement as necessary to present the required information clearly and effectively (although the order of information required by each item must remain the same). The proposed instruction would include examples to provide guidance on this point.[402]

Proposed paragraph (h) of General Instruction C.3, which would require variable contracts to use the Inline XBRL format for the submission of certain required disclosures in the variable contract statutory prospectus,[403] is discussed in more detail in Section II.E below.

Proposed paragraph (i) of General Instruction C.3 would require any website address or cross-reference that is included in an electronic version of the statutory prospectus (*i.e.,* electronic versions sent to investors or available online) to be an active hyperlink.[404] This instruction is intended to ensure that investors viewing electronic versions of the prospectus are able to easily access website addresses and cross-referenced materials that are referenced in the prospectus. This requirement would not apply to statutory prospectuses that are filed on the EDGAR system.[405]

We request comment generally on the proposed amendments to the General Instructions of Forms N–3, N–4, and N–6 and specifically on the following issues:

- Would the proposed instructions provide clear guidance to registrants when preparing or amending a registration statement? Should any of the proposed instructions be modified or not be included? For example, proposed paragraph (i) of General Instruction C.3 would require any website address or cross-reference that is included in an electronic version of the statutory prospectus to be an active hyperlink. Should we broaden that requirement to also apply to the SAI and Part C of the registration statement? Would broadening the requirement in this manner result in any synergies or redundancies with the requirements of proposed rule 498A(h)(2)(iii)?[406] Additionally, to what extent, if any, would the proposed requirement regarding active hyperlinks present challenges or add costs or burdens with respect to the use of statutory prospectuses, given that active links are not required in EDGAR filings (and active links to websites, locations, and documents outside of the EDGAR system are expressly prohibited pursuant to rule 105 of Regulation S–T [17 CFR 232.105])? Are there additional instructions that we should include? Should any current instructions not be included in the revised forms?
- Are the proposed definitions listed as Part A of the General Instructions clear, or should they be modified? Are there additional definitions that we should include in proposed Part A of the General Instructions?
- Are the proposed instructions in Part B of the General Instructions relating to the filing and use of the registration forms clear, or should they be modified? For example, proposed General Instruction B.2.(b) to Forms N–3, N–4, and N–6 provides that for registration statements or amendments filed only under the Investment Company Act, registrants need not respond to certain items of the forms. Those registration statements generally relate to contracts offered to institutional investors who are seeking to provide coverage for their key personnel, and

[399] *See, e.g.,* Kleimann Presentation, *supra* note 106 (encouraging, for example, the use of question-and-answer format, the use of headings to make structure clear, using a strong design grid to organize elements, making line length readable, and using common words and sentence constructions as ways of designing disclosure to promote readability).

[400] The examples clarify that a contract that does not offer optional benefits would not be essentially identical to one that does. Similarly, group and individual contracts would not be essentially identical. However, contracts that vary only due to state regulatory requirements would be essentially identical.

[401] The examples clarify that a registrant could determine it is appropriate to include multiple prospectuses in a registration statement in the following situations: (1) The prospectuses describe the same contract that is sold through different distribution channels; (2) the prospectuses describe contracts that differ only with respect to underlying funds offered; or (3) the prospectuses describe both the original and an ''enhanced'' version of the same contract (where the ''enhanced'' version modifies the features or options that the registrant offers under that contract).

[402] The examples clarify that a prospectus may present all of the Item 2 information for several contracts, followed by all of the Item 3 information for the contracts, and followed by all of the Item 4 information for the contracts. Alternatively, the prospectus may present Items 2, 3, and 4 for each of several contracts sequentially. Other presentations also could be acceptable if they are consistent with the form's intent to disclose the information required by Items 2, 3, and 4 in a standard order at the beginning of the prospectus. As guidance, we believe that regardless of the presentation method chosen, when disclosing information relating to one of several contracts, registrants should clearly identify to which contract the information relates.

[403] *See* proposed General Instruction C.3.(h) to Forms N–3, N–4, and N–6; *see also* proposed Items 3, 4, 5, 12, 19, and 20 of Form N–3; proposed Items 3, 4, 5, 11, and 18 of Form N–4; proposed Items 3, 4, 5, 11, and 18 of Form N–6.

[404] *See* proposed General Instruction C.3.(i) to Forms N–3, N–4, and N–6.

[405] *Id.; see also* rule 105 of Regulation S–T [17 CFR 232.105] (prohibiting hyperlinking to websites, locations, or other documents that are outside of the EDGAR system).

[406] *See supra* section II.A.5.

therefore certain disclosures that would be relevant to retail investors are less significant.[407] Should that instruction in each of the forms be updated to either add any additional items to, or remove any of the items from, this proposed list of exclusions?

- Would the proposed instructions in Part C of the General Instructions result in clearer and more concise disclosure to investors? Are there other instructions that we should include to encourage registrants to use plain English principles or otherwise promote clear and concise disclosure?
- Would other requirements improve the utility and accessibility of the statutory prospectus for retail investors? Are there any areas in the document where requiring the use of a specific check-the-box approach, bullet points, tables, charts, graphs or other graphics or text features would be helpful in presenting any of the information or making it more engaging to retail investors? Should we include requirements for font size, margins and paper size? Should we restrict certain types or sizes of font, color choices or the use of footnotes?
- Is the requirement of proposed General Instruction C.3.(a) that Items 2, 3, and 4 appear in numerical order at the front of the prospectus appropriate? Should we specify that any other items appear at the front of the prospectus? Should all of the portions of the statutory prospectus that are also summary prospectus disclosures be segregated and placed at the beginning of the statutory prospectus to aid in the effective presentation of information for investors in contracts whose issuers choose not to rely on proposed rule 498A?
- Are the instructions in proposed General Instruction C.3.(e) on when registrants may describe multiple contracts in a single prospectus, and include multiple prospectuses in a single registration statement, clear and appropriate? Is it clear when contracts are ''essentially identical,'' or would additional clarification (either in the form text, or provided as Commission guidance) be helpful? Are the examples that the proposed form instructions include useful and appropriate? Are they generally consistent with current industry practice? Should we modify or expand these examples in any way? Would some alternative standard for when a single prospectus may describe multiple contracts, or for when a single registration statement may include multiple prospectuses, be more appropriate than the proposed ''essentially identical'' standard?
- Should a registrant only be permitted to describe a single contract in a prospectus, and if so, what parameters should dictate what a single contract is? Likewise, should a registrant only be permitted to include one prospectus in a registration statement? What is industry practice in terms of describing multiple contracts in a single prospectus, and combining multiple prospectuses into a single registration statement? What are the benefits and costs of this practice, both to members of the industry as well as to investors?
- Should we, as proposed, permit registrants that are providing disclosure for more than one contract in a single prospectus, or for contracts sold in both the group and individual markets, to depart from the instruction to disclose the information required by Items 2, 3, and 4 in numerical order to present the required information clearly and effectively (provided the order of information required by each item remains the same)? Should this instruction be modified in any way?
- Should the instructions in proposed Part D of the General Instructions regarding the use of incorporation by reference be modified in any way?

2. Part A (Information Required in a Prospectus)

Table 5 shows how our proposed amendments would amend the item requirements of Part A of the variable contract registration forms.

TABLE 5—PROPOSED AMENDMENTS TO PART A OF FORMS N–3, N–4, AND N–6

Item description	Proposed item No.	Form N–3: Proposed treatment	Form N–4: Proposed treatment	Form N–6: Proposed treatment
Front and Back Cover Pages (in Forms N–3 and N–4, currently ''Cover Page'').	• Form N–3: Item 1 (currently Item 1). • Form N–4: Item 1 (currently Item 1). • Form N–6: Item 1 (currently Item 1).	Revised	Revised	Revised.
Overview of the Contract	• Form N–3: Item 2 • Form N–4: Item 2 • Form N–6: Item 2	New Item (also in ISP)	New Item (also in ISP)	New Item (also in ISP).
Definitions	N/A (currently, Item 2 in Forms N–3 and N–4).	Revised (incorporated in General Instructions).	Revised (incorporated in General Instructions).	N/A (incorporated in General Instructions).
Key Information	• Form N–3: Item 3 • Form N–4: Item 3 • Form N–6: Item 3	New Item (also in ISP, USP)	New Item (also in ISP, USP)	New Item (also in ISP, USP).
Fee Table (in Form N–3, currently ''Synopsis or Highlights,'' in Form N–4, currently ''Synopsis,'' and in Form N–6, currently ''Risk/Benefit Summary: Fee Table'').	• Form N–3: Item 4 (currently Item 3). • Form N–4: Item 4 (currently Item 3). • Form N–6: Item 4 (currently Item 3).	Revised (also in ISP)	Revised (also in ISP)	Revised (also in ISP).
Condensed Financial Information.	• Form N–3: Item 33 (currently Item 4). • Form N–4: Item 27 (currently Item 4).	Revised and moved to SAI	Revised and moved to SAI	N/A.
Principal Risks of Investing in the Contract (in Form N–6, currently ''Risk/Benefit Summary: Benefits and Risks'').	• Form N–3: Item 5 • Form N–4: Item 5 • Form N–6: Item 5 (currently Item 2).	New Item	New Item	Revised Item.
In Form N–3: General Description of Registrant, Insurance Company, and Investment Options (currently ''General Description of Registrant and Insurance Company''). In Forms N–4 and N–6: General Description of Registrant, Depositor, and Portfolio Companies.	• Form N–3: Item 6 (currently Item 5). • Form N–4: Item 6 (currently Item 5). • Form N–6: Item 6 (currently Item 4).	Revised	Revised	Revised.

[407] For example, institutional investors generally negotiate benefits coverage on a custom basis, and therefore prospectuses regarding contracts offered to institutional investors may not include any discussion regarding death benefits.

TABLE 5—PROPOSED AMENDMENTS TO PART A OF FORMS N–3, N–4, AND N–6—Continued

Item description	Proposed item No.	Form N–3: Proposed treatment	Form N–4: Proposed treatment	Form N–6: Proposed treatment
Management	• Form N–3: Item 7 (currently Item 6).	Revised	N/A	N/A.
Charges (in Form N–3, currently ''Deductions and Expenses,'' in Form N–4, currently ''Deductions'').	• Form N–3: Item 8 (currently Item 7). • Form N–4: Item 7 (currently Item 6). • Form N–6: Item 7 (currently Item 5).	Revised	Revised	Revised.
General Description of Contracts (in Form N–4, currently ''General Description of Variable Annuity Contracts'').	• Form N–3: Item 9 (currently Item 8). • Form N–4: Item 8 (currently Item 7). • Form N–6: Item 8 (currently Item 6).	Revised	Revised	Revised.
Annuity Period	• Form N–3: Item 10 (currently Item 9). • Form N–4: Item 9 (currently Item 8).	Revised	Revised	N/A.
Premiums	• Form N–6: Item 9 (currently Item 7).	N/A	N/A	Unchanged (part also in ISP).
Standard Death Benefit (in Forms N–3 and N–4, currently ''Death Benefit,'' and in Form N–6, currently ''Death Benefits and Contract Values'').	• Form N–3: Item 11 (currently Item 10). • Form N–4: Item 10 (currently Item 9). • Form N–6: Item 10 (currently Item 8).	Revised (part also in ISP)	Revised (part also in ISP)	Revised (part also in ISP).
Other Benefits Available Under the Contract.	• Form N–3: Item 12 • Form N–4: Item 11 • Form N–6: Item 11	New Item (part also in ISP)	New Item (part also in ISP)	New Item (part also in ISP).
Purchases and Contract Value	• Form N–3: Item 13 (currently Item 11). • Form N–4: Item 12 (currently Item 10). • Form N–6: N/A	Revised (part also in ISP)	Revised (part also in ISP)	N/A.
Surrenders and Withdrawals (in Forms N–3 and N–4, currently ''Redemptions,'' in Form N–6, currently ''Surrenders, Partial Surrenders, and Partial Withdrawals'').	• Form N–3: Item 14 (currently Item 12). • Form N–4: Item 13 (currently Item 11). • Form N–6: Item 12 (currently Item 9).	Revised (part also in ISP)	Revised (part also in ISP)	Unchanged (part also in ISP).
Loans	• Form N–3: Item 15 • Form N–4: Item 14 • Form N–6: Item 13 (currently Items 10 and 23).	New Item	New Item	Revised.
Lapse and Reinstatement	• Form N–6: Item 14 (currently Item 11).	N/A	N/A	Unchanged (also in ISP).
Taxes	• Form N–3: Item 16 (currently Item 13). • Form N–4: Item 15 (currently Item 12). • Form N–6: Item 15 (currently Item 12).	Revised	Revised	Unchanged.
Legal Proceedings	• Form N–3: Item 17 (currently Item 14). • Form N–4: Item 16 (currently Item 13). • Form N–6: Item 16 (currently Item 13).	Revised	Revised	Unchanged.
Table of Contents of the SAI	N/A (currently, Item 15 of Form N–3 and Item 14 of Form N–4) [408].	Eliminated	Eliminated	N/A.
Financial Statements	• Form N–3: Item 18 • Form N–4: Item 17 • Form N–6: Item 17 (currently Item 14).	New Item	New Item	Unchanged.
In Form N–3: Investment Options Available Under the Contract. In Forms N–4 and N–6: Portfolio Companies Available Under the Contract.	• Form N–3: Item 19 • Form N–4: Item 18 • Form N–6: Item 18	New Item (also in ISP, USP if disclosures from Item 20 are not included).	New Item (also in ISP, USP)	New Item (also in ISP, USP).
In Form N–3: Additional Information About Investment Options Available Under the Contract.	• Form N–3: Item 20	New Item (also in ISP, USP if disclosures from Item 19 are not included).	New Item	New Item.

a. Front and Back Cover Pages (Item 1 of Forms N–3, N–4, and N–6)

We propose to amend Item 1 of each registration form to reflect the requirements for the prospectus cover pages required by Item 1 of current Form N–6, with three additions to the front cover page:

- First, we are proposing that the front cover page include the name of the contract and the class or classes, if any, to which the contract relates to help clarify the specific contract and class or classes covered by the prospectus; [409]
- Second, as with the initial summary prospectus and updating summary prospectus, we are proposing that the front cover page include a statement directing an investor to the *Investor.gov* website for additional information; [410] and
- Third, as with the initial summary prospectus, we are proposing that the front cover page include a legend informing investors about the free look period.[411]

To streamline the front cover page and because similar information would appear in tabular presentation in the prospectus, we are proposing to eliminate the current requirements in Forms N–3 and N–4 that the registrant include on the front cover page the type of separate account and names of the available portfolio companies, respectively.

Additionally, we are proposing that the prospectus back cover page include certain additional information concerning: (1) The availability of the SAI and how to request other information about the contract; (2) whether and from where information is incorporated by reference into the prospectus as permitted by proposed Part D of the Form's General Instructions; and (3) the EDGAR contract identifier for the contract.[412]

We request comment generally on the proposed amendments to the prospectus cover page requirements, and specifically on the following issues:

- Are there additional disclosure topics that should be included in the cover pages of the statutory prospectus?
- As proposed, should a legend that is similar to the disclosure regarding the free look period on the cover page of the initial summary prospectus also appear on the cover page of the statutory prospectus? Why or why not? Should we modify the proposed legend regarding the free look period that would appear on the cover page of the statutory prospectus in any way?
- Should the registration forms require that the registrant include the names of the investment options/portfolio companies on the front cover page?
- Should we require the name of the contract and the class/classes?

b. Overview of the Contract (Item 2 of Forms N–3, N–4, and N–6)

We propose to add new Item 2 to the registration forms, which would require registrants to include certain basic and introductory information about the contract and its benefits.[413] These disclosures would also be required in initial summary prospectuses.[414]

We request comment generally on the proposal to include a new item requiring registrants to include in the prospectus an overview of the contract, and specifically on the following issues:

- Should we require the proposed overview discussion to be included in the statutory prospectus? Are the content requirements for this proposed item appropriate for inclusion in the statutory prospectus?
- Should the disclosure requirements for this item be modified in any way for the statutory prospectus?

c. Key Information (Item 3 of Forms N–3, N–4, and N–6)

We propose to add new Item 3 to the registration forms, which would require a statutory prospectus to include the Key Information Table providing a brief description of key facts about the variable contract.[415] The Key Information Table would also appear in the initial summary prospectus and the updating summary prospectus, except that it could vary depending on the scope of the initial summary prospectus (which could only describe a single contract that the registrant currently offers for sale), in contrast to the updating summary prospectus and statutory prospectus (which could describe multiple contracts under the conditions of the proposed General Instructions to the registration forms).[416] An updating summary prospectus that describes multiple contracts could contain a separate Key Information Table for each of the contracts, or use a different presentation approach that consistently discloses the required information for each contract in the required order. [417]

We request comment generally on the proposal to include the Key Information Table in the prospectus, and specifically on the following issues:

- Should we require the proposed Key Information Table to be included in the statutory prospectus? Are the content requirements for this proposed item appropriate for inclusion in the statutory prospectus?
- Should the Key Information Table in the statutory prospectus differ in any respect from the table in the summary prospectuses? If so, in what respect? Should we eliminate certain line-items? Are there additional disclosure topics that we should require in the Key Information Table that appears in the statutory prospectus?
- Would the Key Information Table disclosure requirements confuse investors if a prospectus were to describe multiple contracts? For example, if a prospectus that describes multiple contracts were to include a single Key Information Table that discloses separate fee information in the ''Fees and Expenses'' line-items for each contract, would this confuse investors?
- Are there certain disclosure presentations that would be so lengthy, or overly-broad, that they may not be useful to investors? Would it be useful for us to provide additional instructions in the form, about different approaches that registrants could take in presenting any of the required information in the Key Information Table? For example, with respect to fee disclosure in the Key Information Table, should we provide guidance or additional instructions on whether it would be acceptable to present a range of minimum and maximum fees, and lowest and highest annual costs, that includes all of the contracts that the prospectus describes, or instead require registrants to provide separate fee and cost ranges for each contract that the prospectus describes? Alternatively or additionally, should we require disclosure in the Key Information Table reminding investors to review their individual contract for information about the specific fees they will pay in connection with their contract?
- As discussed above, we are proposing a requirement that the Key Information Table include cross-references to the location in the statutory prospectus where the relevant subject matter is described in greater detail.[418] We are separately proposing a

[408] We are proposing to eliminate the Table of Contents of the SAI that is required by Item 15 of current Form N–3 and Item 14 of current Form N–4. We do so to streamline the prospectus and avoid duplicative disclosure with the SAI, which separately requires a Table of Contents. *See infra* section II.D.3.

[409] Proposed Item 1(a)(5) of Forms N–3; proposed Item 1(a)(4) of Forms N–4 and N–6.

[410] Proposed Item 1(a)(8) of Form N–3; proposed Item 1(a)(7) of Forms N–4 and N–6; *see also supra* note 84 and accompanying text.

[411] Proposed Item 1(a)(10) of Form N–3; proposed Item 1(a)(8) of Forms N–4 and N–6; *see also supra* note 83 and accompanying text. The proposed legend on each of the three forms would read: ''If you are a new investor in the [Contract], you may cancel your [Contract] within 10 days of receiving it without paying fees or penalties. In some states, this cancellation period may be longer. Upon cancellation, you will receive either a full refund of the amount you paid with your application or your total contract value. You should review this prospectus, or consult with your investment professional, for additional information about the specific cancellation terms that apply.''

[412] Proposed Item 1(b) of Forms N–3, N–4, and N–6.

[413] *See supra* section II.A.1.c.ii(a) for a discussion of these requirements in more detail. Proposed Item 2(d) of Form N–6 would include the requirements that appear in Item 2(a) of current Form N–6.

[414] Proposed rule 498A(b)(5)(i).

[415] *See supra* section II.A.1.c.ii(b) for a discussion of these requirements in more detail.

[416] *See supra* sections II.A.1 and II.A.2.

[417] *See supra* section II.A.2.c.ii(b).

[418] *See supra* note 162 and accompanying text.

General Instruction (and a parallel instruction in proposed rule 498A) requiring cross-references in electronic versions of the statutory prospectus to link directly to the location in the statutory prospectus where the subject matter is discussed in greater detail).[419] Should we instead include a General Instruction in each of the registration forms (and/or rule 498A as appropriate) that would provide that, where a topic is summarized in the summary or statutory prospectus and is discussed in more detail elsewhere in the statutory prospectus, the summarized topic must include a cross-reference (and a hyperlink in electronic document versions) to the location in the statutory prospectus where the topic is discussed in more detail?

d. Fee Table (Item 4 of Forms N–3, N–4, and N–6)

We propose to amend Item 3 of the current registration forms (which we would re-designate as Item 4) to simplify and update current fee and expense disclosure obligations.[420]

i. Transaction Expenses (Forms N–3 and N–4)

We are proposing to modify the current ''Contractowner Transaction Expenses'' table in Forms N–3 and N–4 (which we would re-title as ''Annual Transaction Expenses'' in each form) by removing the current ''Surrender Fees'' line-item in this table. We believe the current ''Deferred Sales Load'' line-item in the table would already capture these fees.[421] Correspondingly, we are proposing to revise the title of the ''Deferred Sales Load'' line-item to include ''Deferred Sales Load (or Surrender Charge)'' to clarify that a registrant should continue to include surrender charges in the table.

ii. Annual Contract Expenses (Forms N–3 and N–4) and Periodic Charges Other Than Portfolio Company Operation Expenses (Form N–6)

We are proposing several changes to the current ''Annual Account Fee'' and ''Annual Expenses'' line-items in Form N–3,[422] and the current ''Annual Contract Fee and Separate Account Annual Expenses'' table in Form N–4. As proposed, each would be retitled, as a stand-alone table, under the heading ''Annual Contract Expenses'' in both forms to clarify that the item reflects insurance-related annual contract fees and not the fees related to investment options.

In addition, we are proposing to modify the captions for existing line-items, consolidate certain line-items, and add a new line-item for optional benefits in this table in each form.[423] Under the proposal, the ''Annual Contract Expenses'' table in Forms N–3 and N–4 would be composed of the following line-items:

- *Administrative Expenses.* The line-item ''Annual Contract Fee'' in Form N–4 (''Annual Expenses'' in Form N–3) would be replaced with the more plain-English ''Administrative Expenses.'' [424]
- *Base Contract Expenses.* We are consolidating the current line-item under ''Annual Expenses'' in Form N–3 (''Mortality and Expense Risk Fees,'' and ''Other Expenses''), and the current line-items under ''Separate Account Annual Expenses'' in Form N–4 (''Mortality and Expense Risk Fees,'' ''Account Fees and Expenses,'' and ''Total Separate Account Annual Expenses'') under a single new line-item in each table, ''Base Contract Expenses.'' Collapsing these fees into a single line-item is intended to make it easier for investors to understand the annual cost of investing in the basic variable contract.[425] Any other recurring charge (other than charges associated with the portfolio companies, or management fees in the case of Form N–3) would appear as an additional line-item in the Annual Transaction Expenses table or the Annual Contract Expenses table, and would disclose the maximum amount or basis on which the charge is deducted.[426]
- *Management Fees.* Unlike Forms N–4 and N–6, which as discussed below would require separate disclosures about total annual portfolio company operating expenses, Form N–3 would not require such disclosures because Form N–3 registrants have a single-tier structure and do not have underlying portfolio companies. However, Form N–3 registrants generally do have distinct management fees for each investment option offered under the contract. Since these management fees can vary significantly, we propose to require disclosure of the management fee for each investment option.[427]
- *Optional Benefits.* In recognition of the fact that variable contracts today commonly offer optional benefits, the table in Forms N–3, N–4, and N–6 would require a new line-item that would require registrants to list any optional benefits available under the contract, along with its corresponding annual charge.[428] In Form N–6, this same new line-item would be added in the ''Periodic Charges Other Than Portfolio Company Operations Expenses'' table.[429]
- *Total Annual Contract Expenses.* In Form N–3, we are proposing a new requirement to disclose total annual contract expenses, and a related instruction that would specify that total annual contract expenses should be disclosed as a percentage of account value.[430] While annual contract expenses are generally calculated as a percentage of account value, optional benefit expenses may be calculated on a different basis, such as a percentage of the benefit base or as a percentage of average net assets. The proposed instruction would provide that if optional benefit expenses are calculated on a basis other than account value, registrants should prominently indicate that those optional benefit expenses are not included in total annual contract expenses (because they are calculated on different bases and cannot be added). The requirement to disclose total annual contract expenses would differ from the proposed approach to disclosing annual contract expenses in Form N–4, which would require separate line-items for administrative expenses, base contract expenses, and optional benefit expenses, but would not (unlike the proposed approach in Form N–3) require the disclosure of a composite total of these line-items.[431]

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[419] *Id.*

[420] We also propose to change the title of the Item from ''Synopsis of Highlights'' in Form N–3, ''Synopsis'' in Form N–4, and ''Risk/Benefit Summary: Fee Table'' in Form N–6 to ''Fee Table'' in all three forms.

[421] As a conforming change, we propose to remove Instruction 2(c) to current Item 3 of Form N–3 and Instruction 10 to current Item 3 of Form N–4 and revise Instruction 2(b) to current Item 3 of Form N–3 and Instruction 9 to current Item 3 of Form N–4 (which we would re-number as Instruction 10 in each form) to clarify that the term ''deferred sales load'' includes surrender charges.

[422] In current Form N–3, these items are each presented as line-items in the table that Item 3(a) requires.

[423] Although these proposed revisions generally apply to Forms N–3 and N–4, as discussed below, the new line-item for optional benefits would also be added to the ''Periodic Charges Other Than Portfolio Company Operation Expenses'' table in Form N–6.

[424] We also propose to make conforming changes to Instruction 3 to current Item 3 of Form N–3 and Instruction 7 to current Item 3 of Form N–4, which we would renumber as new Instruction 8 in both forms (no changes to the definition).

[425] We also propose to make conforming changes to each form's instructions. We propose to remove Instruction 4(b) to current Item 3 of Form N–3 and Instruction 13 to current Item 3 of Form N–4, which permit ''Mortality and Expense Risk Fees'' to be listed separately on two lines in the table. We also propose to revise Instruction 14 to current Item 3 of Form N–4 (which we would renumber as Instruction 13), and add a corresponding new Instruction 13 to proposed Item 4 of Form N–3, to state that ''Base Contract Expenses'' includes mortality and expense risk fees, and account fees and expenses. We would also include a new Instruction 3(e) to proposed Item 4 of Form N–6 permitting Registrants to consolidate any charges that are assessed on a similar basis (*e.g.,* Administrative charge and Mortality and Expense Risk Fees).

[426] We propose to revise and renumber Instruction 15 to current Item 3 of Form N–4 (which currently appears under the heading ''Portfolio Company Annual Expenses'') as Instruction 14 to proposed Item 4 (to appear under the heading ''Other Annual Expenses'') to make clear that other annual expenses are required to be disclosed (not just other portfolio company annual expenses, as the current instruction provides).

[427] *See* Instruction 7 to proposed Item 4 of Form N–3.

[428] *See* Instruction 15 to proposed Item 4 of Forms N–3 and N–4.

[429] *See* Instruction 3.(f) to proposed Item 4 of Form N–6.

[430] *See* Instruction 16 to proposed Item 4 of Form N–3.

[431] *See* ''Annual Contract Expenses'' table in Item 4 of proposed Form N–4. We understand that most registrants on Form N–4 calculate optional benefit expenses on a basis other than contract value. Because of this, it would generally be difficult to sum optional benefit expenses with other expenses that are presented as annual contract expense line-items. In contrast, we understand that most

iii. Total Annual Portfolio Company Operating Expenses (Form N–4)

We are proposing to amend the disclosures that registrants would provide with respect to the ''Total Annual Portfolio Company Operating Expenses'' table in Form N–4. First, we are proposing to revise the legend that would precede the table to direct investors to the new appendix required by new Item 18 relating to the portfolio companies available under the contract. As a conforming change, we are proposing to eliminate current Instruction 20 (stating that a registrant may include additional tables showing annual operating expenses separately for each portfolio company immediately following the required table), as this information would duplicate the fee information that would appear in the new appendix.

We also propose to simplify other instructions to the table. We propose to revise current Instruction 17(a) (which we would re-designate as new Instruction 16) to instruct registrants to use the gross expense ratio presented in the fee table of a portfolio company's current prospectus when disclosing the minimum and maximum ''Total Annual [Portfolio Company] Operating Expenses.'' Current Instruction 17(a) contains instructions for calculating Total Annual Portfolio Company Operating Expenses, which results in a figure that is the same as the gross expense ratio presented in a portfolio company's prospectus fee table. Directing registrants to use the gross expense ratio reflected in a portfolio company's current prospectus would avoid the need to provide detailed instructions in the form regarding how to calculate this figure (as is the case with current Instruction 17(a)).[432]

We also propose revising current Instruction 19 (and renumbering it as Instruction 17) to modify the way that registrants could reflect operating expenses that include expense reimbursement or fee waiver arrangements. Currently, the instruction specifies that such expenses could appear in a footnote to the table. The revised instruction would instead state that these could appear as an additional line-item to the table. We believe that including these disclosures as a separate line-item in the table would provide a clearer presentation for investors than a footnote to the table.[433]

iv. Example (Forms N–3 and N–4)

We are proposing to update the requirements for the Example that would appear in the Fee Table in Forms N–3 and N–4 in several respects. First, we propose to revise the legend accompanying the Example to reflect the revised Fee Table headings and to reference the inclusion of optional benefits in the Example's assumptions. We believe the Example should reflect the highest cost that an investor may pay under the contract, inclusive of any available optional benefits. We also propose to increase the value of the assumed investment from $10,000, as required under Item 3 of current Form N–4 (and $1,000, as required under Item 3 of current Form N–3), to $100,000. We believe that $100,000 more closely approximates the current average value of a variable annuity,[434] and therefore we believe this figure is more likely to result in cost projections that align with actual investor expectations and experience.

We are also proposing to revise the instructions for the Example to clarify that registrants must provide an example for each contract class, consistent with current practice.[435] We also propose to revise Instruction 21(b) in current Form N–4 (which we would re-number as Instruction 18(b)), and to add new Instruction 16(b) in Form N–3, to make clear that that an example showing the most expensive combination of contract features should be shown first, while additional expense examples would be permitted, but not required.

In addition, we propose to remove the last sentence of Instruction 21(b) of current Form N–4, which states that in lieu of providing the required example based on maximum portfolio company expenses, a registrant may include separate expense examples based on the expenses of each portfolio company. In our experience, registrants rarely include separate expense examples based on the expense of each portfolio company (likely because to do so would add extensive length to the Example section of the prospectus). Eliminating this option would therefore not only reflect actual practice, but also would be consistent with our goal of streamlining prospectus disclosure.

We also propose to make certain technical corrections to Instructions 21(a) and (b) of current Form N–4, by eliminating references to amortization costs, which do not apply to variable annuity contracts that are structured as UITs.[436]

v. Portfolio Turnover (Form N–3)

Because Form N–3 registrants have a single-tier structure, investors do not receive separate prospectuses containing portfolio turnover information for investment options offered under the contract, as is the case for portfolio companies offered under contracts registered on Forms N–4 and N–6. We propose to require disclosure of portfolio turnover for each investment option in Form N–3, as well as a brief statement explaining that portfolio turnover has associated transaction costs, and that a higher portfolio turnover rate may indicate higher transaction cost and higher taxes, which affect the investment option's performance.[437] These disclosure requirements would largely restate existing requirements in caption 10 of Item 4(a) of current Form N–3, although they would include the brief statement that is required by the parallel item in Form N–1A in order to provide more context and information for investors.[438]

vi. General Instructions (Forms N–3, N–4, and N–6)

In addition to specific instructions associated with each of the tables and the Example(s) that would appear in response to the proposed Item 4 disclosure requirements, we also propose to update the General Instructions associated with this item.

Instruction 1(a) to the Fee Table in current Form N–6 instructs registrants to round all dollar figures to the nearest

registrants on Form N–3 either do not offer optional benefits or else calculate optional benefit expenses on a contract value basis. We therefore believe that proposing the disclosure of total annual contract expenses is appropriate for Form N–3 registrants, because the disclosure would be practicable and could help investors understand the total expenses (not including portfolio company fees and expenses) that they will pay each year.

[432] Because this simplification would render obsolete the rest of Instruction 17, as well as Instructions 16 and 18, to current Item 3 of Form N–4, we propose eliminating them.

[433] *See* Disclosure of Costs and Expenses by Insurance Company Separate Accounts Registered as Unit Investment Trusts that Offer Variable Annuity Contracts, Investment Company Act Release No. 25802 (Nov. 13, 2002) [67 FR 69973 (Nov. 19, 2002)], at n.14 and accompanying text (''We intend that the staff construe the amendments to the fee table of Form N–4 consistent with the approach taken under Form N–1A, to permit the addition of one line to the fee table showing the range of net Portfolio Company operating expenses after taking account of contractual limitations that require reimbursement or waiver of expenses.'').

[434] *See supra* note 130.

[435] The instructions for the Example in current Item 3 of Form N–3 (currently unnumbered) would be new Instruction 17 to proposed Item 4, while Instruction 21 to current Item 3 of Form N–4 would be renumbered as Instruction 18 to proposed Item 4.

[436] When Forms N–3 and N–4 were first adopted, the references in Form N–3 to amortization costs were inadvertently included in Form N–4. Because investors in UITs (Form N–4 and N–6 filers) do not pay amortization costs, we are removing this reference from the instruction.

[437] *See* proposed Item 4 of Form N–3.

[438] *See* Item 3 of Form N–1A.

dollar and all percentages to the nearest hundredth of one percent.[439] Because of the underwriting process inherent in variable life insurance contracts, rounding dollar figures to the nearest dollar for certain younger and healthier investors may result in disclosures of zero cost for certain fees, which may be misleading for investors. Therefore, we have proposed to modify this instruction to only require rounding percentages to the nearest hundredth of one percent.[440]

We also propose to revise General Instruction 5 of Form N–4 to state that if a fee is calculated based on a benchmark (*e.g.,* a fee that varies according to volatility levels or Treasury yields), the registrant must disclose a maximum guaranteed charge as a single number. We believe that this proposed instruction would help minimize confusion regarding how much an investor can expect to pay under the contract and would better assist investors in understanding the costs they will pay when investing in a variable annuity. Without this clarifying statement, registrants that offer variable annuity contracts that link certain fees to benchmarks might seek only to present the maximum fee as a range (*e.g.,* a certain percentage plus or minus a stated benchmark).[441] Under the proposed instruction, a registrant that chooses to disclose the fee range (*e.g.,* a fee that varies based on the 10-year Treasury rate) associated with a particular feature could do so, as long as they also disclose the maximum possible charge (*e.g.,* 3%). We also propose to add a parallel provision to Form N–3 as General Instruction 5 of Item 4.

As part of our effort to update the Fee Table, we propose to modify current General Instruction 1.(f) to Item 3 of Form N–3 and General Instruction 6 to Item 3 of Form N–4 to eliminate language that would be redundant in light of new proposed General Instruction C.3.(e) of both forms.[442] We also propose to include new General Instruction 7 to Forms N–3 and N–4, which would require registrants offering a contract with more than one class to provide fee and expense information for each class (and, for Form N–3 registrants, to require registrants offering more than one investment option to provide a separate response for each investment option).[443]

vii. Instructions for New Variable Contract Registrants (Forms N–3, N–4, and N–6)

Finally, we propose to eliminate certain instructions in Item 3 of current Forms N–3, N–4, and N–6 relating to new variable contract registrants. Specifically, we propose to eliminate Instructions 4(d)(i), 4(f)(ii), 4(g)(vi) and Instruction (f) under ''Example'' in Form N–3, Instruction 22 of Form N–4, and Instruction 5 of Form N–6 as the staff has found these instructions to be unnecessary.

For example, Instruction 4(d)(i) to Item 3 of current Form N–3, Instruction 22(a) to Item 3 of current Form N–4, and Instruction 5(a) to current Item 3 of Form N–6 instruct a registrant to base the percentages in the Total Annual Portfolio Company Operating Expenses table on estimated amounts for the current fiscal year, but we understand that these operating expenses need not be estimated because they would not vary based on whether the registrant is new or already exists. Likewise, Instructions 4(f)(ii) and 4(g)(vi) to Item 3 of current Form N–3, Instruction 22(b) to Item 3 of current Form N–4, and Instruction 5(b) of Item 3 to current Form N–6 state that a new registrant may disclose any expense reimbursement or fee waiver arrangements that are expected to reduce the expenses that the table would show. Because Instruction 14(e) in proposed Item 4 of Form N–3, Instruction 17 in proposed Item 4 of Form N–4, and Instruction 4(b) in proposed Item 4 of Form N–6 would address this same issue, and we do not see a reason to distinguish between new and existing registrants for this purpose, these current Instructions are unnecessary.

Lastly, Instruction (f) under the ''Example'' in Item 3 of current Form N–3 and Instruction 22(c) to Item 3 of current Form N–4 state that new registrants must only complete the 1- and 3-year period portions of the Example and estimate any annual contract fees collected. However, because variable contract charges are contractual and do not vary based on whether the variable contract registrant is new or existing, we believe a new registrant's Example should include the full 1, 3, 5, and 10-year periods required of existing registrants. For these reasons, we propose to eliminate these current Instructions in their entirety.

We request comment generally on the amendments we propose to make to the Fee Table, and specifically on the following issues:

- Would the proposed changes to the Fee Table disclosures effectively and appropriately streamline and consolidate the Form and the required disclosures? Would the proposed changes better reflect registrants' current disclosure practices? Would the new captions convey, more clearly than the current captions, the types of expenses investors can expect to pay under the contract?
- Are the proposed disclosure requirements and related instructions associated with the ''Annual Contract Expenses'' table appropriate? For example, would the table appropriately disclose the annual fees and expenses associated with a variable contract? As another example, is ''Base Contract Expenses'' an appropriate way to describe the basic insurance-related contract features available under the contract, or would some other term be preferable? How else might we characterize the charges associated with the basic features available under the contract (excluding optional benefits and annual portfolio company operating expenses)?
- For Form N–3 registrants, should we revise or remove the instruction to the ''Total Annual Expenses'' line-item providing that if optional benefit expenses are calculated on a basis other than contract value, registrants should prominently indicate that those optional benefit expenses are not included in total annual expenses? Would investors be confused by viewing total annual expenses which did not include optional benefit expenses? In this case, or generally, should we not require disclosure of total annual expenses? Conversely, should we require disclosure of total annual expenses for all registrants on Forms N–4 and N–6, as well as on Form N–3?
- Would the proposed requirements appropriately convey to investors the types of optional benefits available under the contract and the charges associated with each? Should we require disclosure of optional benefits that are available at no additional charge in the list of optional benefits? If not, why not?
- Should we revise the legend that would precede the required ''Total Annual Portfolio

[439] *See* Instruction 1(a) to current Item 3 of Form N–6.

[440] *See* Instruction 1(a) to proposed Item 4 of Form N–6.

[441] Our staff has observed that some registrants disclose a fee range for certain optional benefits based on a benchmark (*e.g.,* a fee that varies according to volatility levels or Treasury yields), without also disclosing a firm cap on the maximum amount an investor may have to pay for that contract feature.

[442] We propose to remove from Instruction 6 to current Item 3 of Form N–4 and Instruction 1.(f) to current Item 3 of Form N–3 the statement that ''[i]f a Registrant uses one prospectus to offer a contract in both the group and individual variable annuity contract markets, the Registrant may (a) add narrative disclosure following the fee table identifying markets where certain fees are either inapplicable or waived or lower fees charged to investors in group markets, or (b) provide a separate fee table for group and individual contracts,'' as proposed General Instruction C.3.(e)(i) of Forms N–3 and N–4 would address the registration of multiple contracts.

[443] This would harmonize the General Instructions associated with the Fee Table for Forms N–3 and N–4 with parallel instructions in Form N–1A. *See* Instruction 1(d)(ii) to Item 3 of Form N–1A (''If the prospectus offers more than one Class of a Multiple Class Fund or more than one Feeder Fund that invests in the same Master Fund, provide a separate response for each Class or Feeder Fund.'').

Company Operating Expenses'' table, as proposed in Forms N–4 and N–6? Are the amendments that we propose to the current instructions associated with this table appropriate? Should we make any other modifications to the table?

- Should we modify the requirements for the Example that would appear in the Fee Table, as proposed? Would the revised legend accompanying the Example appropriately alert investors to the assumptions that form the basis for the Example? Are the proposed revised instructions for the Example, including eliminating the option to include separate expense examples based on the expenses of each portfolio company, appropriate? Would they result in a clearer and more salient illustration of the costs of investing in the contract? Would increasing the value of the assumed investment in the Example from $10,000 (or $1,000 in the case of Form N–3 registrants) to $100,000 more closely align with typical current levels of investment in variable contracts? Are there any other modifications to the Example that we should make? If so, what?
- Should we revise the General Instructions to the Fee Table item, as proposed? For example, would the proposed requirement to disclose a maximum guaranteed charge as a single number, if a fee is calculated based on a benchmark, reduce investor confusion and better assist investors in understanding the costs they will pay when investing in a variable annuity? Are the other proposed revisions to the General Instructions appropriate to eliminate redundant language, and to otherwise update the tables? Should we modify or remove any other General Instructions, and if so, how?
- Are there any current General Instructions that we also should amend or other General Instructions we should include?
- Are there any additional modifications we should require to make the fee and expense information easier for investors to understand?

e. Principal Risks of Investing in the Contract (Item 5 of Forms N–3, N–4, and N–6)

We propose to add new Item 5 to Forms N–3 and N–4, which would require registrants to summarize the principal risks of purchasing a contract, including the risks of poor investment performance, that contracts are unsuitable as short-term savings vehicles, limitations on access to cash value through withdrawals, and the possibility of adverse tax consequences. The new disclosure item for Forms N–3 and N–4 generally mirrors Item 2(b) of current Form N–6 (which we propose to re-designate as Item 5), with the exception of the risk of contract lapse.[444] Although registrants currently include risk disclosures in their prospectuses without an explicit form requirement to do so, we note that in some cases, the risk discussions are provided across various sections of the prospectus. We believe the approach taken in Form N–6 of requiring a consolidated summary of the principal risks associated with the contract would provide more effective communication of risks to investors.

Although current Form N–6 requires risk disclosures to be presented in a summary section at the front of the statutory prospectus, we propose to require for each registration form that the risk section be provided after the Key Information Table and Fee Table. While the Key Information Table would include a condensed discussion of contract risks, proposed Item 5 would give registrants the flexibility to describe the principal risks of investing in the contract in more detail than what could reasonably appear in a table meant to summarize the contract's key risks and features. While we are not proposing to limit the length of the summary of principal risks in response to proposed Item 5, we believe that the utility of a summary would be undermined by the long, complex descriptions we sought to avoid when we adopted the summary principal risk section as part of Form N–6.[445]

We request comment generally on the proposal to include a new item requiring disclosure of principal risks in the prospectus, and specifically on the following issues:

- Should we require the summary of principal risks of investing in a contract to be disclosed in a single location in the prospectus? Should we instead permit registrants the flexibility to disclose risks in conjunction with the specific contract feature to which they pertain, thus providing greater context for the risk(s)?
- Should the summary of principal risks disclosures be required to follow the Key Information Table and Fee Table, or should we require or permit the disclosures to be provided elsewhere in the prospectus?
- Does the proposed item appropriately describe the types of risks to be summarized, or should the list of risks be revised?
- Would cross-referencing the risk section in the Key Information Table provide useful layered disclosure for investors, or are there limitations in this approach? How might they be resolved?
- Should we impose a page limit, or other length limit, on responses to the proposed item? If so, what limit would be appropriate? Should we instead allow registrants the flexibility to determine how much disclosure is appropriate? Are there any organizing principles we might consider to encourage registrants to avoid overly-lengthy disclosure?
- Should we make any other changes regarding proposed prospectus disclosures describing risks associated with the contract?
- Should we require the Item 5 disclosures to also be included in the Initial Summary Prospectus and Updating Summary Prospectus?

f. General Description of Registrant, Depositor, and Investment Options/ Portfolio Companies (Item 6 of Forms N–3, N–4, and N–6)

We propose to amend Item 5 of current Forms N–3 and N–4, and Item 4 of current Form N–6, which we would re-designate as Item 6 in each of the registration forms. Reflecting the more up-to-date requirements of the parallel item of current Form N–6, we are proposing to amend Forms N–3 and N–4 to relocate certain information from the prospectus to the SAI: (1) With respect to the depositor, a description of the general nature of its business, its date and form of organization and the state or other jurisdiction under which it is organized, and information relating to persons controlling the depositor; and (2) with respect to the registrant, its date and form of organization and classification pursuant to section 4 of the Investment Company Act, and whether there are sub-accounts of the registrant.[446] In addition, for consistency with Form N–6 and our newer registration forms,[447] in Forms N–3 and N–4 we are proposing to relocate the requirement to identify and state the principal business address of any person who provides significant administrative or business affairs

[444] We are not including risk of contract lapse in proposed Item 5 of Form N–3 or Form N–4 because lapse, which occurs when there is insufficient cash value to pay insurance policy charges, is a less significant risk for variable annuities. Lapse is a greater risk for variable life insurance contracts, which, unlike variable annuities, require continuous premium payments (failure to pay premiums generally triggers a lapse and terminates the contract). In addition, the expenses associated with the death benefit for a variable life insurance contract tend to be higher than those for a variable annuity (in proportion to contract cash value). Higher expenses more quickly erode a variable life insurance contract's cash value, which if insufficient to pay policy charges, will cause the contract to lapse.

[445] *See* Registration Form for Insurance Company Separate Accounts Registered as Unit Investment Trusts that Offer Variable Life Insurance Policies, Investment Company Act Release No. 23066 (Mar. 13, 1998) [63 FR 13988 (Mar. 23, 1998)] (''Form N–6 Proposing Release''), at n.8 (noting that ''[v]ariable life insurance prospectuses generally disclose [information required under the item as proposed], particularly risk information, in the context of long, often complex descriptions of the policy. The Commission believes that the proposed narrative summary will help achieve more effective communication of risks.'').

[446] Proposed Item 6(a) and (b) of Forms N–3 and N–4; proposed Item 22(a) and (b) of Form N–3; proposed Item 20 of Form N–4; *see also* Item 5(a) and 5(b) of current Forms N–3 and N–4.

[447] *See, e.g.,* Item 17(c) of current Form N–6; Item 19(h) of Form N–1A.

management services, and a description of those services, from the prospectus to the SAI.[448]

We are also proposing to amend the information required by the current item in Forms N–4 and N–6 regarding portfolio companies (and for Form N–3, investment options).[449] As discussed below, we are moving the summary of certain information about the portfolio companies and investment options to an appendix of the prospectus.[450] Therefore, with respect to Forms N–4 and N–6, we propose to revise this item to replace the current requirement to briefly describe each portfolio company [451] with a requirement to state that certain information about the portfolio companies is available in the appendix and to cross-reference or link to that appendix, to further state that more detailed information is available in the portfolio companies' prospectuses, and to explain how investors may obtain copies of those prospectuses.[452]

Proposed Item 19 of Form N–3 similarly would require a comparable appendix of investment options, but only if the appendix were included in a summary prospectus.[453] Registrants would also include more detailed disclosures about investment options as required by proposed Item 20. Proposed Item 20 would generally include the disclosures required by current Item 5(c) through (e) regarding investment objectives and policies and principal risk factors associated with investing, as well as additional disclosures regarding the performance of each investment option.[454] Similar to Forms N–4 and N–6, proposed Item 6 would require a Form N–3 registrant to state that certain information about the investment options is available in the appendix (pursuant to proposed Item 19) or elsewhere in the prospectus (pursuant to proposed Item 20), and provide cross-references or links as appropriate.

We request comment generally on the amendments we propose to make to the required prospectus disclosures describing the registrant, depositor, and portfolio companies, and specifically on the following issues:

- Should we streamline the disclosures relating to the depositor and registrant as proposed? Would these proposed amendments reduce any information that would be important to investors? Should we maintain any existing disclosures or require additional disclosures as to the depositor and registrant?
- Should we relocate the requirement to disclose information relating to service providers to the SAI as proposed?
- Should we make any other changes to the form regarding required prospectus disclosures describing the registrant, depositor, and/or portfolio companies?

g. Charges (Item 8 of Form N–3, Item 7 of Forms N–4 and N–6)

We propose to amend Item 7 of current Form N–3 and Item 6 of current Form N–4 (which we would re-title, and re-designate as Item 8 (in the case of Form N–3) and Item 7 (in the case of Form N–4) to reflect the more up-to-date requirements of the parallel item of current Form N–6.[455]

Paragraph (a) would expand the disclosure requirements of the current item in Forms N–3 and N–4 to include certain additional disclosure requirements that currently appear in the parallel item of Form N–6. The proposed amended items would require a registrant to provide a brief description of charges deducted from ''any other source'' (in addition to charges specifically deducted from purchase payments, investor accounts or assets of the registrant, which is currently required). These additional charges could include, for example, contract loan charges and optional benefit charges. In addition, we are proposing to require that the registrant describe: (1) The frequency of deductions (*e.g.,* daily, monthly or annually) for any recurring charges; and (2) where it is possible to identify what is provided in consideration for a particular charge (*e.g.,* use of sales load to pay distribution costs), an explanation of what consideration is provided. We believe these additional disclosures could help alleviate investor confusion about costs by more specifically describing the types of charges that might be incurred under a variable annuity contract.

In addition, Instruction 1 to subparagraph (a) of the proposed amended item in Forms N–3 and N–4 would include a new requirement for the registrant to describe the factors affecting the computation of the amount of the sales load.[456] For contracts with a deferred sales load, Instruction 1 would require the registrant to describe the sales load as a percentage of the applicable measure of purchase payments (or other basis) that the deferred sales load may represent, rather than the amount withdrawn or surrendered. Additionally, registrants would identify any events that would cause the deduction of a deferred sales load (*e.g.,* surrender or partial surrender). The description of any deferred sales load would include how the deduction will be allocated if the investor has allocated contract value among multiple sub-accounts and when, if ever, the sales load will be waived (*e.g.,* if the contract provides a free withdrawal amount).

We are also proposing new Instruction 4 to subparagraph (a) of the amended item of Forms N–3 and N–4.[457] If the contract's charge for premium taxes or other taxes varies according to jurisdiction, proposed Instruction 4 would clarify for the registrant that identifying the range of current premium taxes or other taxes in this paragraph is sufficient.

We also propose to revise the item related to charges in each form to clarify that the required disclosures should relate to ''current'' charges.[458] Disclosure of ''maximum'' charges would be redundant because those charges are encompassed in the fee table that would be included in the prospectus.[459]

Finally, we are proposing to amend the item of Form N–6 relating to charges in two respects. First, we are proposing to relocate disclosures on commissions paid to dealers from the SAI [460] to the prospectus.[461] We believe that this disclosure, which is currently required in the prospectus under Forms N–3 and N–4,[462] is more appropriate in the prospectus due to potential conflict of interest concerns. In addition, we also propose to require a description of the types of operating expenses for which the registrant is responsible,[463] which

[448] *See* proposed Item 25(g) of Form N–3; proposed Item 21(c) of Form N–4.

[449] Item 5(c) through (e) of current Form N–3; Item 5(c) and (d) of current Form N–4; Item 4(c) and (d) of current Form N–6.

[450] *See infra* section II.D.2.r (discussing proposed Item 19 of Form N–3, proposed Item 18 of Forms N–4 and N–6).

[451] *See* Item 5(c) of current Form N–4; Item 4(c) of current Form N–6.

[452] Proposed Item 6(c) of Forms N–4 and N–6.

[453] Instruction 1(a) to proposed Item 19 of Form N–3; *see also supra* text accompanying note 204 and note 241.

[454] *See infra* text following note 525 (discussing the disclosure requirements of proposed Item 20 of Form N–3).

[455] *See* Item 5 of current Form N–6.

[456] This instruction is based on Instruction 1 to Item 5(a) of current Form N–6.

[457] This instruction is based on Instruction 3 to Item 5(a) of current Form N–6.

[458] *See* proposed Item 8(a) of Form N–3; proposed Item 7(a) of Forms N–4 and N–6.

[459] *See* Item 4 of proposed Forms N–3, N–4, and N–6.

[460] Item 20(d) of current Form N–6.

[461] Proposed Item 7(b) of Form N–6.

[462] *See* Item 7(d) of current Form N–3; Item 6(d) of current Form N–4.

[463] Proposed Item 7(e) of Form N–6. If organizational expenses of the registrant are to be paid out of its assets, this item also would require an explanation of how the expenses will be amortized and the period over which the amortization will occur.

Forms N–3 and N–4 currently require in the prospectus.[464] Operating expenses paid by the registrant can be significant, and we believe this is appropriate disclosure for an item discussing contract charges.

We request comment generally on the amendments we propose to make to the required prospectus disclosures regarding contract charges and specifically on the following issues:

- Will investors find the information resulting from the expanded disclosure requirements of the proposed amendments useful (*e.g.,* new requirements in Forms N–3 and N–4 that the registrant describe the frequency of deductions for any recurring charges and, where it is possible to identify what is provided in consideration for a particular charge, an explanation of what consideration is provided)?
- Is the proposed new instruction in Forms N–3 and N–4 that would permit a registrant to disclose a range of charges for premium or other taxes (if these would vary according to jurisdiction) appropriate? Instead, should the prospectus specify each of these charges individually?
- Should we require prospectus disclosure of additional information regarding contract charges?
- In the context of Form N–6 registrants, are there reasons that disclosures on commissions paid to dealers should not be located in the prospectus (and instead should be located in the SAI)? Will the new requirement in Form N–6 to provide a description of the types of operating expenses for which the registrant is responsible better help investors to understand contract charges?
- Are there any instructions that we should not include? Are there any additional instructions we should include?

h. General Description of the Contracts (Item 9 of Form N–3, Item 8 of Forms N–4 and N–6)

We propose to amend Item 8 of current Form N–3, Item 7 of current Form N–4, and Item 6 of current Form N–6 (which we would re-designate as Items 9, 8, and 8, respectively) to reflect the more up-to-date requirements of Form N–6 (in the case of the amendments to Forms N–3 and N–4) and also to harmonize this disclosure item with other proposed amendments to the forms. Except as described below, we do not intend these proposed amendments to significantly alter current disclosure obligations.

We propose to remove the current instruction to subparagraph (a) of Forms N–3 and N–4, which states that the registrant need not repeat rights that are described elsewhere in the prospectus, and replace it with a new instruction to subparagraph (a) in each of the forms[465] that requires registrants to disclose all material state variations and intermediary-specific variations (*e.g.,* certain contract features that may vary by distribution channel). Due to differences in state insurance law, there may be significant variations in a contract based on the state in which a contract is offered. We have also observed that certain contract features may not be available through certain intermediaries.

We also propose to revise current subparagraph (b) of Forms N–3 and N–4 regarding contract provisions and limitation in two ways.[466] First, we would require registrants to briefly describe any provisions and limitations for minimum contract value and the consequences of falling below that amount, because those consequences in some cases can be significant.[467] Second, we are proposing to modify the current requirement in Forms N–3 and N–4 regarding exchanges of contracts to more broadly describe provisions or limitations on conversion or exchange of the contract for another contract (which could include a fixed or variable annuity or life insurance contract) as currently required by Form N–6.[468]

We also propose to revise the disclosure requirement in each registration form to clarify that the existing requirement to describe any provisions and limitations on transfer of contract value between sub-accounts includes transfer programs, such as dollar cost averaging, portfolio rebalancing, asset allocation programs, and automatic transfer programs.[469]

We are also proposing to newly require in each registration form a description of the obligations under the contract that the insurer's general account funds (*e.g.,* death benefits, living benefits, or other benefits available under the contract) and include a statement that these amounts are subject to the insurer's claims-paying ability and financial strength.[470] While some of this information would appear in the Key Information Table,[471] this item would require registrants to provide more detailed disclosure later in the prospectus.

We are also proposing to modify the instruction to the current subparagraph in each form relating to contract or registrant changes to require disclosure of the substitution of one portfolio company for another pursuant to section 26(c) of the Investment Company Act.[472] This amendment is intended to formalize the Commission's long-standing position that investors should be put on notice of the possibility that an insurer may substitute one portfolio company for another portfolio company.[473]

We are also proposing to eliminate current subparagraph (d) in Forms N–3 and N–4, which requires a description of how investor inquiries may be made. This item would duplicate information that would be required to appear on the back cover page of the prospectus pursuant to proposed Item 1(b)(1).

Finally, with respect to Forms N–3 and N–4, we are proposing to relocate disclosures regarding limitations on classes of purchasers from the cover page of the prospectus[474] to the item requiring the general description of contracts.[475] This proposed revision mirrors Item 6(e) of current Form N–6, would help streamline cover page disclosure, and would permit registrants to describe this limitation more fully than if it had to appear on the cover page (which would necessarily entail space constraints).[476]

We request comment on the proposed form amendments relating to the general description of the contracts, and specifically on the following issues:

[464] *See* Item 7(f) of current Form N–3; Item 6(f) of current Form N–4.

[465] This new instruction would also appear in Form N–6.

[466] In addition, subparagraph (b)(iii) of current Forms N–3 and N–4 would be re-designated as subparagraph (b)(5) and revised to replace ''exchanges'' with ''buyout offers'' of variable annuity contracts, including interests of participations therein.

[467] Proposed Item 9(b)(1) of Form N–3; proposed Item 8(b)(1) of Form N–4. For example, some contracts specify that if the contract's value falls below a certain threshold, the contract terminates and an investor's contract value is returned.

[468] Proposed Item 9(b)(4) of Form N–3 and related proposed instruction; proposed Item 8(b)(4) of Form N–4 and related proposed instruction; *see also* Item 8(b)(3) and related instruction of proposed Form N–6; Item 6(b)(3) of current Form N–6.

[469] Proposed Item 9(b)(3) of Form N–3; proposed Item 8(b)(3) of Form N–4; proposed Item 8(b)(2) of Form N–6.

[470] Proposed Item 9(c) of Form N–3; proposed Item 8(c) of Form N–4; proposed Item 8(c) of Form N–6.

[471] *See* Instruction 3(d) to proposed Item 3 of Forms N–3, N–4, and N–6.

[472] *See* Instruction to proposed Item 9(d) of Form N–3; Instruction to proposed Item 8(d) of Form N–4; Instruction to proposed Item 8(d) of Form N–6.

[473] *See* Changes in Investment Company Act Made by 1970 Amendments Act, Investment Company Act Release No. 6506 [36 FR 9130 (May 5, 1971)] (depositors of UITs should notify investors of the possibility that underlying securities may be substituted).

[474] Item 1(a)(iv) of current Forms N–3 and N–4.

[475] Proposed Item 9(e) of Form N–3; proposed Item 8(e) of Form N–4.

[476] *See* Item 6(e) of current Form N–6. Like Form N–6, Form N–1A also requires disclosure of limitations on the purchasers to whom the Contracts are offered further back in the prospectus, and not on the cover page. *See* Items 6 and 11 of Form N–1A.

- Should we require the prospectus to include a description of the obligations under the contract that the insurer's general account funds? Should the proposed requirement be modified in any way?
- Should we require disclosure of the substitution of one portfolio company for another pursuant to section 26(c) of the Investment Company Act? If not, why not? How should such disclosure be provided to investors?
- Should we make any other changes to the form regarding required prospectus disclosures describing the contract?

i. Annuity Period (Item 10 of Form N–3, Item 9 of Form N–4)

We propose to amend Item 9 of current Form N–3 and Item 8 of current Form N–4 (which we would re-designate as Items 10 and 9, respectively) to include a new requirement that a registrant state, if applicable, that the investor will not be able to withdraw any contract value amounts after the annuity commencement date.[477] While the proposed ''Overview'' section of the prospectus would contain similar information,[478] the new item requirement would provide investors with more complete disclosure about a key aspect of annuitization that we believe investors often misunderstand in the context of a more detailed discussion about the annuity benefits under the contract.

We request comment generally on the proposed form amendments relating to the annuity period, and specifically on the following issues:

- Should we require the prospectus to include a statement that the investor will not be able to withdraw any contract value amounts after the annuity commencement date? Should the proposed requirement be modified in any way?
- Should we make any other changes to the form regarding required prospectus disclosures relating to the annuity period (*e.g.,* to specifically require a registrant to state directly, as applicable, that all contract benefits terminate upon annuitization)?

j. Standard Death Benefit (Item 11 of Form N–3, Item 10 of Forms N–4 and N–6)

We propose to amend Item 10 of current Form N–3, Item 9 of current Form N–4, and Item 8 of current Form N–6 (which we would re-designate as Items 11, 10, and 10, respectively) to clarify that the current disclosures required by the item would only apply to the standard death benefit under the contract.[479] Registrants would include prospectus disclosure about optional death benefits (as well as standard and optional living benefits) pursuant to the proposed new Item 12 to Form N–3, and proposed new Item 11 to Forms N–4 and N–6, as discussed below.

To assist variable annuity investors in better understanding the operation of the standard death benefit, we are also proposing to amend Forms N–3 and N–4 to specifically require registrants to summarize the operation of the standard death benefit.[480] As discussed above, these disclosures would also be required in any variable annuity initial summary prospectus, and would serve as the counterpart to similar disclosures that would be included in variable life initial summary prospectuses.[481]

We request comment generally on the proposed form amendments relating to the standard death benefit, and specifically on the following issues:

- Should we require other disclosures regarding the operation of the standard death benefit? Should we make any other changes to the form regarding required prospectus disclosures relating to the standard death benefit?
- As proposed, optional death benefit disclosures would be provided with disclosures of other optional benefits available under the contract. Instead, should we permit or require optional death benefits disclosures to accompany standard death benefit disclosures?

k. Other Benefits Available Under the Contract (Item 12 of Form N–3, Item 11 of Forms N–4 and N–6)

We propose to add a new item to each registration form that would require a registrant to discuss any standard living benefits, as well as all optional benefits (*e.g.,* death benefit, accumulation benefit, withdrawal benefit, long-term care benefit, etc.) available under the contract.[482] Optional benefits and standard living benefits are now a significant aspect of most variable annuity contracts (as well as most variable life insurance contracts). While we understand that insurers generally include disclosure about optional benefits and standard living benefits in their prospectuses, these disclosures have no standard content or presentation because there is no current form requirement regarding optional benefits.

As discussed above, subparagraph (a) of the proposed new item would require a tabular summary overview of each benefit available under the contract (other than the standard death benefit).[483] This tabular summary would also be required in any initial summary prospectus.[484]

Subparagraphs (b) and (c) of the proposed new item would require the statutory prospectus to include narrative disclosures that would provide more detailed information regarding each of the benefits presented in the tabular summary. As proposed, a registrant would be required to include a brief description of each benefit (other than the standard death benefit) offered under the contract,[485] and a brief description of any limitations, restrictions and risks associated with each benefit.[486]

Some benefits offered by a contract may have complicated terms that do not readily lend themselves to being fully described in a tabular summary. Therefore, the proposed narrative disclosures are intended to complement the tabular summary presentation by allowing registrants to discuss the benefits, as well as the limitations, risks, and restrictions associated with each, in more detail without being constrained by the limitations of a tabular presentation. The requirement to discuss the limitations, risks, and restrictions associated with each benefit would also help ensure that these aspects of contract benefits—along with the value they could provide to investors—are discussed in a standardized manner among contract prospectuses.

[477] Proposed Item 10(g) of Form N–3; proposed Item 9(g) of Form N–4.

[478] Proposed Item 2(c)(2) of Forms N–3 and N–4.

[479] Proposed Item 11 of Form N–3; proposed Item 10 of Forms N–4 and N–6.

[480] Proposed Item 11(a) of Form N–3; proposed Item 10(a) of Form N–4. When describing the standard death benefit, registrants would discuss the amount of the benefit and how the benefit amount may vary, the circumstances under which the value of the benefit may increase or be reduced (including the impact of withdrawals), and how the benefit may be terminated.

[481] *See* proposed rule 498A(b)(5)(iii); *see also supra* section II.A.1.c.ii(c).

[482] Proposed Item 12 of Form N–3; proposed Item 11 of Forms N–4 and N–6.

[483] The summary table would include the name of each benefit, its purpose, whether the benefit is standard or optional, associated fees (as a stated percentage of contract value, benefit base, etc.), and a brief description of limitations or restrictions. *See supra* section II.A.1.c.ii(d).

[484] *See* proposed rule 498A(b)(5)(iv); *see also supra* section II.A.1.c.ii(d).

[485] This brief description would be required to include a discussion of: (1) Whether the benefit is standard or elected; (2) the operation of the benefit, including the amount of the benefit and how the benefit amount may vary, the circumstances under which the value of the benefit may increase or be reduced (including the impact of withdrawals), and how the benefit may be terminated; (3) fees and costs, if any, associated with the benefit; and (4) how the benefit amount is calculated and payable, and the effect of choosing a specific method of payment on calculation of the benefit. *See* proposed Item 12(b) of Form N–3; proposed Item 11(b) of Forms N–4 and N–6.

[486] For example, this could include restrictions on which portfolio companies may be selected, risk of reduction or termination of benefit resulting from excess withdrawals, etc. *See* proposed Item 12(c) of Form N–3; proposed Item 11(c) of Forms N–4 and N–6.

We also propose to include an instruction directing registrants in responding to proposed subparagraphs (b) and (c) to provide one or more examples illustrating the operation of each benefit in a clear, concise, and understandable manner.[487] This instruction is intended to further assist investors in understanding the other benefits offered under the contract.

We request comment generally on the proposed new form requirements relating to other benefits under the contract, and specifically on the following issues:

- Would the disclosures by the proposed new item enhance the ability of investors to understand any standard living benefit, as well as additional options available under the contract?
- Should we require additional disclosures or otherwise modify the proposed requirements? For example, while the proposed new item would encompass optional death benefits, as well as standard and optional living benefits, should our registration forms require separate and more tailored disclosures for any of these benefit categories?
- Should the required disclosures be presented in a different manner? Should the statutory prospectus include both a tabular summary overview as well as narrative disclosures? Should any of the disclosures specifically required in the narrative disclosure also be required in the tabular summary?

l. Purchases and Contract Value (Item 13 of Form N–3, Item 12 of Form N–4)

We propose to amend Item 11 of Form N–3 and Item 10 of current Form N–4 (which we would re-designate as Items 13 and 12, respectively) to re-structure the disclosure item and make other minor revisions that would not substantively change current disclosure requirements.[488] As discussed above, variable annuity initial summary prospectuses would include the proposed subparagraph (a) disclosures, which would require registrants to briefly describe the procedures for purchasing a contract, and would serve as the counterpart to similar disclosures that would be included in variable life initial summary prospectuses.[489]

We request comment generally on the proposed form requirements relating to purchases under the contract, including whether we should require any other disclosures with respect to purchases, or otherwise modify existing requirements.

m. Surrenders and Withdrawals (Item 14 of Form N–3, Item 13 of Form N–4, Item 12 of Form N–6)

We propose to amend Item 12 of current Form N–3 and Item 11 of current Form N–4 (which we would re-title and re-designate as Items 14 and 13, respectively) to reflect the more up-to-date requirements of the parallel item of Form N–6 and standardize these disclosure requirements across variable product registration forms.[490]

Specifically, subparagraph (a) of the proposed item would consolidate the current disclosure requirements regarding surrenders and delays in effecting requests for surrender and provide a high-level overview of how an investor can surrender (or partially surrender or make withdrawals from) a contract, including any limits on the ability to surrender, how the proceeds are calculated, and when they are payable.[491] As discussed above, the initial summary prospectus would include the proposed subparagraph (a) disclosures.[492]

Subparagraphs (b) through (d) would require additional information related to the operation of partial surrenders and withdrawals under the contract, including: (1) Whether and under what circumstances they are available; (2) how they will affect a contract's cash value, death benefit(s), and/or any living benefits; and (3) how partial surrenders and partial withdrawals will be allocated among the sub-accounts.[493]

Subparagraph (e) would require registrants to describe any provision for involuntary redemptions and the reasons for such provision.[494] While Item 12(d) of current Form N–3 and Item 11(d) of current Form N–4 specifically also require a description of any provision for lapse, we are proposing to eliminate the requirement to discuss lapse provisions because contract lapse is more relevant in the context of variable life products.[495]

Subparagraph (f), like Item 12(e) of current Form N–3 and Item 11(e) of current Form N–4, would require the disclosure of any revocation rights. However, to provide additional information relating to an investor's revocation rights, the proposed item would also specifically require: (1) A description of how the amount refunded is determined; (2) the method for crediting earnings to purchase payments during the free look period; and (3) whether investment options are limited during the free look period.[496] We believe these disclosures are particularly important because the free look is typically the only time the investor may leave the contract for multiple years after investing in the contract without paying significant surrender fees and penalties.[497]

We request comment generally on the proposed form requirements relating to surrenders and withdrawals, and specifically on the following issues:

- Do commenters agree with our proposed approach of generally modeling disclosures regarding surrenders and withdrawals on similar disclosures required by Form N–6? Are there specific disclosures in Form N–6 that would be inappropriate or less relevant for N–3 and N–4 registrants? For example, although current Form N–3 and Form N–4 use the terms ''redemptions'' and ''partial redemptions,'' proposed Form N–3 and proposed Form N–4 would use the terms ''surrender'' and ''partial surrender.'' We understand these terms are synonymous, although we have chosen the latter terms to reflect the same terminology used in Form N–6. Is there any reason why Form N–3 and Form N–4 should use different terminology other than what is included in Form N–6? Alternatively, are there specific disclosures that would be more appropriate or relevant for N–3 or N–4 registrants but are not currently required by Form N–6?
- Would the proposed amendments help investors to better understand the procedures and impact of surrenders and withdrawals, including issues relating to partial surrenders and withdrawals, sub-account allocation, involuntary redemption, and investors' revocation rights under the contract?
- Should we require any other disclosures with respect to surrenders and withdrawals, or otherwise modify existing requirements? For example, should the proposed

[487] *See* Instruction to proposed Item 12 of Form N–3; Instruction to proposed Item 11 of Forms N–4 and N–6.

[488] Proposed Item 13 of Form N–3; proposed Item 12 of Form N–4.

[489] *See* proposed rule 498A(b)(5)(v); *see also supra* section II.A.1c.ii(e).

[490] *See* Item 9 of current Form N–6.

[491] Proposed Item 14(a) of Form N–3; proposed Item 13(a) of Form N–4.

We are proposing to eliminate Item 12(b) of current Form N–3 and Item 11(b) of current Form N–4 (requirement to disclose any restrictions on redemption that may apply if the registrant offers the contracts in connection with the ''Texas Optional Retirement Program'') and Item 12(c) of current Form N–3 and Item 11(c) of current Form N–4 (requirement to briefly describe whether a request for redemption may not be honored for a period of time after an investor makes a purchase payment). We believe that these requirements are generally encompassed by the proposed requirements (discussed in the following paragraph) to disclose any limits on the ability to surrender, including any limits on the availability of partial surrenders and withdrawals.

[492] *See* proposed rule 498A(b)(5)(vii); *see also supra* section II.A.1.c.ii(g).

[493] Proposed Item 14(b) through (d) of Form N–3; proposed Item 13(b) through (d) of Form N–4. These disclosure requirements would conform to those that appear in the parallel provisions of current Form N–6. *See* Item 9(b) through (d) of current Form N–6.

[494] Proposed Item 14(e) of Form N–3; proposed Item 13(e) of Form N–4.

[495] *See supra* note 444 and accompanying text.

[496] These proposed disclosure requirements would conform to those that appear in the parallel provisions of current Form N–6. *See* Item 9(e) of current Form N–6.

[497] *See supra* paragraphs accompanying note 65.

requirements to disclose any limits on the ability to surrender, including any limits on the availability of partial surrenders and withdrawals, specifically include any of the disclosure requirements that appear currently in Form N–3 and Form N–4, and that we believe the proposed disclosure requirements encompass? [498]

n. Loans (Item 15 of Form N–3, Item 14 of Form N–4, Item 13 of Form N–6)

We are proposing to amend Form N–6 to consolidate required prospectus and SAI disclosures relating to contract loans [499] into a single item in the prospectus.[500] Given that investors would receive summary information relating to loan provisions in the Overview section of the statutory prospectus (and initial summary prospectus), we believe that investors would benefit from having more complete information on contract loans in a single location.

Specifically, a registrant would be required to briefly describe: (1) The availability of loans; (2) any limitations on that availability (*e.g.,* a prohibition on loans during the first contract year); (3) interest provisions; (4) the effects of loans on contract value and death benefits; (5) any other effects that a loan could have on the contract (*e.g.,* the effect of a contract loan in excess of contract value); and (6) loan procedures.

We understand that variable annuities, like variable life insurance contracts, often offer investors the opportunity to borrow money against the cash value of their contract, and that insurers and intermediaries frequently promote this contract feature in their sales of variable annuities. Therefore, we are also proposing to add new Item 15 to Form N–3 and new Item 14 to Form N–4, which would require similar prospectus disclosure about the availability and terms of loans under the contract.[501]

We request comment generally on the proposed new form requirements relating to loans under the contract, and specifically on the following issues:

- Should we require the prospectus to include a discussion of contract loan provisions? Would this disclosure be more appropriate only in the context of variable life insurance products?
- Will the information disclosed to investors pursuant to the proposed new form item be helpful to investors in understanding contract loan provisions, including any attendant risks? Should we require disclosure of additional information related to loan provisions, or otherwise modify the proposed requirements?

o. Taxes (Item 16 of Form N–3, Item 15 of Forms N–4 and N–6)

We propose to amend Item 13 of current Form N–3 and Item 12 of current Form N–4 (which we would re-designate as Items 16 and 15, respectively) to reflect the more up-to-date presentation and disclosure requirements of the parallel provisions of Form N–6.[502] As amended, registrants would continue to (a) describe the material tax consequences to the investor and beneficiary of buying, holding, exchanging, or exercising rights under the contract, (b) identify the types of qualified plans for which the contract is intended to be used, and (c) describe the effect, if any, of taxation on the determination of cash values or sub-account values.[503]

However, the amendments would specifically limit required disclosures to ''material'' tax consequences. While the instructions to subparagraph (a) of Item 13 of current Form N–3 and Item 12 of current Form N–4 provide that the ''disclosure need not include detailed description of applicable law,'' we are proposing to eliminate this instruction in light of the proposed language limiting disclosures to ''material'' consequences.

We do not expect any of the proposed amendments to this item to significantly alter current disclosure obligations. We request comment generally on these amendments.

p. Legal Proceedings (Item 17 of Form N–3, Item 16 of Forms N–4 and N–6)

We propose to amend Item 14 of current Form N–3 and Item 13 of current Form N–4 (which we would re-designate as Items 17 and 16, respectively) to reflect the more up-to-date presentation and disclosure requirements of the parallel provisions of Form N–6.[504]

As currently required by Form N–6, the proposed amendments would newly require registrants to: (1) Provide a description of the factual basis alleged to underlie the proceeding, and the relief sought, and (2) in addition to describing proceedings that a governmental authority has instituted, include information about proceedings ''known to be contemplated'' by governmental authorities.[505] The proposed amendments would also eliminate the requirement to discuss pending legal proceedings against any subsidiary of the registrant to mirror Form N–6's (and Form N–1A's) parallel provision and provide consistency across forms, which we believe is particularly appropriate in the context of separate account registrants, which are unlikely to have subsidiaries.[506]

These amendments are not expected to significantly alter current disclosure obligations. We request comment generally on these amendments.

q. Financial Statements (Item 18 of Form N–3, Item 17 of Forms N–4 and N–6)

We propose to add new Item 18 of Form N–3 and new Item 17 to Form N–4, which would require a statement, under a separate caption, of where any required financial statements of the registrant and the depositor may be found if they are not included in the prospectus.[507] A registrant would also briefly explain how investors may obtain any financial statements not provided in the SAI.[508] These proposed disclosure requirements would conform with a similar requirement included in Item 14 of current Form N–6.

The form's proposed General Instructions would provide that registrants are free to include in the prospectus financial statements required to be in the SAI, and may also include in the SAI financial statements that may be placed in Part C.[509] The proposed new item is intended to assist investors in finding and obtaining any financial statements that have been moved at the registrant's discretion from the location where they would otherwise be provided in the registration statement.[510]

We request comment generally on the proposal to include new Item 18 of Form N–3 and new Item 17 of Form N–4, and specifically on the following issues:

- To what extent do registrants currently make available the financial statements of the registrant and depositor in locations other than the prospectus and/or SAI, as our

[498] *See supra* note 491 and accompanying text.

[499] *See* Items 10 and 23 of current Form N–6.

[500] Proposed Item 13 of Form N–6.

[501] Proposed Item 15 of Form N–3; proposed Item 14 of Form N–4.

[502] *See* Item 12 of current Form N–6.

[503] Proposed Item 16 of Form N–3; proposed Item 15 of Form N–4.

[504] *See* Item 13 of current Form N–6.

[505] Proposed Item 17 of Form N–3; proposed Item 16 of Form N–4.

[506] *Id.; see also* Item 13 of current Form N–6; Item 10(a)(3) of Form N–1A.

[507] Proposed Item 18 of Form N–3; proposed Item 17 of Form N–4.

[508] *Id.*

[509] *See* proposed General Instruction C.3.(b) to Forms N–3, N–4, and N–6.

[510] A similar requirement to this proposed new item appears in paragraph (c) of Item 4 of current Form N–3 and paragraph (b) of current Form N–4. As discussed below, we propose to move the majority of the disclosure that current Item 4 of each of these forms would require to the contract SAI. *See infra* notes 545 through 554 and accompanying text (discussion of Accumulation Unit Value tables).

registration forms currently permit? What are the advantages or disadvantages of providing flexibility to registrants as to the location of the registrant's and depositor's financial statements?

• Would the proposed item in the prospectus regarding the availability of financial statements assist investors in locating those materials?

r. Appendix: Portfolio Companies/ Investment Options Available Under the Contract (Item 19 of Form N–3, Item 18 of Forms N–4 and N–6)

We propose to add a new disclosure item to each registration form (proposed Item 19 of Form N–3, and proposed Item 18 of Forms N–4 and N–6), which would require registrants to include as an appendix to the prospectus a table summarizing information about the portfolio companies available under the contract. This table would appear under the heading ''Portfolio Companies Available Under the Contract'' and would consolidate certain summary information about each portfolio company into a concise, easy-to-read tabular presentation, as discussed in more detail above.[511] This would replace certain other disclosure requirements, on the prospectus cover page[512] and elsewhere in the prospectus,[513] relating to the contract's portfolio companies or investment options.

The appendix would provide a tabular summary overview of portfolio companies available under the contract that is designed to improve the ability of investors to understand, evaluate, and compare those portfolio companies. If the availability of one or more portfolio companies varies by benefit offered under the contract, registrants would be required to include as another appendix a separate table indicating which portfolio companies were available under each of those benefits.[514] These same disclosures would also appear in the initial summary prospectuses and updating summary prospectus,[515] except for variations due to the more limited scope of the initial summary prospectus (which would only describe one contract) in contrast to the updating summary prospectus and statutory prospectus (which could describe more than one contract).[516]

Because we understand that certain variable contracts registered on Form N–3 have very few investment options (and sometimes have only one investment option), we recognize that the proposed appendix could have limited utility for certain Form N–3 registrants and their investors. For this reason, for variable contracts registered on Form N–3, we propose that registrants could omit the appendix and instead provide the more detailed disclosures about the investment options offered under the contract that proposed Item 20 of Form N–3 would require.[517] For Form N–3 registrants, the appendix would be required to appear in a statutory prospectus only if the appendix were included in a summary prospectus.[518]

The same legends that precede the appendix in the summary prospectus would generally also precede the appendix in the statutory prospectus.[519] Under proposed Form N–3, the legend that would precede the appendix would be required to state, in part, as follows: ''Performance reflects contract fees and expenses that are paid by each investor'' (in contrast, the parallel legend that Forms N–4 and N–6 would require would state that performance *does not* reflect contract fees and expenses that are paid by each investor). This difference is intended to reflect the fact that insurance charges are inherently reflected in the performance of investment options for contracts registered on Form N–3, since those investment options are offered as part of the variable contract. The performance of portfolio companies offered under contracts registered on Forms N–4 and N–6 does not reflect insurance charges, because those portfolio companies are separately registered as entities distinct from the variable contract. Additionally, only registrants on Forms N–4 and N–6 that chose to rely upon proposed rule 498A(j) to satisfy their portfolio company prospectus delivery obligations would be required to include in the appendix an internet address to a landing page, toll-free telephone number, and email address that investors could use to obtain or request portfolio company statutory and summary prospectuses.[520]

We request comment generally on the proposed appendix requirement, and specifically on the following issues:

• Should we require these disclosures to be included in the statutory prospectus? Are the content requirements for this proposed item appropriate for inclusion in the statutory prospectus?

• Our proposal would generally require registrants to include the same information in the proposed appendix regarding portfolio companies in the statutory prospectus and in the initial summary prospectus and updating summary prospectus.[521] Should any of the appendix requirements for the summary prospectus be different for the appendix

[511] *See supra* discussion at note 192 and accompanying and following text.

[512] *See* Item 1(a)(v) of current Form N–3 (requiring outside cover page to identify the type of separate account or a brief statement of the registrant's investment objectives); Item 1(a)(viii) of current Form N–4 (requiring the outside cover page of the prospectus to include the names of portfolio companies).

[513] *See* Item 5(c) and (d) of current Form N–3 (requiring registrants to concisely describe the investment objectives and policies of the registrant, and providing instructions for disclosure regarding the registrant's investment policies); Item 5(c) of current Form N–4 (requiring registrants to briefly describe each portfolio company, including its name, its type or a brief statement concerning its investment objectives, and its investment adviser); Item 4(c) of current Form N–6 (requiring registrants to briefly describe the registrant's sub-accounts and each portfolio company, including its name, its type or a brief statement concerning its investment objectives, and its investment adviser and any sub-adviser).

[514] *See supra* note 195 and accompanying and following text. A reference in this section to ''appendix'' includes any additional appendix (to the extent a registrant would be required to include one).

[515] *See* proposed rule 498A(b)(5)(ix); proposed rule 498A(c)(6)(iv); *see also supra* sections II.A.1.c.ii(*i*), II.A.2.c.ii(c).

[516] As discussed above, an initial summary prospectus could only describe a single contract that the registrant currently offers for sale, whereas the updating summary prospectus and statutory prospectus could describe multiple contracts under the conditions of the proposed General Instructions to Forms N–3, N–4, and N–6. *See supra* sections II.A.1.b, II.A.2.b.

[517] *See* Instruction 1(a) to proposed Item 19 of Form N–3; *see also* proposed rule 498A(b)(5)(ix), (c)(6)(iv) (the appendix also could be omitted from the summary prospectus); *infra* paragraphs following note 525 (discussing proposed Item 20 of Form N–3).

[518] *See* Instruction 1(a) to proposed Item 19 of Form N–3; *see also supra* text following note 192 and accompanying note 241.

[519] *See supra* section II.A.1.c.ii(i). The sole exception involves registrants on Form N–3 that use a summary prospectus that includes the disclosures required by proposed Item 19. In this case, the portion of the legend in the summary prospectus explaining how more information about the investment options may be obtained would not be required to be included in the statutory prospectus. *See* note 520 and accompanying text.

[520] *See* Instruction 1(b) to proposed Item 18 of Forms N–4 and N–6 (''Registrants not relying upon rule 498A(j) under the Securities Act [17 CFR 230.498A(j)] with respect to the Portfolio Companies that are offered under the Contract may, but are not required to, provide the next-to-last sentence of the first paragraph of the introductory legend to the table regarding online availability of the prospectuses.'').

Registrants on Form N–3 that use a summary prospectus that includes the disclosures required by proposed Item 19 of Form N–3 would be required to include in that appendix an introductory legend explaining how more information about the investment options may be obtained. *See* proposed rule 498A(b)(5)(ix) and *supra* notes 196–199 (discussing legend in initial summary prospectus); proposed rule 498A(c)(6)(iv) and note 240 (discussing legend in updating summary prospectus). However, that legend would not be required to be included in the statutory prospectus, because the statutory prospectus would already include those disclosures pursuant to proposed Item 20 (which requires more detailed disclosure regarding each of the investment options available under the contract). *See* Instruction 1(a) to proposed Item 19 of Form N–3; proposed Item 20 of Form N–3.

[521] *See generally supra* sections II.A.1.c.ii(*i*), II.A.2.c.ii(c).

included in the statutory prospectus? If so, how? For example, should registrants that choose not to use a summary prospectus be permitted not to include disclosures about how investors can find portfolio company prospectuses online or obtain them at no cost upon request? Should the statutory prospectus require more comprehensive disclosures for investors who wish to obtain additional details beyond what would be disclosed in the summary prospectus? If so, what additional information should be disclosed?

- Will the proposed tabular presentation required for portfolio company-related disclosures in the prospectus be more user-friendly for investors than the current disclosure requirements? Is the specific information required to be disclosed about portfolio companies likely to be more relevant and useful to investors than the current disclosure requirements? If not, why not? Are there alternatives we should consider?
- Under our proposal, registrants on Form N–3 would have the option of omitting the proposed appendix and instead providing the more detailed disclosures about the investment options offered under the contract that proposed Item 20 of Form N–3 would require (and would be required to include the appendix in the statutory prospectus only if the appendix also appears in the summary prospectus). In order to increase comparability between registration statements, should we require this appendix for all registration statements on Form N–3?

s. Additional Amendments to Form N–3

We are also proposing additional amendments to Form N–3 that are generally intended to update and enhance disclosures related to investment options by requiring similar disclosures required for open-end management companies registered on Form N–1A.

Management (Item 7 of Form N–3)

We are proposing to revise Item 6 of current Form N–3 (which we would re-designate as Item 7) to increase consistency among forms used to register management investment companies.[522] Except as described below, we do not intend these proposed amendments to significantly alter current disclosure obligations.

Among other things, the proposed amendments would require disclosure of the compensation paid to each investment adviser of the registrant.[523] Form N–3 currently includes three fiscal years of such disclosures in the SAI, where they would remain under our proposal, but our proposal would also include such disclosures for the most recent fiscal year in the prospectus to highlight this information for investors and to update this aspect of Form N–3 to parallel Form N–1A.[524] The proposed amendments would also move certain information from the prospectus to the SAI, including responsibilities of the board of managers, disclosure regarding persons providing administrative or business affairs services, and information regarding brokerage allocations.[525] We believe this information is more appropriate for disclosure in the SAI, and is consistent with how such information is presented in Form N–1A.

Additional Information About Investment Options Available Under the Contract (Item 20 of Form N–3)

We are proposing a new item that would provide more detailed information about each of the investment options available under the contract.

New paragraphs (a) and (b) would restate existing disclosure requirements contained in paragraphs (c), (d), and (e) of current Item 5 regarding investment strategies and risks to reflect the updated presentation and disclosure requirements of the parallel provisions of Form N–1A. These paragraphs would re-focus these disclosure requirements to require more granular disclosure related to each investment option as opposed to broader disclosure regarding registrants.

Specifically, among other things, the proposed amendments would require disclosure of whether the investment option may take temporary defensive positions that are inconsistent with the investment option's principal investment strategies in attempting to respond to adverse market, economic, political, or other conditions. We believe that investors should be informed about investment positions that an investment option can take from time to time that are inconsistent with the investment option's central investment focus.

The proposed amendments also would require the registrant to disclose, for each investment option, whether it may engage in active and frequent trading of portfolio securities and, if so, the consequences of increased portfolio turnover to investors and the investment option's performance. Increased portfolio turnover can result in increased transaction costs that are ultimately borne by investors. Collectively, these proposed amendments are intended to clarify and enhance the disclosure requirements relating to investment options' strategies and risks, and to increase consistency and thereby promote comparability among forms used to register management investment companies.[526]

New paragraph (c) would require registrants with annual returns for at least one calendar year to provide, for each investment option:

- A bar chart showing the investment option's annual total returns for each of the last 10 calendar years (or for the life of the investment option, if less than 10 years), as well as the investment option's highest and lowest return for a quarter during the period displayed in the chart;
- A table showing the investment option's average annual total returns (with and without taxes on distributions and redemptions) for 1-, 5-, and 10-year calendar periods ending on the date of the most recently completed calendar year (or for the life of the investment option, if shorter), as well as the returns of an appropriate broad-based securities market index for those same periods; and
- Certain explanatory statements, such as how the information in the chart and table illustrates the variability of the investment option's returns, the investment option's past performance is not necessarily an indication of how the investment option will perform in the future, and, if applicable, how updated performance information may be obtained.

The disclosures that new paragraph (c) would require are modeled after the risk/return bar chart and table that Form N–1A currently requires and are intended to supplement the disclosures currently required by Form N–3 regarding accumulation unit income and capital changes [527] by providing investors and potential investors with more information about the performance of the investment options offered under the contract.[528] In particular, the bar chart would illustrate the variability of the investment options' returns and give investors an idea of the attendant risks of each investment option. Likewise, the

[522] *See, e.g.,* Items 5 and 10 of Form N–1A.

[523] Registrants would disclose the aggregate fee paid to each investment adviser for the most recent fiscal year as a percentage of net assets or, if the adviser's fee is not based on a percentage of net assets, a description of the basis of the adviser's compensation. *See* proposed Item 7(a)(1)(i) and (ii) of Form N–3.

[524] *Compare* Item 21(a)(iii) of Form N–3 (requiring total compensation paid to the adviser under the investment advisory contract for the last three fiscal years) *with* proposed Item 25(a)(3) of Form N–3 (same); *see also* Item 10 of Form N–1A.

[525] These disclosure requirements would be moved, respectively, to: Proposed Item 24(b)(1) (''Management of the Registrant''); proposed Item 25(g) (''Investment Advisory and Other Services''); and proposed Item 27 (''Brokerage Allocation and Other Practices'').

[526] *See, e.g.,* Item 9 of current Form N–1A.

[527] *See infra* section II.D.3.d.

[528] *See, e.g.,* Item 4(b)(2) of Form N–1A; *see also* Registration Form Used by Open-End Management Investment Companies, Investment Company Act Release No. 23064 (Mar. 13, 1998) [98 FR 13968 (Mar. 23, 1998)] (''Form N–1A Adopting Release'') at text accompanying and following n.51 (discussing the risk/return bar chart/table requirement).

accompanying table would help investors evaluate an investment option's risks and returns relative to the market.

We request comment generally on the proposed amendments to the Part A requirements of Form N–3, and specifically on the following issues:

- Should we, as proposed, adopt amendments to certain current items in Form N–3 Part A as described in this section? To the extent that we have proposed amending these items to generally mirror the presentation of parallel items in Form N–1A, is this appropriate in the context of variable annuities whose separate accounts are registered on Form N–3? Do commenters recommend any additional amendments to any of the current Form N–3 Part A items?
- Proposed Item 7 (''Management'') would revise current disclosure requirements to move certain disclosures from the prospectus to the SAI, while other disclosures would appear in the prospectus that currently only appear in the SAI. Are these proposed amendments appropriate, and are there other disclosures that currently appear in Part A of Form N–3 that would be better suited for disclosure in the SAI? On the other hand, are there other disclosures that currently appear in the SAI that would better suited for disclosure in the prospectus?
- In the case of registrants that offer more than one investment option under the contract, should the disclosures contemplated by proposed Item 20 (''Additional Information About Investment Options Available Under the Contract''), as proposed, be presented for each investment option? If not, how should those disclosures be presented? Should any of these proposed disclosures be modified in any way? Are there additional investment option-related disclosures that may be relevant to contract investors and that we should require to appear in the prospectus?

3. Part B (Information Required in a Statement of Additional Information)

Table 6 shows how our proposal would amend the item requirements of Part B of our variable contract registration forms. Except as described below, our proposed amendments to Part B of Forms N–3 and N–4 would generally conform to the language of the related Part B disclosure items in current Form N–6.

TABLE 6—PROPOSED AMENDMENTS TO PART B OF FORMS N–3, N–4, AND N–6

Item description	Proposed item No.	Form N–3: Proposed treatment	Form N–4: Proposed treatment	Form N–6: Proposed treatment
Cover Page and Table of Contents (in Forms N–3 and N–4, currently two separate items: ''Cover Page'' and ''Table of Contents'').	• Form N–3: Item 21 (currently Items 16, 17). • Form N–4: Item 19 (currently Items 15, 16). • Form N–6: Item 19 (currently Item 15).	Revised	Revised	Revised.
General Information and History.	• Form N–3: Item 22 (currently Item 18). • Form N–4: Item 20 (currently Item 17). • Form N–6: Item 20 (currently Item 16).	Revised	Revised	Unchanged.
Services (in Form N–3, ''Investment Advisory and Other Services'').	• Form N–3: Item 25 (currently Item 21). • Form N–4: Item 21 (currently Item 18). • Form N–6: Item 21 (currently Item 17).	Revised	Revised	Unchanged.
Investment Objectives and Risks (in Form N–3, currently ''Investment Objectives and Policies'').	• Form N–3: Item 23 (currently Item 19).	Revised	N/A	N/A.
Management of the Registrant (in Form N–3, currently ''Management'').	• Form N–3: Item 24 (currently Item 20).	Revised	N/A	N/A.
Portfolio Managers	• Form N–3: Item 26 (currently Item 22).	Revised	N/A	N/A.
Brokerage Allocation and Other Practices (in Form N–3, currently ''Brokerage Allocation'').	• Form N–3: Item 27 (currently Item 23).	Revised	N/A	N/A.
Purchase of Securities Being Offered.	• Form N–3: Item 28 (currently Item 24). • Form N–4: Item 22 (currently Item 19).	Unchanged	Unchanged	N/A.
Premiums	• Form N–6: Item 22 (currently Item 18).	N/A	N/A	Unchanged.
Additional Information About Operation of Contracts and Registrant.	• Form N–6: Item 23 (currently Item 19).	N/A	N/A	Unchanged.
Underwriters	• Form N–3: Item 29 (currently Item 25). • Form N–4: Item 23 (currently Item 20). • Form N–6: Item 24 (currently Item 20).	Revised	Revised	Revised.
Additional Information About Charges.	• Form N–6: Item 25 (currently Item 21).	N/A	N/A	Unchanged.

TABLE 6—PROPOSED AMENDMENTS TO PART B OF FORMS N–3, N–4, AND N–6—Continued

Item description	Proposed item No.	Form N–3: Proposed treatment	Form N–4: Proposed treatment	Form N–6: Proposed treatment
Lapse and Reinstatement	• Form N–6: Item 26 (currently Item 22).	N/A	N/A	Unchanged.
Loans	• Form N–6: Item 13 (currently Items 10 and 23).	N/A	N/A	Revised and consolidated in prospectus (currently, there are prospectus and SAI items).
Calculation of Performance Data.	• Form N–3: Item 30 (currently Item 26). • Form N–4: Item 24 (currently Item 21).	Revised	Revised	N/A.
Annuity Payments	• Form N–3: Item 31 (currently Item 27). • Form N–4: Item 25 (currently Item 22).	Unchanged	Unchanged	N/A.
Financial Statements	• Form N–3: Item 32 (currently Item 28). • Form N–4: Item 26 (currently Item 23). • Form N–6: Item 27 (currently Item 24).	Revised	Revised	Revised.
Condensed Financial Information.	• Form N–3: Item 33 (currently Item 4). • Form N–4: Item 27 (currently Item 4).	Revised and moved to SAI	Revised and moved to SAI	N/A.
Illustrations	• Form N–6: Item 28 (currently Item 25).	N/A	N/A	Unchanged.

a. Amendments Conforming Part B Items of Forms N–3 and N–4 to Presentation in Form N–6

We propose to amend certain items of Part B of Forms N–3 and N–4 to reflect the more up-to-date presentation of corresponding items in Form N–6, and to re-designate their numbering as shown in Table 6 above. To the extent that these amended items incorporate only minor wording changes,[529] they are indicated as ''unchanged items'' in Table 6. Otherwise, each of these amended items is discussed in more detail below.

• *Cover Page (Item 21 of Form N–3, Item 19 of Forms N–4 and N–6).* We are proposing to amend the outside front cover page requirements for each registration form to include the name of the contract and classes to which the contract relates.[530] We are also proposing to amend Forms N–3 and N–4 to: (1) Require a statement whether and from where information is incorporated by reference; [531] (2) remove the current required statement that the SAI should be read with the prospectus; [532] and (3) consolidate the current item requiring a table of contents into the item specifying cover page disclosures.[533]

• *General Information and History (Item 22 of Form N–3, Item 20 of Forms N–4 and N–6).* We are proposing to amend Item 18 of current Form N–3 and Item 17 of current Form N–4 (which we would re-designate as Items 22 and 20, respectively) to require: (1) The date and form of organization of the depositor, the name of the state or other jurisdiction in which the depositor is organized, and a description of the general nature of the depositor's business; and (2) the date and form of organization of the registrant and the registrant's classification pursuant to Section 4 of the Investment Company Act.[534]

• *Services (Item 25 of Form N–3,*[535] *Item 21 of Forms N–4 and N–6).* We are proposing to amend Item 21 of current Form N–3 and Item 18 of current Form N–4 (which we would re-designate as Items 25 and 21, respectively) to require registrants to, unless disclosed elsewhere, identify and state the principal business address of any person who provides significant administrative or business affairs management services for the registrant (*e.g.,* an ''administrator,'' ''sub-administrator,'' ''servicing agent''), describe the services provided, and the compensation paid for the services.[536]

• *Financial Statements (Item 32 of Form N–3, Item 26 of Form N–4, Item 27 of Form N–6).* We are proposing to amend Item 28 of current Form N–3 and Item 23 of current Form N–4 (which we would re-designate as Items 32 and 26, respectively) to: (1) Clarify that the depositor's financial statements must be prepared in accordance with generally accepted accounting principles (''GAAP'') if the depositor prepares financial information in accordance with GAAP for use by the depositor's parent in any report under sections 13(a) and 15(d) of the Exchange Act or registration statement filed under the Securities Act; [537] (2) specify how an investor may request certain additional financial information about the depositor that is omitted from the SAI and is included in Part C of the registration statement; [538] and (3) clarify how current the depositor's financial statements must be when the anticipated effective date of the registration statement

[529] For example, edits to use defined terms where appropriate, to use synonyms for consistency across forms (*e.g.,* ''State the name . . .'' instead of ''Give the name . . .''), and to add titles to sub-paragraphs for clarity and consistency across forms (and to help the reader navigate the form).

[530] Proposed Item 21(a)(3) of Form N–3; proposed Item 19(a)(3) of Form N–4; proposed Item 19(a)(3) of Form N–6.

[531] Proposed Item 21(a)(4)(iii) of Form N–3; proposed Item 19(a)(4)(iii) of Form N–4.

[532] Item 16(a)(iii)(B) of current Form N–3; Item 15(a)(iii)(B) of current Form N–4.

[533] Proposed Item 21(b) of Form N–3; proposed Item 19(b) of Form N–4.

[534] Proposed Item 22 of Form N–3; proposed Item 20 of Form N–4.

[535] In Form N–3, the title of this disclosure item is ''Investment Advisory and Other Services.'' In addition to the amendments we propose to conform this disclosure item with the parallel item in Form N–6, we also propose additional amendments to this disclosure item, as discussed below, that would reflect the presentation of Item 19 in Form N–1A. *See infra* section II.D.3.e.

[536] Proposed Item 25(g) of Form N–3; proposed Item 21(c) of Form N–4.

[537] Instruction 1 to proposed Item 32(b) of Form N–3; Instruction 1 to proposed Item 26(b) of Form N–4. This instruction would be consistent with prior guidance we have provided in the context of registration statements on Form N–6, namely that statutory financial statements could be used in those limited circumstances when GAAP financial statements are not otherwise required to be prepared for either the depositor or its parent. *See* Separate Accounts Offering Variable Life Release, *supra* note 54, at n.58 and accompanying and following text.

[538] Instruction 2 to proposed Item 32(b) of Form N–3; Instruction 2 to proposed Item 26(b) of Form N–4.

falls within 90 days after the depositor's fiscal year-end.[539]

b. Underwriters (Item 29 of Form N–3, Item 23 of Form N–4, Item 24 of Form N–6)

We are proposing to amend Item 25 of current Form N–3 and Item 20 of current Form N–4 (which we would re-designate as Items 29 and 23, respectively) to specifically require identification of all principal underwriters of the registrant (other than the depositor), their principal business addresses, and the source of any affiliation.[540]

We also propose to add an instruction to this item in Forms N–3, N–4, and N–6 stating that information need not be provided about bona fide contracts with the registrant or its insurance company for outside legal or auditing services, or bona fide contracts for personal employment entered into with the registrant or its depositor in the ordinary course of business. This instruction is intended to focus disclosures on underwriting costs, as opposed to costs for legal or auditing services or other ancillary matters, and would parallel similar instructions in Part C of these same forms regarding disclosures for principal underwriters.[541]

Also, because we propose to amend Item 5 of current Form N–6 to include the disclosures on commissions to dealers currently required by current Item 20 in the SAI, we also propose to remove this disclosure from current Item 20 (which we would re-designate as Item 24).[542]

c. Calculation of Performance Data (Item 30 of Form N–3, Item 24 of Form N–4)

We are proposing to amend Item 26 of current Form N–3 and Item 21 of current Form N–4 (which we would re-designate as Items 30 and 24, respectively), to remove the instruction specifically permitting the registrant to furnish separate yield quotations for individual and group contracts.[543] Because the proposed General Instructions would state that individual and group contracts are not essentially identical, we would not expect to see both types of contracts presented in a single prospectus.[544]

d. Accumulation Unit Value Disclosure (Item 33 of Form N–3, Item 27 of Form N–4)

We also propose to relocate the disclosures required by Item 4 of current Forms N–3 and N–4 from the prospectus to the SAI,[545] with some modifications.[546] Those items currently require a registrant to disclose, for the last ten fiscal years and for each subaccount, the accumulation unit value at the beginning and end of each period and the number of accumulation units outstanding at the end of each period (the ''AUV tables'').[547] For variable annuity contracts, the change in accumulation unit value provides a measure of performance of the registrant's sub-accounts.[548]

When the AUV tables were adopted in 1985, the approach did not anticipate the proliferation of variations in contract charges and optional benefits that has resulted in numerous possible combinations of contract charges.[549] Since registrants commonly maintain a separate class of accumulation units for each combination of separate account charges, the AUV tables add considerable length (sometimes hundreds of pages) to the contract prospectus, which may overwhelm other important information.[550] Because only one combination of contract charges is relevant to any individual investor (depending on the contract features they select), much of the required disclosure is of limited value to most investors.[551]

To streamline the prospectus, we propose to relocate the AUV tables from the prospectus to the SAI, where they are more appropriately located with certain detailed information that traditionally appears in the SAI. To reduce burdens on registrants, we propose to decrease the time periods for which the required information must be presented from 10 years [552] to five years.[553] We also propose to include an instruction permitting registrants to omit AUV tables altogether if they provide each investor with an annual account statement that discloses, with respect to each class of accumulation units the investor holds, the actual performance of each subaccount during the prior fiscal year.[554] This option would reduce the length of the SAI and provide investors with customized annual performance information that reflects the impact of insurance-related costs.

[539] Instruction 3 to proposed Item 32(b) of Form N–3; Instruction 3 to proposed Item 26(b) of Form N–4.

[540] Proposed Item 29(a) of Form N–3; proposed Item 23(a) of Form N–4. Item 25(a) of current Form N–3 and Item 20(a) of current Form N–4 only require a registrant to state if the depositor or the affiliate of the depositor is the principal underwriter of the contract.

[541] *See infra* text accompanying and preceding note 597. Forms N–3, N–4, and N–6 also include in their disclosure requirements regarding underwriters other similar instructions, such as instructions stating that information need not be given about the service of mailing proxies or periodic reports of the registrant.

[542] *See supra* note 461 and accompanying text.

[543] Proposed Item 30 of Form N–3; proposed Item 24 of Form N–4.

[544] *See supra* note 400 and accompanying text.

[545] Proposed Item 33 of Form N–3; proposed Item 27 of Form N–4.

[546] Such modifications would include re-designating Item 4(c) of current Form N–3 and Item 4(b) of current Form N–4 as Items 18 and 17, respectively (''Financial Statements''), and adding an instruction to proposed Item 33 of Form N–3 and proposed Item 27 of Form N–4 that defines ''class of accumulation units'' to mean ''any variation that affects accumulation units, including variations related to contract class, optional benefits, and sub-accounts.'' *See supra* section II.D.2.q (discussing proposed Item 18 of Form N–3 and proposed Item 17 of Form N–4); *see also* Instruction 1 to proposed Item 33 of Form N–3; Instruction 1 to proposed Item 27 of Form N–4.

[547] Item 4(a) of current Form N–3; Item 4(a) of current Form N–4.

[548] When Form N–6 was proposed, it did not include AUV tables ''[b]ecause [due to] the individual nature of variable life insurance charges, such as the cost of insurance, there does not appear to be a comparable measure of performance that is applicable to all holders of a particular variable life insurance policy.'' *See* Form N–6 Proposing Release, *supra* note 445, at 17.

[549] *See* Forms N–3 and N–4 Adopting Release, *supra* note 28.

[550] In response to these concerns, the staff issued a no-action letter stating that the staff would not recommend enforcement action if registrants were to depict in the prospectus only two classes of unit values (one reflecting the highest possible combination of contract charges, the other reflecting the lowest possible combination of contract charges) shown for each available portfolio company, so long as the SAI were to include the full disclosure that current Item 4 would require. *See* Nationwide Life Insurance Company, SEC Staff No-Action Letter (pub. avail. Mar. 16, 2001) (''Nationwide 2001 Letter''). If the Commission adopts the proposed AUV table amendments, these final rules would effectively moot the Nationwide 2001 Letter.

[551] In addition, while the AUV tables are designed to reflect the performance of a subaccount after reflecting contract charges that are based on separate account value, many contract charges today are based on other values, such as a benefit base, which cannot be reflected in AUV values. Instead, when these charges are assessed, the number of accumulation units is reduced. As a result, AUV tables may only reflect a portion of a contract's fees, diminishing their usefulness to investors.

[552] *See* Instruction 2 to Item 4 of current Forms N–3 and N–4.

[553] *See* Instruction 3 to proposed Item 33 of Form N–3; Instruction 3 to proposed Item 27 of Form N–4. We are proposing five years to be consistent with Item 13 of Form N–1A, which requires funds to disclose five years of data for the Financial Highlights section of the prospectus. Five years is also the typical timeframe for disclosing information in response to other form items (*e.g.,* Fee Table expense example (Item 3 of current Form N–3 and current Form N–4); insurer name change and suspension of sales (Item 18 of current Form N–3 and Item 17 of current Form N–4)).

[554] *See* Instruction 7 to proposed Item 33 of Form N–3; Instruction 6 to proposed Item 27 of Form N–4. For accounts held less than one year, the annual account statement would disclose the actual performance of each sub-account for the length of time the investor has owned the sub-account.

e. Adjustment to Disclosure Thresholds (Items 29 and 32 of Form N–3, Items 23 and 26 of Form N–4, Items 24 and 27 of Form N–6)

Our variable contract registration forms currently include various dollar thresholds that date back to their initial adoption. In the SAI, for example, information need not be given about any service required to be disclosed pursuant to current Item 25 of Form N–3, current Item 20 of Form N–4, and current Item 20 of Form N–6, for which total payments of less than $5,000 were made during each of the last three fiscal years.[555] In addition, financial statements of the insurance company required to be included in the registration statement need not be more current than as of the end of the most recent fiscal year of the insurance company unless certain balance sheets of the sponsor would show a combined capital and surplus (if a stock company) or an unassigned surplus (if a mutual company), of less than $1,000,000.[556] As part of our efforts to update the registration forms, we are proposing to increase these thresholds to $15,000[557] and $2,500,000,[558] respectively, to account for the effects of inflation since 1985, the year of inception for Forms N–3 and N–4.[559]

f. Additional Amendments to Form N–3

We are also proposing additional amendments to Form N–3 that are generally intended to update and enhance disclosures related to investment options by requiring similar disclosures required for open-end management companies registered on Form N–1A. The revisions generally reflect the updated presentation and disclosure requirements of the parallel item in Form N–1A and would harmonize the disclosure requirements across registration statements for different products.

Investment Objectives and Risks (Item 23 of Form N–3)

We are proposing to make certain amendments to Item 19 of Form N–3, which we would re-designate as Item 23.[560] Proposed Item 23 would contain a new instruction clarifying that if the registrant offers more than one investment option, the required disclosures should be made for each investment option. Paragraph (a) of proposed Item 23 would newly require the registrant to describe any investment strategies that are not principal strategies, as well as the risks of those strategies. These disclosures would complement the prospectus disclosures of principal investment strategies that would be required by proposed Item 20.

Paragraph (b) of proposed Item 23 would require the discussion of all policies regarding: (1) Issuing senior securities; (2) borrowing money, including the purpose for which the proceeds will be used; (3) underwriting securities of other issuers; (4) concentrating investments in a particular industry or group of industries; (5) purchasing or selling real estate or commodities; (6) making loans; and (7) any other policy that the registrant deems fundamental or that may not be changed without shareholder approval, including, if applicable, the registrant's investment objectives. In contrast, Item 19 of current Form N–3 generally requires the disclosure of: (1) Fundamental policies not described in the prospectus regarding those same topics, as well as short sales, purchases on margin, and writing of put and call options, and any other policy the registrant deems fundamental; and (2) any significant but non-fundamental investment policies not described in the prospectus and which can be changed without the approval of the majority of votes available to eligible voters. We believe that the proposed amendments better correspond with the requirements of section 8 of the Investment Company Act than the current Form N–3 item requirements, since they more specifically reflect the disclosure that section 8 mandates.[561]

Paragraph (c) of proposed Item 23 would newly require registrants to disclose the types of investments that a registrant may make while assuming a temporary defensive position. We believe that investors should be informed about investment positions that an investment option can take from time to time that are inconsistent with the investment option's central investment focus.

Paragraph (f) of proposed Item 23 would newly require certain disclosures regarding material events by registrants or investment options that hold themselves out as ''money market funds'' or ''money market accounts'' pursuant to rule 2a–7 under the Investment Company Act.[562] That rule requires these same disclosures to appear on a fund's website, and for information about money market fund material events to be reported to the Commission on Form N–CR.[563] We believe that, to the extent investors may not be familiar with researching filings on EDGAR (or other equivalent platform), including these disclosures in a registrant's SAI (which investors may receive in hard copy through the U.S. Postal Service or may access on a registrant's website, as well as accessing on EDGAR or other equivalent platform) may make this information more readily available to these investors.[564] The

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[555] *See* Instruction 2 to Item 25 of current Form N–3; Instruction 2 to Item 20 of current Form N–4; Instruction 2 to Item 20 of current Form N–6.

[556] *See* Instructions 3(ii) and (iii) to Item 28 of current Form N–3; Instructions 3(ii) and (iii) to Item 23 of current Form N–4; Instructions 3(ii) and (iii) to Item 24 of current Form N–6.

[557] *See* Instruction 2 to proposed Item 29 of Form N–3; Instruction 2 to proposed Item 23 of Form N–4; Instruction 2 to proposed Item 24 of Form N–6.

[558] *See* Instructions 3(ii) and (iii) to proposed Item 32 of Form N–3; Instructions 3(ii) and (iii) to proposed Item 26 of Form N–4; Instructions 3(ii) and (iii) to proposed Item 27 of current Form N–6.

[559] Indexing the $5,000 thresholds for inflation would result in revised thresholds of $11,950, and indexing the $1,000,000 thresholds for inflation would result in revised thresholds of $2,390,009. Calculations are based on the Bureau of Labor Statistics consumer price index average for all urban consumers (CPI–U) between January 1985 and August 2018. *See* CPI Inflation Calculator, Bureau of Labor Statistics, *available at https://www.bls.gov/data/inflation_calculator.htm.*

[560] *See* proposed Item 23 of Form N–3. The proposed amendments to this item would reflect the presentation of Item 16 of Form N–1A.

[561] Section 8 of the Investment Company Act requires a fund to disclose in its registration statement the fund's policies with respect to borrowing money, issuing senior securities, underwriting securities issued by other persons, investing in real estate or commodities, and making loans. Section 8 also requires a fund to disclose in the registration statement its policies on concentration and portfolio turnover, and any other policies that the fund deems fundamental or that may not be changed without shareholder approval.

When the Commission proposed amendments to Form N–1A in 1997, it noted that, although they are not required to do so, some funds disclose in the prospectus their policies with respect to the practices identified under section 8. *See* Proposed New Disclosure Option for Open-End Management Investment Companies, Investment Company Act Release No. 22529 (Feb. 27, 1997) [62 FR 10943 (Mar. 10, 1997)]. To provide a clearer directive to disclose this information in the SAI, the Commission proposed (and later adopted) amendments to specifically require disclosure about these policies in the SAI. *See* Form N–1A Adopting Release, *supra* note 528. This amended Form N–1A requirement forms the basis for the amendments to paragraph (b) of proposed Item 23 of Form N–3 described herein.

[562] *See* proposed Item 23(e) of Form N–3 (requiring prospectus disclosure of imposition of liquidity fees, temporary suspension of registrant redemptions, and financial support provided to money market funds or money market accounts).

[563] *See* rule 2a–7 under the Investment Company Act (requiring a money market fund to prominently post this same information on its website); Form N–CR (requiring a money market fund to report this same information to the Commission); *see also* Item 16(g) of Form N–1A (requiring disclosure of certain material events for money market funds). Portfolio companies registered on Form N–1A and offered by registrants on Forms N–4 and N–6 are currently required to include these disclosures in their SAIs.

[564] *See* Money Market Reform; Amendments to Form PF, Investment Company Act Release No. 31166 (July 23, 2014) [79 FR 47736 (Aug. 14, 2014)], at text accompanying and following n.1258.

remaining paragraphs of proposed Item 23 would restate existing disclosure requirements to reflect the updated presentation and disclosure requirements of the parallel item in Form N–1A.[565]

Management of the Registrant (Item 24 of Form N–3)

We are proposing to make certain amendments to Item 20 of Form N–3, which we would re-designate as Item 24, to restate existing disclosure requirements to reflect the updated presentation and disclosure requirements of the parallel item in Form N–1A.[566] Except as discussed below, these changes are not intended to significantly alter current disclosure obligations.

The proposed amendments would: (1) Newly require disclosure of the responsibilities of the board of directors with respect to the registrant's management and any arrangements that result in breakpoints in, or elimination of, sales loads for directors and other affiliated persons of the registrant; [567] and (2) remove the current requirement to state that codes of ethics adopted by the registrant, its investment adviser, and principal underwriter can be viewed and copied at the Commission's Public Reference Room, because the Public Reference Room no longer maintains paper copies of filings on Form N–3.[568]

Investment Advisory and Other Services (Item 25 of Form N–3)

In addition to the amendments to Item 21 of Form N–3 (which we would re-designate as Item 25) that we discuss above, which would conform certain aspects of this item to the disclosure requirements of Form N–6,[569] we are also proposing amendments to restate existing disclosure requirements to reflect the updated presentation and disclosure requirements of the parallel item in Form N–1A.[570] Except as discussed below, these changes are not intended to significantly alter current disclosure obligations.

We are proposing to amend the current requirement to disclose the total dollar amount that the registrant or the insurance company paid under the investment advisory contract for the last three fiscal years to also require disclosure of amounts paid to ''to the adviser (aggregated with amounts paid to affiliated advisers, if any), and any advisers who are not affiliated persons of the adviser.'' [571] We are also proposing to newly require a registrant to disclose any front-end sales load reallowed to dealers as a percentage of the registrant's shares.[572] Finally, we are proposing to newly require additional disclosures regarding plans adopted under rule 12b–1 under the Investment Company Act.[573] Industry practices regarding the use of ''12b–1 plans'' have evolved since Form N–3 was adopted in 1985, and the new disclosures are intended to enhance the information provided to investors by requiring information similar to that required by Form N–1A.

Portfolio Managers (Item 26 of Form N–3)

We are proposing to make certain amendments to Item 22 of Form N–3, which we would re-designate as Item 26.[574] The proposed amendments would amend the current requirement to describe the compensation of each portfolio manager by including relocation expenses among the list of items that may be excluded from compensation disclosures, provided that those items do not discriminate in scope, terms, or operation in favor of the portfolio manager and are available generally to all salaried employees.[575] Otherwise, these changes would rephrase certain disclosure requirements to conform to current presentation requirements in Form N–1A but are not intended to significantly alter current disclosure obligations.

Brokerage Allocation and Other Practices (Item 27 of Form N–3)

We are proposing to make certain amendments to Item 23 of Form N–3, which we would re-designate as Item 27.[576] The proposed amendments would amend the current requirement to describe how transactions in portfolio securities are effected, by newly including markdowns on principal transactions among the items that must be discussed in a general statement about brokerage commissions and markups.[577] This would mirror the parallel requirement of Form N–1A [578] and could provide additional relevant information regarding the ways portfolio security transactions involving negative, as well as positive, spreads could impact the separate account and its investors. The proposed amendments would also slightly alter the instruction regarding the identification of securities issued by the registrant's regular broker or dealer and which the registrant has acquired by deleting the statement that if the registrant has issued more than one class or series of stock, information must be disclosed for the class or series that has securities that are being registered on Form N–3.[579] Otherwise, these changes would rephrase certain disclosure requirements to conform to current presentation requirements in Form N–1A but are not intended to significantly alter current disclosure obligations.

g. Additional Amendments to Form N–6

Together with the cover page amendments described above,[580] we are proposing two additional amendments to Part B of Form N–6. First, as discussed above, we are proposing to relocate the disclosure on commissions paid to dealers from the SAI to the prospectus.[581] Second, as also discussed above, we are proposing to eliminate current Item 23 (Loans) and consolidate

[565] Proposed paragraphs (b), (d), and (e) would require disclosure regarding certain investment policies, portfolio turnover, and disclosure of portfolio holdings, respectively.

[566] *See* proposed Item 24 of Form N–3. The proposed amendments to this item would reflect the presentation of Item 17 of Form N–1A.

[567] *See* paragraphs (b)(1) and (d) of proposed Item 24 of Form N–3.

[568] *See* paragraph (e) of proposed Item 24 of Form N–3. These codes of ethics would continue to be filed as exhibits to Part C of the registrant's registration statement. *See* proposed Item 34(q) of Form N–3.

[569] *See supra* note 536 and accompanying text.

[570] *See* proposed Item 25 of Form N–3. The proposed amendments to this item would reflect the presentation of Item 19 of Form N–1A.

[571] *See* paragraph (a)(3)(i) of proposed Item 25 of Form N–3.

[572] *See* paragraph (e) of proposed Item 25 of Form N–3.

[573] Registrants would disclose the relationship between amounts paid to the distributor and the expenses that it incurs; the amount of any unreimbursed expenses incurred under the plan in a previous year and carried over to future years; and whether the registrant participates in any joint distribution activities with another investment company and, if so, whether fees paid under the plan may be used to finance the distribution of the shares of another investment company and the method of allocating distribution costs (*e.g.,* relative net asset size, number of shareholder accounts). *See* paragraphs (f)(2) through (4) of proposed Item 25 of Form N–3.

[574] *See* proposed Item 26 of Form N–3. The proposed amendments to this item would reflect the presentation of Item 20 of Form N–1A.

[575] *See* Instruction 2 to proposed Item 26(b) of Form N–3 (discussing relocation expenses).

[576] *See* proposed Item 27 of Form N–3. The proposed amendments to this item would reflect the presentation of Item 21 of Form N–1A.

[577] *See* proposed Item 27(a) of Form N–3.

[578] *See* Item 21(a) of Form N–1A.

[579] *See* Instruction to proposed Item 27(e) of Form N–3. We believe this aspect of the current instruction is not necessary, as disclosure in response to a registration form's requirements generally relates to the class or series for which securities are being registered.

[580] *See supra* note 530 and accompanying text.

[581] *See supra* note 461 and accompanying text; *see also* Item 20 of current Form N–6; proposed Item 7 of Form N–6.

required disclosures relating to contract loans into the prospectus.[582]

h. Request for Comment on Proposed SAI Amendments

We request comment generally on the proposed amendments to the SAI requirements contained in our variable contract registration forms, and specifically on the following issues:

- Should we amend as proposed the items in Part B discussed above? Should we amend any other items of Part B, or add new items to Part B covering other disclosure items?
- Should we adjust the thresholds described above in section II.D.3.e? If so, should we propose to adjust similar thresholds in our registration statement forms for other types of investment companies to comparable levels? Should they be adjusted to a different level? Please explain the basis for any suggested changes, including the reasons for whether they should be adjusted using different factors or other considerations.
- Are the AUV tables useful to investors, and has the usefulness of these tables evolved since Forms N–3 and N–4 were first adopted? Is it appropriate to move the AUV tables from the prospectus to the SAI, or would some other approach better serve investors? For example, should we instead codify the approach set forth in staff no-action relief described above? [583] Should we consider other modifications, such as eliminating the requirement to provide AUVs corresponding to every pricing permutation that results from offering multiple optional riders (which were not available when the forms were first adopted), and instead require only disclosure of variations that affects AUVs related to contract (share) class and sub-accounts? Should we require the AUV tables to reflect only five, and not 10, years of data? Should we, as proposed, permit registrants to omit AUV tables altogether if they provide each investor with an annual account statement that discloses, with respect to each class of accumulation units the investor holds, the actual performance of each subaccount during the prior fiscal year? Or should we mandate that registrants provide annual account statements to each investor? Alternatively, should we eliminate altogether the requirement to include AUV tables in the registration statement, or otherwise revise this requirement? If we were to revise the requirement, should we also extend the revised requirement to Form N–6, which does not currently require the inclusion of AUV tables? [584] Can or do investors receive performance information that is similar to, or more useful than, the data in the AUV tables?
- Should we, as proposed, amend Part B of Form N–3 to require comparable disclosures required by Form N–1A? Should we modify the proposed amendments in any way?

4. Part C (Other Information)

Table 7 shows how our proposed amendments would amend the item requirements of Part C of our variable contract registration forms. These amendments are largely intended to update the disclosure requirements and provide greater consistency among variable contract registration forms. We are also proposing to eliminate certain disclosure items in light of recent regulatory developments and our goal of reducing duplicative disclosure requirements.

TABLE 7—PROPOSED AMENDMENTS TO PART C OF FORMS N–3, N–4, AND N–6

Item description	Proposed item No.	Form N–3: Proposed treatment	Form N–4: Proposed treatment	Form N–6: Proposed treatment
Exhibits (in Forms N–3 and N–4, currently "Financial Statements and Exhibits").	• Form N–3: Item 34 (currently Item 29). • Form N–4: Item 28 (currently Item 24). • Form N–6: Item 29 (currently Item 26).	Revised	Revised	Revised.
In Form N–3: Directors and Officers of the Insurance Company. In Forms N–4 and N–6: Directors and Officers of the Depositor.	• Form N–3: Item 35 (currently Item 30). • Form N–4: Item 29 (currently Item 25). • Form N–6: Item 30 (currently Item 27).	Unchanged	Unchanged	Unchanged.
In Form N–3: Persons Controlled by or Under Common Control with the Insurance Company or Registrant. In Forms N–4 and N–6: Persons Controlled by or Under Common Control with the Depositor or Registrant.	• Form N–3: Item 36 (currently Item 31). • Form N–4: Item 30 (currently Item 26). • Form N–6: Item 31 (currently Item 28).	Revised	Revised	Unchanged.
Number of Contractowners	N/A (currently, Item 32 in Form N–3 and Item 27 in Form N–4).	Eliminated	Eliminated	N/A.

[582] The disclosures required by current Item 23 would be consolidated with current Item 10 into a single proposed Item 13. *See supra* paragraphs accompanying and immediately following note 500.

[583] *See supra* note 550.

[584] The level of customization now available for variable annuity contracts is somewhat comparable to the individual nature of variable life insurance charges, which the Commission previously stated did not appear to provide a comparable measure of performance that is applicable to all holders of a particular variable life insurance contract. *See* Form N–6 Proposing Release, *supra* note 445. Consequently, Form N–6 does not require the inclusion of AUV tables.

TABLE 7—PROPOSED AMENDMENTS TO PART C OF FORMS N–3, N–4, AND N–6—Continued

Item description	Proposed item No.	Form N–3: Proposed treatment	Form N–4: Proposed treatment	Form N–6: Proposed treatment
Indemnification	• Form N–3: Item 37 (currently Item 33). • Form N–4: Item 31 (currently Item 28). • Form N–6: Item 32 (currently Item 29).	Revised	Revised	Unchanged.
Business and Other Connections of Investment Adviser.	• Form N–3: Item 38 (currently Item 34).	Unchanged	N/A	N/A.
Principal Underwriters	• Form N–3: Item 39 (currently Item 35). • Form N–4: Item 32 (currently Item 29). • Form N–6: Item 33 (currently Item 30). • Form N–3: Item 40 (currently Item 36).	Revised	Revised	Revised.
Location of Accounts and Records.	• Form N–4: Item 33 (currently Item 30). • Form N–6: Item 34 (currently Item 31).	Unchanged	Unchanged	Unchanged.
Management Services	• Form N–3: Item 41 (currently Item 37). • Form N–4: Item 34 (currently Item 31). • Form N–6: Item 35 (currently Item 32).	Revised	Revised	Revised.
Fee Representation	• Form N–3: Item 42 • Form N–4: Item 35 • Form N–6 Item 36 (currently Item 33).	New Item	New Item	Unchanged.
Undertakings	N/A (currently, Item 38 in Form N–3 and Item 32 in Form N–4).	Eliminated	Eliminated	N/A.

a. Amendments Conforming Part C Items of Form N–3 and N–4 to Presentation in Form N–6

We propose to amend certain items of Part C of proposed Form N–4 to reflect the more up-to-date presentation of corresponding items in Form N–6, and to re-designate their numbering as shown in Table 7 above. To the extent that these amended items incorporate only minor wording changes,[585] they are indicated as ''unchanged items'' in Table 7. Otherwise, each of these amended items is discussed in more detail below.

• *Exhibits (Item 34 of Form N–3, Item 28 of Form N–4, Item 29 of Form N–6).*[586] We are proposing to amend the Exhibits item: (1) For Forms N–3 and N–4, to eliminate the requirement to list the financial statements filed as part of the registration statement;[587] (2) for Form N–4, to require the filing of participation agreements;[588] and (3) for Forms N–3 and N–4, to require the filing of administrative contracts.[589]

• *Persons Controlled by or Under Common Control with the Depositor or Registrant (Item 36 of Form N–3, Item 30 of Form N–4, Item 31 of Form N–6).* We are proposing to amend Forms N–3 and N–4 to no longer require registrants to disclose the principal business of any persons controlled by or under common control with the depositor or registrant.[590] We believe that the revised item provides sufficient information for investors to assess the effects of control arrangements affecting the registrant (which effects are based largely on the percentage of voting securities owned by controlling persons, or other bases of control, as required to be disclosed under the item).

• *Indemnification (Item 37 of Form N–3, Item 31 of Form N–4, Item 32 of Form N–6).* For Forms N–3 and N–4, we are proposing to amend the item relating to indemnification to eliminate the instruction specifying that, in responding to the item's requirements, a registrant should note the requirements of Securities Act rule 461 and 484, and section 17 of the Investment Company Act.[591] We do not believe that specifically noting these legal requirements is necessary for an investor to understand the general effects of agreements insuring or indemnifying underwriters or affiliated persons of the registrant against liability, and moreover, eliminating legal references from investor documents is consistent with our plain English requirements.[592]

[585] *See supra* note 529.

[586] As part of the 2017 FAST Act Proposal, the Commission proposed amendments to its registration forms, including Forms N–3, N–4, and N–6, to require hyperlinks to most exhibits required to be filed with the registration statement. *See* 2017 FAST Act Proposal, *supra* note 307.

[587] *See* Item 29(a) of current Form N–3; Item 24(a) of current Form N–4.

[588] Proposed Item 28(h) of Form N–4.

[589] Proposed Item 34(k) of Form N–3; proposed Item 28(i) of Form N–4.

[590] *See* Item 31 of current Form N–3; Item 26 of current Form N–4.

[591] *See* Item 33 of current Form N–3; Item 28 of current Form N–4.

[592] *See, e.g.,* rule 421(c) under the Securities Act (requiring information required to be included in a prospectus to be clearly understandable without referring to the particular form or general rules and regulations).

• *Fee Representation (Item 42 of Form N–3, Item 35 of Form N–4).* We also propose to add new Item 42 to Form N–3 and new Item 35 to Form N–4, which would require registrants to provide a representation of the insurance company or depositor that the fees and charges deducted under the contracts, in the aggregate, are reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the insurance company or depositor. The new disclosure item would mirror Item 33 of current Form N–6 (which we propose to re-designate as Item 36). Because section 26(f) of the Investment Company Act requires that the representation be made in the registration statement,[593] this new item would merely request the representation required by section 26(f) and not impose any new obligations on a Form N–3 or Form N–4 registrant.

b. Amendments Requiring Filing of Preliminary Form of Summary Prospectus

For each form, we are proposing to amend the ''Exhibits'' disclosure item to require a registrant to file a preliminary form of any contract summary prospectus that the registrant intends to use on or after the effective date of the registration statement as an exhibit.[594] As discussed above, we are proposing the new requirement to file a preliminary form of a contract summary prospectus to permit the staff to review a summary prospectus in the form and manner in which a registrant would provide it to investors, prior to the registration statement's effective date.[595] These proposed amendments to the ''Exhibits'' item of each form would accompany the other amendments that we propose to the ''Exhibits'' item of Forms N–3 and N–4 to conform to the parallel disclosure requirements in Form N–6.[596]

c. Principal Underwriters (Item 39 of Form N–3, Item 32 of Form N–4, Item 33 of Form N–6).

For Form N–3, we propose to add an instruction stating that information need not be provided about bona fide contracts with the registrant or its insurance company for outside legal or auditing services, or bona fide contracts for personal employment entered into with the registrant or its depositor in the ordinary course of business. Likewise, for Forms N–4 and N–6, we propose to add a similar instruction stating that information need not be given about the service of mailing proxies or periodic reports of the registrant. Collectively, these instructions are intended to focus disclosures on underwritings costs, as opposed to costs for legal or auditing services or other ancillary matters, and would parallel similar instructions in Part B of these same forms regarding disclosures for underwriters.[597]

Also, for Form N–3, we propose to amend the instruction to subparagraph (c) of Item 35 of current Form N–3 to eliminate the portion of the first instruction requiring to include as ''other compensation'' any compensation received by an underwriter for keeping the registrant's securities in the hands of the public.[598] The category of ''other compensation'' is intended to encompass compensation that is not otherwise enumerated in one of the other categories, and so we believe deletion of this instruction would help streamline the form and remove any suggestion that this category is limited only to disclosure of compensation received for keeping the registrant's securities in the hands of the public.

d. Adjustment to Disclosure Thresholds (Items 39 and 41 of Form N–3, Items 32 and 34 of Form N–4, Items 33 and 35 of Form N–6)

In addition to proposing certain updated disclosure thresholds in the SAI, we are similarly proposing to increase certain disclosure thresholds in Part C. For example, when providing information required regarding commissions and other compensation received, directly or indirectly, from the registrant during the registrant's last fiscal year by each principal underwriter, a registrant currently may exclude information about any service for which total payments of less than $5,000 were made during each of the registrant's last three fiscal years.[599] In addition, when providing a summary of certain contracts under which management-related services are provided to the registrant, a registrant currently need not provide information about any service for which total payments of less than $5,000 were made during each of the last three fiscal years.[600] As part of our efforts to update the registration forms, we are proposing to increase these thresholds to $15,000[601] to reflect the effects of inflation since 1985.[602]

e. Amendments Eliminating Current Part C Disclosure Requirements

To reduce overlapping regulatory requirements, we propose to eliminate Item 32 of current Form N–3 and Item 27 of current Form N–4 (''Number of Contractowners''), as we will obtain the information that this item would require a registrant to disclose in a registrant's filings on Form N–CEN.[603] Unlike registration statements on Forms N–3 and N–4, reports on Form N–CEN are filed with the Commission in a structured data format that permits the Commission and its staff to more easily collect, aggregate, and analyze the reported information. We also propose to eliminate Item 38 of current Form N–3 and Item 32 of Form N–4 (''Undertakings''). These requirements are outdated[604] or redundant of similar requirements under the proposed amendments to Forms N–3 and N–4.[605]

[593] Section 26(f)(2)(A) of the Investment Company Act provides that it shall be unlawful for any unit investment trust that is a registered separate account funding variable insurance contracts to sell any such contract unless the registration statement for the contract represents that the fees and charges deducted under the contract, in the aggregate, are reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the insurance company. Section 27(i)(2) of the Investment Company Act makes section 26(f) of the Investment Company Act applicable to Form N–3 registrants.

[594] Proposed Item 34(r) of Form N–3; proposed Item 28(o) of Form N–4; proposed Item 29(r) of Form N–6.

[595] An instruction would provide that registrants are required to provide the preliminary summary prospectus exhibits only in connection with the filing of an initial registration statement, or in connection with a pre-effective amendment or a post-effective amendment filed in accordance with paragraph (a) of rule 485 under the Securities Act. *See generally supra* section II.A.7.a.

[596] *See supra* notes 587 through 589 and accompanying text.

[597] *See supra* section II.D.3.b.

[598] Instruction 1 to Item 35(c) of current Form N–3.

[599] *See* Instruction 3 to Item 35(c) of current Form N–3; Instruction 3 to Item 29(c) of current Form N–4; Instruction 3 to Item 30(c) of current Form N–6.

[600] *See* Instruction 2 to Item 37 of current Form N–3; Instruction 2 to Item 31 of current Form N–4; Instruction 2 to Item 32 of current Form N–6.

[601] *See* Instruction 3 to proposed Item 39 and Instruction 2 to proposed Item 41 of Form N–3; Instruction 3 to proposed Item 32 and Instruction 2 to proposed Item 34 of Form N–4; Instruction 3 to proposed Item 33 and Instruction 2 to proposed Item 35 of Form N–6.

[602] For a discussion of the calculation methodology, *see supra* note 559.

[603] *See* Item F.13 of Form N–CEN (requiring disclosure of the number of individual contracts that are in force at the end of the reporting period).

[604] Item 38(c) of current Form N–3 and Item 32(b) of current Form N–4 require an undertaking to include either (1) as part of any application to purchase a contract offered by the prospectus, a space that an applicant can check to request an SAI, or (2) a post card or similar written communication affixed to or included in the prospectus that the applicant can remove to send for an SAI. Because we understand that investors typically use the internet or—for investors who do not use the internet, telephonic means—to request an SAI, we believe that this undertaking is outdated.

[605] Because the Commission's view is that issuers of variable insurance contracts are required by section 10(a)(3) of the Securities Act to maintain a current prospectus for so long as payments may be accepted under the contracts, regardless of whether new policies are being sold, the undertakings to file

f. Additional Amendments to Form N–6

We are proposing to amend the third column of the table required by Item 30 of current Form N–6 (''Principal Underwriters,'' which we would re-designate as Item 33) to reflect compensation received from the registrant on all redemptions, rather than the more narrow requirement to disclose only compensation from events occasioning the deduction of a deferred sales load.[606] Because compensation may be paid upon redemptions not defined as deferred sales loads, we believe this proposed change will clarify for investors the amount of redemption compensation received from the registrant.

g. Request for Comment on Proposed Part C Amendments

We request comment generally on the proposed amendments to the Part C requirements of our variable contract registration forms, and specifically on the following issues:

- Should we amend as proposed the items in Part C discussed above? Should we amend any other items of Part C, or add new items to Part C covering other disclosure items?
- We request comment regarding the exhibits that would be required to be filed as part of the registration statement. Should we modify the proposed list of required exhibits? Should we require any additional exhibits, or eliminate any currently required exhibits? Should we revise the description of the exhibits that this item would require? For example, with respect to reinsurance contracts, should we specifically request guarantees and credit support agreements from one insurance company to another (*e.g.,* from parent to subsidiary)? Are there any other changes we should make to the required exhibit list?
- Should we require Form N–3 and Form N–4 registrants to include the fee representations specified by the new item that mirrors a parallel item in Form N–6? If we do not require this disclosure in Form N–3 and Form N–4, should we remove the parallel requirement in Form N–6?
- Should we adjust the thresholds described above in section II.D.4.d? If so, should we propose to adjust similar thresholds in our registration statement forms for other types of investment companies to comparable levels? Should they be adjusted to a different level? Please explain the basis for any suggested changes, including the reasons for whether they should be adjusted using different factors or other considerations.

5. Guidelines

The guidelines to current Forms N–3 and N–4 (the ''Guidelines'') were prepared by the Division of Investment Management when the Commission adopted the forms in 1985.[607] The Guidelines, which generally restate certain Division positions that may affect fund disclosure, were intended to assist funds in preparing and filing their registration statements.

Although certain Guidelines have been revised and new ones added in connection with the adoption of various rules, the Guidelines collectively have not been reviewed since 1985. Certain Division positions in the Guidelines have become outdated.[608] Other Guidelines explain or restate legal requirements and may encourage generic disclosure about registrant operations that may not assist investors in evaluating and comparing registrants.[609] More generally, we believe the Guidelines have generally been superseded by other resources that are more frequently updated and accessible to the public. For example, registrants seeking additional guidance in preparing new or amended registration statements may consult the Investment Company Registration and Regulation Package, a Commission staff publication that is available online.[610]

As with other registration forms that have more recently been amended to eliminate the guidelines for those forms, we are proposing to rescind the Guidelines to Forms N–3 and N–4.[611] We request comment on whether all or parts of the Guidelines should be retained (either as form items or instructions, or addressed as Commission guidance).

E. Inline XBRL

We are proposing to require the use of the Inline XBRL format for the submission of certain required disclosures in the variable contract statutory prospectus. The proposed amendments are intended to harness technology to allow investors (directly and through their investment professionals), data aggregators, financial analysts, Commission staff, and other data users to efficiently analyze and compare the available information about variable contracts, as required by their particular needs and circumstances. This aspect of our proposal is in keeping with our ongoing efforts to implement reporting and disclosure reforms that take advantage of the benefits of advanced technology to modernize the investment company reporting regime and to, among other things, help investors and other market participants better assess different products.

Information structured using the Inline XBRL format is both human-readable and machine-readable for purposes of validation, aggregation, and analysis. Inline XBRL is a specification of the XBRL format that allows filers to embed XBRL data directly into an HTML document, eliminating any need to submit a copy of the tagged information in a machine-readable document separate from the human-readable document.

In 2009, the Commission adopted rules requiring operating companies, mutual funds, and ETFs to submit certain disclosures in the XBRL format.[612] More recently, the

post-effective amendments required by Items 38(a) and (b) of current Form N–3 and Item 32(a) of current Form N–4 simply restate an issuer's obligation under the Securities Act. *See* Form N–6 Proposing Release, *supra* note 445, at text following n.83.

Compare Item 38(d) of current Form N–3 and Item 32(c) of current Form N–3 (requiring undertaking to deliver any SAI and any required financial statements promptly upon written or oral request) *with* proposed Item 1(b) of Forms N–3 and N–4 (requiring registrants to state that the SAI is available, without charge, upon request and further requiring registrants to send the SAI within three business days of receipt of the request, by first-class mail or other means designed to ensure equally prompt delivery) and proposed Item 18 of Form N–3 and proposed Item 17 of Form N–4 (requiring registrants to explain how financial statements may be found or obtained).

[606] Proposed Item 33(c) of Form N–6. This proposed change would conform Form N–6 with the comparable item of Form N–4. *See* Item 29(c) of current Form N–4.

[607] *See* Forms N–3 and N–4 Adopting Release, *supra* note 28, at text following n.51 (stating that publication of the Guidelines was not intended to elevate their status beyond that of staff guidance).

[608] *See, e.g.,* Form N–3 Guideline 31 (the reference to the synopsis would no longer be necessary as revised Form N–3 would have detailed instructions with respect to the Overview and Key Information sections); Form N–3 Guideline 36 (the staff no longer takes the position that if there is a variable annuitization option that the variable option must be the default; a fixed option can be the default so long as the default option is disclosed in the prospectus at the time of purchase); *see also* Form N–4 Guideline 4 (mortality and expense risk charges no longer require exemptive relief; also the reference to the Glass-Steagall Act is no longer relevant); Form N–4 Guideline 12 (same as Form N–3 Guideline 36).

[609] *See, e.g.,* Form N–3 Guideline 1 (rule 35d–1 under the Investment Company Act makes the guidance redundant that the registrant should invest least 65% of its assets in the type of investment suggested by its name); *see also* Form N–4 Guideline 3 (restates the law regarding redemptions without providing new guidance).

[610] *See* Investment Company Registration and Regulation Package (Dec. 21, 2014), *available at https://www.sec.gov/investment/fast-answers/divisionsinvestmentinvcoreg121504htm.html.*

[611] *See* Form N–1A Adopting Release, *supra* note 528 (eliminating similar guidelines from Form N–1A).

[612] In one rulemaking, the Commission required operating companies to submit financial statements accompanying their registration statements and periodic and current reports in XBRL. *See* Interactive Data to Improve Financial Reporting, Release No. 33–9002 (Jan. 30, 2009) [74 FR 6776], as corrected by Release No. 33–9002A (Apr. 1,

Continued

Commission amended its rules to require operating companies, mutual funds, and ETFs to submit the required information in Inline XBRL.[613] Those amendments were intended to improve the data's usefulness, timeliness, and quality, benefiting investors, other market participants, and other data users and to decrease, over time, the cost of preparing the data for submission to the Commission.[614]

Reflecting the development in XBRL specifications and for consistency with the format required for operating companies, mutual funds, and ETFs, we are proposing amendments to our rules and forms that would require variable contract registrants to submit certain information in the Inline XBRL format.[615] We believe that the public's access to this data will be facilitated by making the data available in Inline XBRL, a format with which they will already be familiar as a result of reviewing and analyzing other disclosures in Inline XBRL. Variable contract registrants would be required to embed a part of the Interactive Data File[616] within an HTML document using Inline XBRL and to include the rest in an exhibit to that document. The portion filed as an exhibit to the filing will contain contextual information about the XBRL tags embedded in the filing. The information as tagged will continue to be required to satisfy all other requirements of rule 405 under Regulation S–T, including the technical requirements in the EDGAR Filer Manual.

For filers, Inline XBRL can enhance the efficiency of review, yield savings in time and cost of preparing machine-readable data, and potentially enhance the quality of the data over other machine-readable standards because certain errors will be easier to identify and correct because the data is also human-readable. For investors and other data users, requiring information to be tagged in a structured format could facilitate analysis and comparison of variable contracts. In addition, making the data available in Inline XBRL should enhance the usability and ease of accessibility to the disclosures because users will not have to access two different documents (one machine-readable and one human-readable) for the same data, and users can leverage the enhanced search and filtering capabilities of the Commission's Inline XBRL Viewer. Moreover, given the complexity of variable contracts, we believe that tagging certain sections within the statutory prospectus in Inline XBRL format could provide greater transparency regarding the products' features and risks in the marketplace.

Filings to be tagged. Like mutual funds and ETFs, registrants would be required to submit to the Commission in Inline XBRL certain information discussed below in registration statements or post-effective amendments filed on Forms N–3, N–4, and N–6, and forms of prospectuses filed pursuant to rule 497(c) or rule 497(e) under the Securities Act that include information that varies from the registration statement.

Information to be tagged. We are proposing that registrants tag the following prospectus disclosure items using Inline XBRL: The Key Information Table, Fee Table, Principal Risks of Investing in the Contract, Other Benefits Available Under the Contract, and Investment Options Available Under the Contract in the statutory prospectus, and for Form N–3 registrants, Additional Information About Investment Options Available Under the Contract.[617] We believe that these items—which provide important information about a variable contract's key features, costs, and risks—would be most suited to being tagged in a structured format and be of greatest utility for investors and other data users that seek structured data to analyze and compare variable contracts.

We would require registrants to tag the Key Information Table, which provides a concise summary of fees and expenses, risks, restrictions, taxes, and conflicts of interest. We are also proposing to include the Fee Table, which provides detailed information about the variable contract's costs. We believe that tagging could facilitate analysis of the costs associated with variable contracts, and allow investors and their investment professionals to compare the costs of a particular contract with the costs of other variable contracts or other investment products, such as mutual funds.

We are also proposing to require Principal Risks to be tagged so investors and their investment professionals can analyze a contract's risks alongside the contract's features and benefits. We would also require registrants to tag Other Benefits Available Under the Contract because these optional product features may be easier to analyze and compare if information pertaining to those features is available in a structured data format. Finally, we are proposing to require registrants to tag Investment Options Available Under the Contract, as this may allow investors and their investment professionals to more easily compare the mutual funds or other investment options that are offered by different variable contracts and assess whether a particular contract's investment options meet the investor's needs or goals.

Submission of Interactive Data File. In a framework similar to that for mutual funds and ETFs under the recently adopted Inline XBRL regime,[618] we would require variable contract registrants to submit Interactive Data Files as follows:

- For post-effective amendments filed pursuant to paragraph (b)(1)(i), (ii), (v), or (vii) of rule 485, and in the case of registrants on Forms N–4 or N–6, paragraph (b)(1)(vi) of rule 485,[619] Interactive Data Files must be filed either concurrently with the filing or in a subsequent amendment that is filed on or before the date that the post-effective amendment that contains the related information becomes effective; [620]
- for initial registration statements and post-effective amendments filed other than pursuant to paragraph (b)(1)(i), (ii), (v), or (vii) of rule 485, and in the case of registrants on Forms N–4 or N–6, paragraph (b)(1)(vi) of rule 485, Interactive Data Files must be filed

2009) [74 FR 15666]. In a parallel rulemaking, the Commission required mutual funds and ETFs to submit risk/return summaries in XBRL. *See* Interactive Data for Mutual Fund Risk/Return Summary, Investment Company Act Release No. 28617 (Feb. 11, 2009) [74 FR 7748 (Feb. 19, 2009)].

[613] *See* Inline XBRL Filing of Tagged Data, Investment Company Act Release No. 33139 (June 28, 2018) [83 FR 40846 (Aug. 16, 2018)] (''Inline XBRL Adopting Release'').

[614] *Id.*

[615] Proposed General Instruction 3.C.(h) of Forms N–3, N–4, and N–6; proposed amendments to rules 485 and 497 under the Securities Act; proposed amendments to rules 11 and 405 of Regulation S–T.

[616] Regulation S–T defines the term ''Interactive Data File'' to mean the machine-readable computer code that presents information in XBRL electronic format pursuant to rule 405 of Regulation S–T and as specified by the EDGAR Filer Manual. 17 CFR 232.11; 17 CFR 232.405. The EDGAR Filer Manual sets forth the technical formatting requirements for the presentation and submission of electronic filings through the EDGAR system.

[617] *See* General Instruction C.3.(h) to Forms N–3, N–4, and N–6; *see also* proposed Items 3, 4, 5, 12, 19, 20 of Form N–3; proposed Items 3, 4, 5, 11, and 18 of Form N–4; proposed Items 3, 4, 5, 11, and 18 of Form N–6. This information largely parallels similar information contained in the Form N–1A risk/return summary. *See* Item 2 of Form N–1A (Risk/Return Summary: Investment Objectives/Goals); Item 3 of Form N–1A (Risk/Return Summary: Fee Table); Item 4 of Form N–1A (Risk/Return Summary: Investments, Risks and Performance).

[618] *See* Inline XBRL Adopting Release, *supra* note 613.

[619] To help facilitate efficiencies in the variable contract post-effective amendment filing process, we propose to permit variable contracts to submit Interactive Data Files concurrently with these post-effective amendments because post-effective amendments filed pursuant to these paragraphs of rule 485 generally are not subject to further revision.

[620] Proposed General Instruction C.3.(h)(i)(B) of Forms N–3, N–4, and N–6; *cf.* General Instruction C.3.(g)(i)(B) of Form N–1A.

in a subsequent amendment on or before the date the registration statement or post-effective amendment that contains the related information becomes effective; [621] and

• for any form of prospectus filed pursuant to rule 497(c) or (e), Interactive Data Files must be submitted concurrently with the filing.[622]

We believe this approach will facilitate the timely availability of important information in a structured format for investors, their investment professionals, and other data users yielding substantial benefits. For data aggregators responding to investor demand for the data, the availability of the required disclosures in the Inline XBRL format concurrent with filing or before the date of effectiveness would allow them to quickly process and share the data and related analysis with investors. Therefore, we are not proposing to provide variable contract registrants with a filing period to submit Interactive Data Files.

Identification of Classes. The Interactive Data File would be required to be submitted in such a manner that would permit the information for each contract (and, for any information that does not relate to all of the classes in a filing, each class of the contract) to be separately identified.[623]

Consequence of failure to submit required Interactive Data File. Similar to the framework for mutual funds and ETFs, we are proposing to amend rule 485 under the Securities Act to provide that if a registrant does not submit a required Interactive Data File, the registrant's ability to file post-effective amendments to its registration statement under subparagraph (b) of the rule will be automatically suspended until the required Interactive Data File is submitted.[624]

Availability of hardship exemptions. Variable contract registrants could request temporary and continuing hardship exemptions for the inability to timely file electronically the Interactive Data File.[625]

We request comment generally on the proposed amendments to require the use of Inline XBRL, and specifically on the following issues:

• Should we adopt rules that make the submission of structured data in the Inline XBRL format mandatory for variable contract registrants? Should the requirements for variable contracts generally mirror the recently adopted Inline XBRL requirements for mutual funds and ETFs as we have proposed, or do variable contracts present different issues and considerations from mutual funds and ETFs? To what extent, or how, should registration statements and other filings for contracts operating in the manner that the Staff Letters describe, as discussed in section II.C above, be required to submit information in Inline XBRL?

• Should any category of variable contract registrants be exempt from the proposed Inline XBRL requirements? If so, which ones, and explain why. If we were to exempt any such filers from the Inline XBRL requirements, should they be permitted to voluntarily file in the Inline XBRL format? What would be the effects on data quality and usability to investors and other data users associated with exempting such filers from the Inline XBRL requirements?

• Should we otherwise take a different approach for variable contracts, and if so, what would that be? For example, should we require instead that information be submitted in reports filed on Form N–CEN? Would submission on Form N–CEN ensure that current structured data for all variable contracts, including those operating in the manner that the Staff Letters describe, as discussed in section II.C above, would be available under a common submission framework for all variable contracts? Would such a filing framework provide a less burdensome means of submitting the same structured data to the Commission? What would be the effects on data quality and usability to investors and other data users of having the information available in Form N–CEN's XML format instead of the proposed Inline XBRL format?

• Should variable contract registrants be required to use Inline XBRL to tag the proposed sections of the contract (Key Information Table, Fee Table, Principal Risks of Investing in the Contract, Other Benefits Available Under the Contract, and/or Portfolio Companies [Investment Options] Available Under the Contract) for Forms N–3, N–4, and N–6? Should only one or both Items 19 (Investment Options Under the Contract) and 20 (Additional Information About Investment Options Available Under the Contract) of Form N–3 be required to be tagged? Should other or different information be required to be tagged in Inline XBRL?

• What costs or other burdens (*e.g.,* related to personnel, systems, operations, compliance, etc.) would the proposed Inline XBRL requirements impose on variable contract registrants? Please provide quantitative estimates to the extent available.

• How long is it likely to take for vendors and filers to develop solutions for tagging variable contract submissions in Inline XBRL?

• As outlined in Section II.G below, we are proposing a similar compliance date of 18 months after the effective date of any final rules for the summary prospectus framework for all variable contracts to submit to the Commission the required information in Inline XBRL. Is this period appropriate, or should the requirement to submit the required information in Inline XBRL be subject to a compliance date later than the compliance date for any final rules for the summary prospectus framework? Should we adopt a phase-in schedule for the implementation of Inline XBRL for variable contract registrants based on certain factors, such as registrant size (or otherwise)?

• In the case of post-effective amendment filings made pursuant to paragraphs (b)(1)(i), (ii), (v), and (vii) of rule 485 under the Securities Act, and in the case of registrants on Forms N–4 or N–6, paragraph (b)(1)(vi) of rule 485, should we, as proposed, permit registrants to file the Inline XBRL document concurrently with the related filing? Why or why not? For example, is there a risk that investors may be confused by information that is tagged in Inline XBRL and filed before effectiveness of the related filing? Should we also permit registrants to submit tagged data information concurrently with the related filing in the case of initial registration statements and post-effective amendments made pursuant to other paragraphs of rule 485? Why or why not? Should we instead require that Interactive Data Files only be submitted in a subsequent amendment to the initial registration statement or any post-effective amendment? Why or why not?

• We are not proposing to provide a filing period for registrants to submit the Interactive Data Files. Instead, registrants would be required to submit Interactive Data Files on or prior to the effectiveness of a related initial registration statement or post-effective amendment, or concurrently with the filing of a related form of prospectus pursuant to rule 497. Are there costs or other burdens that may be incurred by filers if there is no filing period? Should we instead provide a filing period, and if so, what is the appropriate time period (*e.g.,* 1 day, 5 days, 10 days, 20 days, 30 days)? In lieu of a filing period that would be available indefinitely, should we instead provide for a filing period that would be available for a temporary transitional period after the effectiveness of any final rules? If so, what should that transitional period be (*e.g.,* the filing period would only be available for two years after effectiveness of any final rules, and thereafter, registrants would submit Interactive Data Files no later than the effectiveness of the related initial registration statement or post-effective amendment, or concurrently with the filing of a related form of prospectus pursuant to rule 497, as under the proposed rules)? If there is a filing period, would investors and other data users find the structured data to be as useful as if it had been as proposed?

• To what extent do investors and other market participants find information that is available a structured format useful for analytical purposes? Is information that is narrative, rather than numerical, useful as an analytical tool? Would investors and other market participants find variable contract information that is available in a structured format useful for analytical purposes? To what ends would they find that information useful?

• Are any other amendments necessary or appropriate to require the submission of the

[621] Proposed General Instruction C.3.(h)(i)(A) to Forms N–3, N–4, and N–6; *cf*. General Instruction C.3.(g)(i)(A) of Form N–1A.

[622] Proposed General Instruction C.3.(h)(ii) to Forms N–3, N–4, and N–6; *cf.* General Instruction C.3.(g)(ii) of Form N–1A.

[623] Proposed General Instruction C.3.(h)(iii) to Forms N–3, N–4, and N–6.

[624] Proposed rule 485(c)(3).

[625] *See* rule 201 Regulation S–T (temporary hardship exemption) and rule 202 of Regulation S–T (continuing hardship exemption).

proposed required information in Inline XBRL? If so, what are they?

- In what ways might the Commission enhance the access to Inline XBRL data submitted by filers?
- Should we require other types of information to be submitted in the Inline XBRL format? If so, what other types of information would be suitable for the Inline XBRL format and why? Are there other means of embedding structured data into the human-readable format of filings that we should consider?
- Are the proposed hardship exemptions appropriate for variable contract registrants? Do variable contract participants have unique challenges that would impede them from being able to comply with the proposed filing requirements? If so, what are they?

F. Technical and Conforming Amendments to, and Requests for Comment on, Other Aspects of the Regulatory Framework for Variable Contracts

Proposed Conforming Amendments, and Requests for Comment, To Reflect Proposed Rule 498A and Amended Registration Forms

We are proposing conforming amendments to various cross-references in our rules to reflect proposed rule 498A, and the proposed amendments to Forms N–3, N–4, and N–6. These cross-references are reflected in our proposed amendments to: Rules 159A, 421, 431, 482, 485, 497, and 498 under the Securities Act; rules 11 and 405 of Regulation S–T; and rule 14a–16 under the Exchange Act. We request comment generally on whether the proposed conforming amendments are appropriate. Should they be modified in any way or are additional conforming amendments needed?

Rescission of Form N–1

We are proposing to rescind Form N–1 under the Securities Act and the Investment Company Act. In 1984, the Commission prescribed Form N–1 as the registration form to be used by open-end management investment companies that are separate accounts of insurance companies for registering under the Investment Company Act and for registering their securities under the Securities Act.[626] In 1985, Form N–3 superseded Form N–1 for open-end management investment companies that are separate accounts of insurance companies issuing variable annuity contracts.[627] As a result, only an open-end management investment company that is a separate account of an insurance company offering variable life insurance contracts would use Form N–1.[628] Today, it appears that all separate accounts issuing variable life insurance contracts are organized as unit investment trusts. For that reason, we do not believe any registrants continue to use Form N–1.[629]

We request general comment on rescinding Form N–1 and whether there is any continuing need for the form. In addition, we request specific comment on the following:

- Are there currently any insurance company separate accounts offering variable life insurance contracts that are organized as management investment companies? Do any insurers have a present intention of establishing such a separate account?
- Would any registrants, including any variable annuity or variable life insurance registrants, be affected by the rescission of Form N–1? If so, how?
- If Form N–1 is rescinded, should the Commission prescribe another registration form for use by open-end management investment companies that are separate accounts of insurance companies issuing variable life insurance contracts? If so, should a new form be used for this purpose, or should an existing form be used and what changes should be made to the suggested form to adapt it for this category of registrants? If a new form should be used, what should that form look like?

Proposed Technical Amendments to, and Rescission of, Certain Rules and Forms Governing Variable Life Insurance Contracts and Variable Annuity Contracts

We are proposing certain technical amendments to rules relating to variable life insurance contracts. Rule 6e–2 under the Investment Company Act, which was adopted in 1976, covers variable life insurance contracts having scheduled premium payment plans.[630] Rule 6e–3(T) under the Investment Company Act (together with rule 6e–2, the ''VLI Rules''), which was adopted in 1984, covers variable life insurance contracts offering flexible premium payment plans.[631] Rule 6e–2 was last substantively amended in 1983,[632] and rule 6e–3(T) in 1987.[633]

Some provisions of these rules, specifically the detailed regulation of sales loads and other fees and charges required by sections 26 and 27 of the Investment Company Act, no longer follow statutory requirements as a consequence of amendments to those sections enacted by the National Securities Market Improvement Act of 1996 (''NSMIA'').[634] We are proposing to amend the VLI Rules and other rules under the Investment Company Act, as well as rescind certain other rules and forms under the Investment Company Act, to reflect the effect of these NSMIA amendments.[635]

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[626] Form N–1 Amendments, Investment Company Act Release No. 14084 (Aug. 7, 1984) [49 FR 32058 (Aug. 10, 1984)].

[627] Forms N–3 and N–4 Adopting Release, *supra* note 28, at 26156.

[628] When Form N–3 was adopted, separate accounts funding variable annuity contracts were permitted to continue to use Form N–1 if they no longer offered the contracts to new purchasers. Forms N–3 and N–4 Adopting Release, *supra* note 28, at 26156. The Commission is not aware of any such variable annuity registrants that continue to use Form N–1.

[629] Based on a review of EDGAR filings, it appears that Form N–1 has not been used in more than 20 years. When Form N–6 was proposed in 1998, the Commission sought comment on whether to rescind Form N–1. Form N–6 Proposing Release, *supra* note 445, at section II.G. One commenter noted that at that time several contracts registered on Form N–1 were still in existence, but not actively marketed. Because of this continuing need for the form, the Commission decided at that time to retain Form N–1. *See* Separate Accounts Offering Variable Life Release, *supra* note 54, at section I.C.

[630] Separate Accounts of Life Insurance Companies Funding Certain Variable Life Insurance Contracts, Investment Company Act Release No. 9482 (Oct. 18, 1976) [41 FR 47023 (Oct. 27, 1976)].

[631] Separate Accounts Funding Flexible Premium Variable Life Insurance Contracts, Investment Company Act Release No. 14234 (Nov. 14, 1984) [49 FR 47208–01 (Dec. 3, 1984)].

[632] *See* Exemptive Relief for Mutual Funds Underlying Variable Life Insurance Separate Accounts, Investment Company Act Release No. 13688 (Dec. 23, 1983) [49 FR 1476–01 (Jan. 12, 1984)]. Among other things, these amendments provided relief to variable life insurance separate accounts, and to portfolio companies underlying those accounts, from minimum capital requirements already being provided by rule 14a–2 under the Investment Company Act to variable annuity separate accounts and to portfolio companies underlying those accounts.

[633] *See* Separate Accounts Funding Flexible Premium Variable Life Insurance Contracts, Investment Company Act Release No. 15651 (Mar. 30, 1987) [52 FR 11187–02 (Apr. 8, 1987)]. These amendments revised the calculation of charges subject at the time to rate regulation under section 27 of the Investment Company Act.

In 2002, the Commission issued a release making technical amendments to the VLI Rules, among others, to correct statutory references in those rules following the enactment of then recent legislation affecting those statutes. *See* Technical Amendments to Rules and Forms Due to the National Securities Markets Improvement Act of 1996 and the Gramm-Leach-Bliley Act, Investment Company Act Release No. 25621 (June 24, 2002) [67 FR 43534–01 (July 8, 2002)].

[634] National Securities Market Improvement Act of 1996 (Pub. L. 104–290, 110 Stat. 3416 (1996). In particular, NSMIA amended sections 26 and 27 of the Investment Company Act to replace specific limits on the amount, type, and timing of charges applicable to variable life insurance contracts with a requirement that fees and charges be reasonable when considered in the aggregate.

[635] In addition to the VLI Rules, we are proposing technical amendments to rules 0–1, 6c–7, 6c–8, 11a–2, 14a–2, 26a–1, and 27c–1 under the Investment Company Act. Rule 27c–1, relating to the redeemability of variable contracts, would be renamed as rule 27i–1, since as a result of NSMIA, the redeemability requirement addressed in the rule is now described in section 27(i) of the Investment Company Act. We are also proposing to make permanent temporary rule 6e–3(T) under the Investment Company Act, which would be renamed rule 6e–3.

As part of these technical amendments, we are proposing to rescind rules 26a–2, 27a–1, 27a–2, 27a–3, 27d–2, 27g–1, and 27h–1 under the

Among other things, these amendments would remove the detailed rate regulatory provisions in the VLI Rules and other rules and forms under the Investment Company Act. In addition, these technical amendments would remove the detailed definitions of sales charges in those rules, as these definitions are not necessary to implement the reasonableness in the aggregate standard instituted by NSMIA. These amendments would also remove the numerical load limit on front end sales loads on variable annuities that had been included in rule 11a–2 when it was adopted in 1983—before NSMIA had been enacted—to incorporate the load limit in section 27(a), and make appropriate cross-referencing revisions to related rules. Separate from sales charge related changes, these amendments would additionally remove certain minimum capital conditions for insurers to qualify for exemptions from section 14(a) of the Investment Company Act, since NSMIA amended section 26 to mandate that any insurer serving as a separate account depositor have that level of minimum capital.[636]

We seek comment on our proposed technical amendments to the VLI Rules, and proposed technical amendments and rescission of other rules and forms under the Investment Company Act intended to reflect the effect of the NSMIA amendments. Specifically:

- Should we adopt the technical amendments to the VLI Rules and other rules as proposed? Are other amendments necessary to reflect the effect of the NSMIA amendments?
- We are proposing to rescind rules 26a–2, 27a–1, 27a–2, 27a–3, 27d–2, 27g–1, and 27h–1, and related Forms N–27I–1 and N–27I–2, because these rules and forms were rendered moot as a result of the NSMIA amendments. Should we rescind these rules and forms as proposed, or are these rules and forms still necessary despite the NSMIA amendments?

Rescission of Rules 27e–1 and 27f–1 and Related Forms

We also propose to rescind rules 27e–1 and 27f–1 under the Investment Company Act and related Forms N–27E–1 and N–27F–1. These rules and forms were promulgated to prescribe the form of notices required by sections 27(d) and (e) of the Investment Company Act relating to refund and withdrawal rights of periodic payment plan certificate holders, including those certificates not issued by insurance company separate accounts. We are proposing to rescind these rules and forms because since 2006, section 27(j) of the Investment Company Act has barred new certificate issuances,[637] and notice rights of holders of certificates issued before then have long since expired.

We request comment generally on our proposal to rescind rules 27e–1 and 27f–1 and related Forms N–27E–1 and N–27F–1, and specifically on the following issues:

- Are any periodic payment plans currently outstanding? If so, how many?
- Would any outstanding periodic payment plans be affected if we rescind the rules and forms as proposed? If so, how would they be affected?
- In lieu of rescinding these rules and forms, should we modify them in any way?

General Request for Comment on VLI Rules

Finally, we are considering whether it would be appropriate to update other provisions of the VLI Rules. Certain provisions of the VLI Rules, such as exemptions allowing insurers, under certain circumstances, to disregard voting instructions on matters submitted to policy holders in compliance with sections 13 and 15 of the Investment Company Act, may not be necessary.[638] In addition, it may be appropriate to update other provisions of the VLI Rules, such as the exemptions provided to insurance companies and affiliated persons from section 9(a) of the Investment Company Act, to reflect industry experience with the operation of those rules.[639] We request general comment on the continued utility of the exemptions the VLI Rules provide and the extent to which those rules should be harmonized with the regulation of variable annuity issuers and of other investment companies. We also request specific comment on the following:

- To what extent are issuers of variable life insurance contracts relying on the exemptions and other conditions of the VLI Rules? For example, do insurers rely on the exemptions to disregard voting instructions?
- To what extent, if any, should limits in the VLI Rules on the parties to whom portfolio company shares underlying UIT separate accounts may be sold, or the conditions under which they may be sold, be changed?
- To what extent, if any, should the minimum capital requirement imposed by NSMIA on separate accounts offering variable insurance contracts, and on insurers sponsoring those accounts, be changed?
- In light of NSMIA's replacement of specific limits on sales charges and administrative expenses with a reasonableness standard for all fees and charges in the aggregate, would it be appropriate to consider any limitations on deferred sales loads to address concerns that those loads might present a burden on redemption? For example, how should those concerns be reflected in rule 6c–8 under the Investment Company Act governing deferred sales loads on variable annuity contracts?
- The VLI Rules provide an exemption from the redeemability provisions of the Investment Company Act generally for ''established administrative procedures of the life insurer'' relating to, among others, issuance, transfer, and redemptions of variable life insurance contracts. What procedures have developed since the rules were adopted for which an exemption is appropriate?
- Should the VLI Rules be amended to eliminate exemptions for managed separate

Investment Company Act. We are also proposing to rescind Forms N–27I–1 and N–27I–2 under the Investment Company Act.

[636] Section 14(a) requires that registered investment companies have at least $100,000 in net worth. Under the VLI Rules, managed separate accounts and portfolio companies that are established by an insurer and are sold only to variable life insurance contract investors are exempt from the requirement if the insurer has at least $1,000,000 in combined capital and surplus (or unassigned surplus in the case of a mutual life insurer). *See* rules 6e–2(b)(6), 6e–2(b)(15)(v), 6e–3(T)(b)(6), and 6e–3(T)(b)(15)(iv) under the Investment Company Act. Section 26(f)(2)(B), enacted by NSMIA, prohibits any insurance separate account (or the depositor insurer) from selling any variable contract unless, among other things, the insurer has at least that amount in combined capital and surplus (or unassigned surplus in the case of a mutual life insurer).

The $1,000,000 requirement in section 26(f)(2)(B) is a condition required for sales of both variable life insurance contracts and variable annuity contracts. Accordingly, in addition to proposing this amendment to the VLI Rules, we are also proposing a conforming amendment to rule 14a–2 under the Investment Company Act, which has a similar minimum capital condition applicable to depositors of separate accounts offering variable annuities to qualify for a similar exemption from section 14(a).

[637] Section 27(j) was enacted into law by the Military Personnel Financial Services Protection Act (Pub. L. 109–290, 120 Stat. 127) (2006).

[638] In the release proposing rule 6e–2, the Commission stated that these exemptions were proposed ''to assure the solvency of the life insurer and performance of its contractual obligations by enabling an insurance regulatory authority or the life insurer to act when certain proposals reasonably could be expected to increase the risks undertaken by the life insurer.'' Notice of Proposal to Adopt Rule 6e–2 under the Investment Company Act of 1940 Relating to Separate Accounts Formed by Life Insurance Companies to Fund Certain Variable Life Insurance Contracts, Investment Company Act Release No. 9104 (Dec. 30, 1975) [41 FR 2256 (Jan. 15, 1976)], at 10–11. Since the adoption of rule 6e–2 over forty years ago, however, we are not aware of an instance where an insurer relied on these exemptions to disregard investors' voting instructions.

[639] As to section 9(a), the language in the rules provides exemptions in circumstances for which no instance of reliance could be identified. For example, the rules conditionally allow separate account depositors employing an ineligible person to serve as an adviser or underwriter of an underlying fund, but depositors generally do not themselves serve in those roles. *See* rules 6e–2(b)(15)(ii) and 6e–3(T)(b)(15)(ii) under the Investment Company Act. More broadly, many of the provisions in the VLI Rules cover exemptions provided to registered managed separate accounts, but there have been no filings by those accounts issuing variable life insurance contracts at least since EDGAR filings became mandatory for all filers in 1996.

accounts? Should they be combined into a single rule relating to all variable life insurance contracts, or instead framed as separate exemptions from one or more provisions of the Investment Company Act or rules that would apply both to variable annuity and variable life insurance contracts?

- Should the VLI Rules be amended in any other manner to reflect current legal requirements and industry practice, and if so, how?

G. Compliance Date

The Commission proposes to provide a transition period after the effective date of the amendments to give registrants sufficient time to update their prospectuses and to prepare new registration statements under the amendments. We would require all initial registration statements on Forms N–3, N–4, and N–6, and all post-effective amendments that are annual updates to effective registration statements on these forms, filed 18 months or more after the effective date, to comply with the proposed amendments. A registrant could rely on rule 498A to satisfy its obligations to deliver a variable contract's statutory prospectus beginning on the effective date of the rule provided that the registrant is also in compliance with the amendments to Forms N–3, N–4, or N–6 (as applicable). We would also require variable contract registrants to submit to the Commission certain specified disclosures in Inline XBRL within the same 18-month compliance period. Further, our position with respect to Alternative Disclosure Contracts and/or any final rules associated with discontinued contracts would come into effect as of the effective date of rule 498A.

We request comment on the proposed compliance date, including whether the compliance date for using Inline XBRL to file certain specified disclosures should be different (if so, why), and whether the Commission should adopt a transition period after the effective date of the amendments for its position with respect to Alternative Disclosure Contracts if a summary prospectus framework is adopted.

III. Economic Analysis

A. Introduction

We are mindful of the costs imposed by, and the benefits obtained from, our rules. Section 3(f) of the Exchange Act, section 2(b) of the Securities Act, and section 2(c) of the Investment Company Act state that when the Commission is engaging in rulemaking under such titles and is required to consider or determine whether the action is necessary or appropriate in (or, with respect to the Investment Company Act, consistent with) the public interest, the Commission shall consider whether the action will promote efficiency, competition, and capital formation, in addition to the protection of investors. Further, section 23(a)(2) of the Exchange Act requires the Commission to consider, among other matters, the impact such rules would have on competition and states that the Commission shall not adopt any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The following analysis considers, in detail, the potential economic effects that may result from the proposed rule, including the benefits and costs to investors and other market participants as well as the broader implications of the proposal for efficiency, competition, and capital formation.

The proposed rule allows insurers to satisfy prospectus delivery requirements for variable contracts by providing investors with a summary prospectus while making statutory prospectuses and other documents available online. The proposed approach contemplates the use of two types of summary prospectuses: An initial summary prospectus to be provided to new investors, and an updating summary prospectus to be provided to existing investors. To help investors make informed investment decisions, each type of summary prospectus uses a layered disclosure approach designed to provide investors with key information relating to the contract's terms, benefits, and risks in a concise and more reader-friendly format, with access to more detailed information available online and electronically or in paper format on request. The proposed rule would permit satisfaction of any portfolio company prospectus delivery obligations if, among other conditions, the portfolio company summary and statutory prospectuses are posted at the website address specified on the variable contract summary prospectus.

We are also proposing to amend the registration forms for variable contracts to update and enhance the disclosure regime for these investment products. Additionally, we are proposing to require registrants to use Inline XBRL when filing certain disclosures contained in the contract statutory prospectus with the Commission. Finally, if the proposed summary prospectus framework is adopted, the Commission would take the position that if an issuer of an existing contract does not file post-effective amendments to update a variable contract registration statement and does not provide updated prospectuses to existing investors, under certain circumstances, this would not provide a basis for enforcement action so long as investors receive certain alternative disclosures (the Commission's position on ''Alternative Disclosure Contracts,'' as discussed above [640]).[641]

We note that, where possible, we have attempted to quantify the costs, benefits, and effects on efficiency, competition, and capital formation expected to result from the proposed rule. In some cases, however, we are unable to quantify the economic effects because we lack the information necessary to provide a reasonable and reliable estimate. For example, because summary prospectuses offer a less lengthy, less complex disclosure alternative compared to statutory prospectuses, we expect that readership of variable contract disclosure would increase. We do not have data on the extent to which the use of summary prospectuses enhances readership compared to a scenario in which variable contract investors were only to receive a statutory prospectus and not a summary prospectus.[642] Similarly, summary

[640] *See supra* section II.C. Under the Commission's position, the Commission would permit ''Alternative Disclosure Contracts,'' *i.e.,* contracts operating in the manner described in the Staff Letters discussed in section II.C *supra* as of the effective date of any final summary prospectus rules, to continue to operate in such manner. For all other contracts, the Commission's position would not be applicable, and therefore variable contract issuers would be required to file post-effective amendments to update their registration statements and provide updated prospectuses under current regulatory requirements, and could avail themselves of the summary prospectus framework as adopted.

[641] As noted above, the Commission is proposing certain technical and conforming amendments. With respect to those intended to reflect proposed rule 498A and the amendments to the registration forms, we do not believe there are any economic effects of these amendments that can be separated from the economic effects of proposed rule 498A and the proposed amendments to the registration forms. In addition, we do not believe there are any economic effects of the proposed technical amendments regarding certain variable life insurance rules, since market participants have already adjusted to the changes enacted by NSMIA that the amendments would reflect in the rules. Similarly, we do not believe there are any economic effects of the proposed rescission of certain rules and forms relating to the rights of periodic payment plan certificate holders, as the 2006 amendments to section 27 of the Investment Company Act barred new issuances of such certificates, and we believe the notice rights of holders of certificates issued before those amendments have since expired. For those reasons, the economic effects of these technical and conforming amendments are not addressed separately in this section.

[642] Prior to the Commission's 2009 adoption of mutual fund summary prospectus rules, the Commission engaged a consultant to conduct focus group interviews and a telephone survey concerning investors' views and opinions about

prospectuses could reduce the amount of time and effort investors require making an investment decision. We do not have data on the extent to which variable contract summary prospectuses would reduce the amount of time and effort investors require to make an investment decision, or the value of that time and effort to investors.[643] In those circumstances in which we do not have the requisite data to assess the impact of the proposal quantitatively, we have qualitatively analyzed the economic impact of the proposed rule.

B. Economic Baseline

We are concerned that the volume, format, and content of disclosures in the variable contract context may make it difficult for investors to find and understand key information that they may want to make an informed investment decision. Section III.B.1 below provides an overview of the variable products market, including discussion of total assets, sales, organizational structures, and investor demographics. Our view of this market is based on statistics that describe the variable annuity market because we have not identified a reliable data source of information on the variable life insurance market. We invite commenters to provide data to assist us in forming a more complete understanding of the variable life insurance portion of the overall variable products market. Section III.B.2 provides an overview of existing statutory and regulatory disclosure requirements for variable products.

1. Overview of Variable Products Market

In 2017 there were a total of 2,327 unique variable annuity products offered by a total of 33 companies.[644] The average number of portfolio companies offered per registered contract was 59.[645] The total number of variable annuity contracts in force was 18.7 million, with an average individual contract value of $106,187.[646] Net assets totaled $1,985.7 billion.[647]

Also in 2017, variable annuity sales totaled $91.8 billion.[648] Of the total sales, $59.3 billion (65% of total sales) were to qualified plans and $32.5 billion (35%) were to non-qualified plans.[649] Investors purchased variable annuities across various distribution channels—captive agents, $34.6 billion (38% of total sales); independent financial planners/NASD firms, $33.4 billion (36%); banks/credit unions, $8.7 billion (10%); wirehouses/regional broker-dealers, $12.0 billion (13%); and direct response, $3.1 billion (3%).[650]

A variable contract investor may allocate his or her contract purchase payments to a range of options offered through an insurance company's separate account. Separate accounts may be registered as management companies or UITs. As of the end of calendar year 2017, there were five separate accounts registered as management companies and 723 structured as UITs.[651]

Eighty-six percent of individual annuity investors purchased their first annuity before age 65, including 47% who were between the ages of 50 and 64 years old.[652] The average age of investors at first purchase of an annuity is 51.[653] The average current age of annuity investors is 70.[654] Eighty percent of individual annuity investor households have incomes under $100,000.[655] Sixty percent of household incomes are below $75,000, and 35% are below $50,000.[656]

2. Statutory and Regulatory Disclosure Requirements

Currently, the default method for delivering the variable contract prospectus and the underlying portfolio company prospectuses is by printing and mailing paper copies of the documents to investors. While the costs of providing paper copies of variable contract prospectuses are borne by the insurer, the allocation of the costs of printing and mailing the portfolio company prospectuses depends on the terms of the participation agreement between the insurance company and the portfolio company.[657] We understand that most insurers also offer investors the option to elect to receive the variable contract prospectus and portfolio company prospectuses electronically. Investors who have opted for electronic delivery of prospectuses typically receive an email from the insurer containing a link to a website where the materials are available.

Because insurers are not required to report investors' delivery elections to the Commission, we lack verifiable data on the percentage of variable contract prospectuses that are currently delivered electronically. In a 2016 letter to the Commission, one commenter estimated based on a survey of insurers conducted in 2015 that, generally, less than 15% of contract owners have affirmatively consented to electronic delivery.[658] Another industry source estimated in a 2016 report that approximately 5% of annuity investors had opted for electronic delivery at that time.[659] Based on these estimates, and with consideration for the general increase in electronic delivery rates over time demonstrated in other investment products,[660] we estimate that currently

various disclosure documents filed by companies, including mutual funds. During this process, investors participating in focus groups were asked questions about a hypothetical Summary Prospectus. Investors participating in the telephone survey were asked questions relating to several disclosure documents, including mutual fund prospectuses. *See* Abt SRBI, Inc., *Final Report: Focus Groups on a Summary Mutual Fund Prospectus* (May 2008), available at *https://www.sec.gov/comments/s7-28-07/s72807-142.pdf.* Although the results from the investor testing reflect stated investor preferences, they do not provide us with information with respect to the extent to which variable contract investors would actually be more likely to read a variable contract summary prospectus relative to a statutory prospectus.

[643] *Id.* The survey results do not provide data on the extent to which a variable contract summary prospectus would actually reduce the amount of time and effort required to make an investment decision using summary prospectuses rather than statutory prospectuses.

[644] IRI Fact Book, *supra* note 8, at 170.

[645] *Id.*

[646] *Id.*

[647] *Id.*

[648] *Id.* at 167.

[649] *Id.*

[650] *Id.* at 169. The IRI Fact Book defines (1) a ''captive agent'' as a career or general agent who typically only sells products issued by an affiliated company, (2) ''independent financial planners/NASD firms'' as independent firms not affiliated with major national banks, regional banks, or captive firms, and (3) wirehouses as large, national full service firms. Under direct response, the investor purchases directly without relying on a third party. *See* Lee Covington, ''The Impact of Third-Party Distribution Channels,'' presented at the National Association of Insurance Commissioners and the Center for Insurance Policy and Research State of the Life Insurance Industry Symposium on October 25, 2012, available at *http://irionline.org/docs/default-source/default-document-library/the-impact-of-third-party-distribution-channels-.pdf?sfvrsn=0*).

[651] Of the 723 separate accounts organized as UITs, 435 were variable annuity separate accounts and 288 were variable life separate accounts. This information is based on registration statement filings on Form N–3, Form N–4, and Form N–6 with the Commission.

[652] Gallup Survey, *supra* note 9, at 8.

[653] *Id.*

[654] *Id.*

[655] *Id.* at 8 and 9.

[656] *Id.* at 9. Also, according the U.S. Census Bureau, in 2016 72% of households had incomes of less than $100,000, 60% had incomes of less than $75,000, and 43% had incomes of less than $50,000. *See* U.S. Census Bureau, U.S. Income and Poverty in the United States: 2016 (Sept. 2017), available at *https://www.census.gov/data/tables/2017/demo/income-poverty/p60-259.html.*

[657] We expect that costs borne by insurers and portfolio companies in supplying variable contracts to the market will, ultimately, be borne by contract investors through the fees that investors pay.

[658] Comment Letter of the Committee of Annuity Insurers on Proposed Rule 30e–3 (Jul. 22, 2016), available at *https://www.sec.gov/comments/s7-08-15/s70815-612.pdf.*

[659] *See* Broadridge, *Digital Transformation of Insurance Communications* (2016), *available at https://www.broadridge.com/_assets/pdf/digital-transformation-ins-comm.pdf.*

[660] *See, e.g.,* Memorandum from the Division of Investment Management re: Meeting with Broadridge (Sept. 27, 2017) (including attachments

Continued

15% of variable contract statutory prospectuses and portfolio company summary prospectuses are delivered electronically.[661]

As discussed in section II.C above, Commission staff has issued a series of no-action letters, referred to in this release as the ''Staff Letters,'' stating that the staff would not recommend enforcement action if issuers did not update the variable contract registration statement and deliver updated prospectuses to existing investors, so long as certain conditions were met, including sending alternative disclosures to investors. We estimate that as of the end of calendar year 2017, approximately 14% of existing variable annuity contracts had issuers that were operating in the manner that the Staff Letters describe (hereinafter, we refer to contracts whose issuers are currently operating in the manner that the Staff Letters describe as ''In-Force Alternative Disclosure Contracts'').[662]

C. Benefits and Costs of the Proposed Rule

1. Optional Summary Prospectus Regime

The proposed rule would create a choice for insurers. They may continue to meet their prospectus delivery obligations by providing the statutory prospectus, or they may satisfy these obligations by providing a summary prospectus and making statutory prospectuses and other required documents available online. Those insurers that expect to benefit by providing summary prospectuses will choose to rely on the proposed rule to meet their prospectus delivery obligations.[663] Those insurers that do not expect to benefit from this optional prospectus delivery regime will choose to continue to provide statutory prospectuses to investors.[664]

If insurers choose to meet their prospectus delivery obligations by delivering summary prospectuses to investors, with other documents available online, investors will then have a choice as well. Under the layered disclosure framework we are proposing, investors will receive information in the form of a summary prospectus, with more detailed information available online if the investor chooses to access it. Thus, investors can continue to review the statutory prospectuses by accessing them online, or they may request paper or electronic delivery of statutory prospectuses on an ad hoc basis. Alternatively, investors may choose only to consult the summary prospectuses. Further, if investors want to rely on some combination of summary and statutory prospectuses to receive information about the contract, that choice is available to them as well.

We expect a vast majority of insurers will choose to use summary prospectuses. Thus, we expect that the vast majority of investors will have the option to use both summary prospectuses and statutory prospectuses in their decision-making, in whatever proportion investors think is best for their preferences. We discuss below the benefits and costs to both investors and insurers of the new options presented by the proposed contract summary prospectus regime and associated new optional delivery method for portfolio company prospectuses.

a. Benefits and Costs for Investors

i. Proposed Summary Prospectus for Variable Contracts

(a) Benefits

(1) Initial Summary Prospectus

Should insurers choose to use summary prospectuses, investors may benefit in a number of ways.[665] Variable contract prospectuses (particularly those that include optional benefits) are typically lengthy and complex, and they also may describe different versions of the contract in one prospectus, some of which may no longer be available to new investors. In addition, investors generally allocate their purchase payments to a range of portfolio companies, each of which also has its own prospectus. Because industry practice is to bundle all portfolio company prospectuses with the variable contract prospectus, the disclosure documents that are delivered to investors at purchase and on an annual basis can be voluminous.

First, investors are likely to benefit from the simplification of disclosure associated with initial summary prospectuses. We understand that contract statutory prospectuses may include disclosure about contract features and options that the registrant may no longer offer to new investors. Aggregating disclosures for multiple contracts, or currently-offered and no-longer-offered features and options of a single contract, creates complexity that can hinder investors from distinguishing between contract features and options that apply to them and those that do not.[666]

For example, a separate account could offer different contracts over time, but with the contracts having substantially similar names. Likewise, separate accounts could offer different contracts at a single point in time, but with the contracts also having substantially similar names. Thus, contract investors reviewing lengthy statutory prospectuses may find it difficult,

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thereto containing the survey data presented), available at *https://www.sec.gov/comments/s7-08-15/s70815-2604201-161127.pdf* (demonstrating increasing rates of electronic delivery in investment company fund reports).

[661] We understand that variable contract investors typically make a single delivery method election that applies to both the variable contract statutory prospectus and the portfolio company prospectuses.

[662] Of the 1,021 variable annuity registration statements on file, 521 registration statements appear to be for In-Force Alternative Disclosure Contracts. Of the 521, we understand that 517 are for contracts whose issuers are operating in the manner described in letters in which the staff stated that a circumstance associated with its determination not to recommend enforcement action was that the relevant registration statement have 5,000 or fewer existing investors. We understand that the remaining four registration statements are for contracts whose issuers are operating in the manner described in letters in which the number of existing investors described by the staff was greater than 5,000. While there is no data in the registration statements regarding the number of current investors, we assume that registrants are operating in the manner described in the Staff Letters entailing circumstances in which a contract has 5,000 or fewer investors. As a result, we estimate that these 517 registration statements represent a maximum of 2.59 million investors. Staff estimates that the remaining four registration statements represent at most 90,542 investors. *See supra* footnote 366. As a result, we estimate that up to 2.68 million investors may hold In-Force Alternative Disclosure Contracts (14% of the total number of contracts). Because we lack reliable data on the variable life insurance market, we have not estimated the proportion of existing variable insurance contracts that are In-Force Alternative Disclosure Contracts.

[663] If the expected costs of using summary prospectuses exceed the expected benefits of doing so, insurers could simply choose to maintain the status quo and continue to deliver statutory prospectuses to investors.

[664] Insurers that do not use summary prospectuses could be at a competitive disadvantage if investors choose variable products based on a preference for summary prospectuses, either because investors prefer summary prospectuses or because insurers that use summary prospectuses have lower expenses due to savings of printing and mailing costs. We expect that insurers would take any such competitive effects into account when assessing the costs of using summary prospectuses.

[665] Some investors may prefer to read statutory prospectuses, and therefore, the advantages associated with summary disclosure, as described in this section, may not apply to those investors. Because the statutory prospectus would, under the proposed rule, be available online and in paper or electronic format upon request, we recognize that the need to take additional action to review a statutory prospectus imposes some costs for these investors, which are discussed below.

[666] Existing research notes that individuals exhibit limited ability to absorb and process information. *See* Nisbett RE & Ross L. Human Inference: Strategies and Shortcomings of Social Judgment (1980); David Hirshleifer & Siew Hong Teoh, Limited attention, information disclosure, and financial reporting, Journal of Accounting and Economics 36, 337–386 (Dec. 2003).

confusing, and time-consuming to identify disclosures related to contract terms and features that are relevant to their investments. These characteristics of existing variable contract statutory prospectuses could result in a risk of inefficient allocation of funds among portfolio companies in variable contracts or inefficient matching of investors to variable contracts. Incomplete information about the variable contracts made available to investors may cause them to over- or underinvest in variable contracts or to misallocate parts of their investment portfolio held outside of variable contracts.

In contrast, the proposed initial summary prospectus would be limited to describing only the contract and features currently available under the statutory prospectus. We believe this narrower focus could facilitate investors' understanding of their variable contract's features and risks and make these features and risks more salient. In reviewing the more targeted information in the initial summary prospectus, investors will be able to more easily and more efficiently understand the product they are investing in, leading to more informed investment choices.

Moreover, the initial summary prospectus is designed to provide investors with key information relating to the contract's key terms, benefits, and risks. The overview would describe the parties to the contract (the issuer and investor), and provide readers with basic information relevant to the cash flows of the contract, such as premium payments and benefits. Further, the Key Information Table includes aspects of variable contracts that investors have most frequently stated that they failed to fully understand according to the complaints database maintained by the Commission's Office of Investor Education and Advocacy,[667] including: (1) Fees, including surrender charges; (2) risk of loss of principal and/or lack of guarantees of income; (3) illiquidity prior to the pay-out period; (4) tax consequences; (5) death benefits; and (6) compensation of investment professionals.[668]

Later sections of the initial summary prospectus would provide investors more detailed information about the cash flows related to contract purchase. One section would provide information about cash flows to the insurer, such as initial and subsequent purchase and premium payments. Other sections discuss cash flows investors can expect to receive, such as death benefits and other benefits. The initial summary prospectus for variable life insurance contracts also includes a section on how a contract could lapse, and thereby reduce payouts to investors. Finally, a section on withdrawal and surrenders discusses how accessing the money in a variable contract early affects the payouts that an investor should expect to receive. This basic information about cash flows would help investors value a variable contract and determine whether the contract would help them meet their financial goals. Taken together, the concise content provided in the initial summary prospectus could facilitate investors' evaluation and comparison of contracts at the time of investment and re-evaluation of contracts during the free look period. This could reduce the risk of inappropriate investments in variable contracts or inefficient matching of investors to variable contracts.

In addition, given the time required to review a statutory prospectus, investors may benefit from summary prospectuses because they offer a shorter alternative to statutory prospectus disclosure. Indeed, there is evidence that suggests that consumers benefit from summary disclosures.[669] Within the specific context of investing, there is evidence from related contexts that suggests that summary prospectuses allow investors to spend less time and effort to arrive at the same portfolio decision as if they had relied on a statutory prospectus.[670] This research is consistent with the 2012 Financial Literacy Study, which showed that at least certain investors favor a layered approach to disclosure with the use, wherever possible, of summary documents containing key information about an investment product or service.[671]

Further, investors allocate their attention selectively,[672] and the sheer volume of disclosure that investors receive about variable contracts and the underlying portfolio companies may discourage investors from reading contract statutory prospectuses (and the prospectuses of the underlying portfolio companies).[673] The observations of a telephone survey conducted on behalf of the Commission with respect to mutual fund statutory prospectuses (which are typically shorter than variable contract statutory prospectuses) are consistent with the view that the volume of disclosure may discourage investors from reading statutory prospectuses.[674] That survey observed that many mutual fund investors do not read statutory prospectuses because they are long, complicated, and hard to understand. To the extent summary prospectuses increase readership of variable contract disclosures, they could improve the efficiency of portfolio allocations made on the basis of disclosed information for those investors who otherwise would not have read the statutory prospectus.[675]

Moreover, potential variable contract investors that choose to read disclosures despite their length may face ''information overload,'' causing them to make inefficient decisions about the size of their variable contract positions, their selection of optional benefits, or the

[667] *See supra* note 105.

[668] *See supra* section II.A.1.c.ii(b). The Commission's Office of Investor Education and Advocacy offers online resources designed to enhance investor understanding of variable contract investments. *See, e.g., https://www.investor.gov/additional-resources/news-alerts/alerts-bulletins/investor-bulletin-variable-annuities%E2%80%94-introduction.*

[669] There is evidence that the summarization of key information is useful to consumers. *See, e.g.,* Agarwal S, Chomsisengphet S, Mahoney N, Stroebel J., *Regulating consumer financial products: Evidence from credit cards,* NBER Working Paper 19484 (2013). The authors find that a series of requirements in the CARD Act, including provisions designed to promote simplified disclosure, has produced decreases in both over-limit and late fees, saving US credit card users $20.8 billion annually; *see also* Clark R, Maki J, Morrill M.S., *Can simple informational nudges increase employee participation in a 401(k) plan?,* NBER Working Paper 19591 (2013). The authors find that a flyer with simplified information about an employer's 401(k) plan, and about the value of contributions compounding over a career, had a significant effect on participation rates.

[670] Beshears Paper, *supra* note 43. We note, however, that while the authors find evidence that investors spend less time making their investment decision when they are able to use summary prospectuses, there is no evidence that the quality of their investment decisions is improved. In particular, ''On the positive side, the Summary Prospectus reduces the amount of time spent on the investment decision without adversely affecting portfolio quality. On the negative side, the Summary Prospectus does not change, let alone improve, portfolio choices. Hence, simpler disclosure does not appear to be a useful channel for making mutual fund investors more sophisticated . . .'' (p. 13).

[671] *See* 2012 Financial Literacy Study, *supra* note 39.

[672] *See* Loewenstein, George, Cass R. Sunstein, and Russell Golman, *Disclosure Psychology Changes Everything,* 6 Annual Review of Economics 391–419 (2014).

[673] *See supra* note 344.

[674] *See supra* note 642.

[675] Review of the complaints database maintained by the Commission's Office of Investor Advocacy and Education revealed that the most common type of complaint submitted by variable contract investors involved an investor's belief that a sales agent had made misrepresentations about the variable contract and/or recommended a variable contract despite the product being unsuitable for the investor. To the extent that summary prospectuses increase readership of variable contract disclosures, they may also facilitate stronger investor protection.

allocation of funds across underlying portfolio companies.[676]

We note that these benefits are potentially magnified given the demographic profile of variable contract investors. The average age of annuity investors is 70.[677] Studies indicate that exposure to financial harms may increase with age, potentially exacerbated by a decline in the capacity to process financial information for some individuals.[678] To the extent that summary prospectuses allow investors to spend less time and effort to understand their investments and arrive at investment decisions, that benefit is magnified in the context of variable contracts given the demographic profile of the underlying investor base.[679]

The presentation proposed for the initial summary prospectus may also reduce the investor effort required to compare variable products when an investor considers a new investment. Information provided in a concise, user-friendly presentation could allow investors to compare information across products and as a result, may lead investors to make decisions that better align with their investment goals.[680] For example, the proposed rule requires insurers to distill certain key product information into tables, which could facilitate comparison across different products. The effect of the proposed initial summary prospectus alone on the ability of the investor to compare products may be limited, however, by the extent to which variable contracts are sold through agents.[681]

Additionally, the proposed framework for variable contract summary and statutory prospectuses also includes design elements to facilitate investor use. In particular the proposed rule includes requirements for linking both within the electronic version of a contract statutory prospectus and between the electronic versions of the contract statutory prospectus and the contract summary prospectus. The linking requirement would permit investors who use the electronic versions of contract prospectuses to quickly navigate between related sections within the contract statutory prospectus and back and forth between related sections of the contract summary prospectus and the contract statutory prospectus.[682] Further, the proposed rule would also require that investors either be able to view the definition of each special term used in an online summary prospectus upon command, or to move directly back and forth between each special term and the corresponding entry in any glossary or list of definitions that the summary prospectus includes. This requirement would facilitate understanding of terms that may be confusing or unfamiliar among investors viewing the documents online.

Finally, the proposed rule would additionally require that contract documents required to be posted online remain available on the website for at least 90 days. This requirement mirrors the online availability requirement for the mutual fund summary prospectuses used by most portfolio companies. As a result, investors who prefer to access the disclosure documents online could be certain that the documents for both the contract and the portfolio companies would be available for the same period of time.

(2) Updating Summary Prospectus

The proposed updating summary prospectus will have many of the same benefits for investors associated with the initial summary prospectus discussed above associated with presenting key information in an easier and less time-consuming manner for investors. Specifically, because many terms of the variable contract do not change from year-to-year, the contract statutory prospectus may contain large amounts of disclosure that is duplicative of disclosure that the investor has previously received. Those changes that do occur may be important to investors, but the disclosure about these changes could be difficult for the investor to identify given the volume of prospectus disclosure that investors currently receive, and the current lack of a requirement to identify new or changed information.

Under the proposed rule, the updating summary prospectus would include a concise description of important changes affecting the statutory prospectus disclosure relating to certain topics that occurred within the prior year—namely the Fee Table, the standard death benefit, other benefits available under the contract, and portfolio companies available under the contract. We believe that these are topics that are most likely to entail contract changes and, for the reasons previously noted, are the types of contract changes most likely to be important to investors because they affect how investors evaluate variable contracts and are relevant to investors when making additional investment decisions or otherwise monitoring their contract. The proposed updating summary prospectus, if used by insurers to satisfy their prospectus delivery obligations, would likely reduce the burden on investors and increase their understanding of their contract by highlighting certain changes to the contract made during the previous year, while foregoing the repetition of most information that had remained unchanged.[683]

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[676] *See* Paredes, Troy A., *Blinded by the light: Information overload and its consequences for securities regulation,* 81 Wash. U. Law Rev. 417 (2003).

[677] *See supra* note 652.

[678] *See e.g.,* Schroeder, David H., and Timothy A. Salthouse, ''Age-related effects on cognition between 20 and 50 years of age,'' *Personality and individual differences* 36.2 (2004): 393–404; Salthouse, Timothy A., ''Aging and measures of processing speed,'' *Biological psychology* 54.1–3 (2000): 35–54; Fair, Ray C., ''How Fast Do Old Men Slow Down?'' *The Review of Economics and Statistics* (1994): 103–118; Ulman Lindberger and Paul B. Baltes, ''Sensory functioning and intelligence in old age: A strong correlation,'' Psychology and Aging, 9 (1994): 339–355; Ulman Lindberger and Paul B. Baltes, ''Intellectual functioning in old and very old age: Cross-sectional results from the Berlin Aging Study,'' Psychology and Aging, 12, (1997): 410–432; Patricia D. Struck, ''NASAA Statement at SEC Seniors Summit'', available at *http://www.nasaa.org/860/nasaa-presidents-statement-at-sec-seniors-summit/;* Karla Pak and Doug Shadel, ''AARP Foundation National Fraud Victim Study'', (2011).

[679] If there are investors who would choose to rely on statutory prospectuses, one option available to them is to access the statutory prospectuses in electronic form online. If older investors are less likely to use the internet, that would attenuate the overall benefits of the rule for the older demographic.

[680] Research suggests that individuals are generally able to make more efficient decisions when they have comparative information that allows them to assess relevant trade-offs. *See, e.g.,* Hsee C.K., Loewenstein G.F., Blount S, Bazerman M.H., *Preference reversals between joint and separate evaluations of options: A review and theoretical analysis,* 125 Psychological Bulletin 576–90 (1999); *see also* Kling J.R., Mullainathan S., Shafir E., Vermeulen L.C., Wrobel M.V., *Comparison friction: Experimental evidence from Medicare drug plans,* 127 Quarterly Journal of Economics 199–235 (2012). In a randomized field experiment, some senior citizens choosing between Medicare drug plans were randomly selected to receive a letter with personalized, standardized, comparative cost information. Plan switching was 28% in the intervention group, but only 17% in the comparison group, and the intervention caused an average decline in predicted consumer cost of about $100 a year among letter recipients.

[681] However, we expect the proposed requirement to file certain information from variable contract statutory prospectuses in Inline XBRL would facilitate data collection by third-party aggregators and the trade press as well as facilitate investors' comparison of variable products. *See infra* section III.C.4.

[682] In response to a recent rulemaking proposal requiring registrants to include a hyperlink to each exhibit identified in the exhibit index in any registration statement or report that is required to include exhibits under Item 601 of Regulation S–K or under Form F–10 or Form 20–F, commenters agreed that hyperlinking would make it easier and reduce the amount of time required for investors to navigate to related documents. *See* Exhibit Hyperlinks and HTML Format Release No. 34–80132 (March 1, 2017) [82 FR 14130 (March 17, 2017)] at nn.85 and 86.

[683] Unlike with the initial summary prospectus, the proposed rule permits insurers to describe multiple contracts in the updating summary

The updating summary prospectus also would include the Key Information Table. The inclusion of this key information could benefit investors by reminding them of the most important features of the contract, including the contract's fees and expenses, risks, restrictions, tax implications, and investment professional compensation. Finally, the updating summary prospectus would include an appendix that provides summary information about the portfolio companies that the registrant offers under the contract. The inclusion of this portfolio company information could benefit investors by reminding them of one of the most important decisions they face during the lifecycle of a contract—that is, whether and where to reallocate funds among the portfolio companies or investment options available to them.

(b) Costs

While we believe that, should insurers opt to use summary prospectuses, the majority of investors would benefit from their disclosures, certain investors may incur costs. For example, although research indicates that investors generally prefer to receive summary disclosures [684] there may be investors who prefer to rely on statutory prospectuses when making investment decisions. While statutory prospectuses will continue to be available online and in paper or electronic copy upon request, access to those statutory prospectuses will require investors to take additional steps, imposing some burden. For example, investors choosing to access the statutory prospectus online rather than requesting a paper copy will need to manually enter a hyperlink from a paper updating summary prospectus or click on a link to a website containing the statutory prospectus.[685] To the extent that internet access and use among variable contract investors is not universal, those investors without home internet access might experience a reduction in their ability to quickly and easily access statutory prospectus information.[686] Even for those investors with home internet access, there may be some resistance to taking the additional step of accessing the statutory prospectus online.

Moreover, those investors who prefer paper copies of statutory prospectuses and do not have ready access to the internet (and the ability to print out the statutory prospectus that is made available online [687]), would not be able to elect paper delivery of statutory prospectuses on a going-forward basis. Rather, they would need to make an ad hoc request for paper delivery of the statutory prospectus each time one is made available. This may delay their review of the statutory prospectus as they await paper delivery, or, in some cases, if the investor does not take the additional step to request paper delivery, may result in the investor not receiving the statutory prospectus in their preferred format and ultimately receiving less information than they would like about their contract.[688] We believe that possibility is unlikely in this circumstance, however. We believe investors who prefer statutory prospectuses rather than summary prospectuses are likely investors who are willing to seek out detailed information to inform their investment decisions. We believe that for these investors, the additional effort required to access the statutory prospectus online or request paper or electronic statutory prospectuses would be incrementally minimal.

ii. Proposed Approach to Portfolio Company Prospectus Delivery

As described in section III.C.1.b below, we anticipate that the new optional delivery method for portfolio company prospectuses will result in cost savings from reduced printing and mailing expenses. To the extent that a portfolio company bears the printing and mailing expenses associated with portfolio company prospectuses, we expect that the reductions would benefit the portfolio company, as well as variable contract investors who have allocated contract value to the portfolio company (except perhaps in certain circumstances such as where the portfolio company is operating under an expense limitation arrangement). To the extent that the insurance company bears these costs, we expect that the reductions would benefit the insurance company, which may pass on such cost savings to existing variable contract investors and to new variable contract investors in the pricing of variable contracts offered in the future.[689]

While we believe that the proposed framework may benefit investors through reduced costs, certain investors may incur additional costs. While the portfolio company prospectuses will be available online and in paper or

prospectus. However, given the limited number of changes in each contract on an annual basis, we do not believe that permitting multiple contracts in the updating summary prospectus will create significant confusion for investors or reduce any of the benefits associated with the description of key changes for each contract.

We further recognize that the changes highlighted in the updating summary prospectus are only those relative to the immediately preceding updating summary prospectus and statutory prospectus. Accordingly, if an investor wanted to understand the changes to his or her contract since he or she initially purchased the contract, the investor would need to review all of the updating summary prospectuses (or each updated statutory prospectus). However, we have designed the updating summary prospectus to allow investors to better focus their attention on new or updated information relating to the contract. As noted above, we believe that existing investors in a variable contract would benefit more from a brief summary of changes that have occurred in the contract than a document like the initial summary prospectus, which is designed for someone making an initial investment decision. Therefore, we believe that requiring the proposed updating summary prospectus to only provide information on the most recent changes strikes the appropriate balance between increasing investor's understanding of and access to information about changes in the updated statutory prospectus and imposing additional costs on insurers to create more tailored updating disclosures comparing the current state of the contract to the original contract for each contract holder.

[684] *See supra* note 671.

[685] Investors may also call or email the insurer to obtain the statutory prospectus.

[686] According to the most recent U.S. census data, approximately 77.2% of U.S. households had some form of internet access in their home in 2015, and 86.8% had a computer (*e.g.,* desktop, laptop, tablet or smartphone). *See* Camille Ryan & Jamie M. Lewis, *Computer and internet Usage in the United States: 2015* (Sept. 2017), available at *https://www.census.gov/content/dam/Census/library/publications/2017/acs/acs-37.pdf; see also* Sarah Holden, Daniel Schrass & Michael Bogdan, *Ownership of Mutual Funds, Shareholder Sentiment, and Use of the internet, 2017* (Oct. 2017), available at *https://www.ici.org/pdf/per23-07.pdf* (''[i]n mid-2017, 95 percent of households owning mutual funds had internet access, up from about two-thirds in 2000'' and ''86 percent of mutual fund-owning households with a household head aged 65 or older had internet access in mid-2017''); Andrew Perrin & Maeve Duggan, *Americans' internet Access: 2000–2015* (June 2015), available at *http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/* (finding in 2015, 84 percent of all U.S. adults use the internet).

[687] *See supra* section II.A.4.

[688] This outcome is suggested by research which finds that investors can experience a ''status quo bias.'' *See, e.g.,* Richard H. Thaler and Shlomo Bernatzi, *Save More Tomorrow™: Using Behavioral Economics to Increase Employee Saving,* 112:1 Journal of Political Economy, S164–S187 (2004); Richard H. Thaler and Cass R. Sunstein, *Libertarian Paternalism,* 93:2 The American Economic Review 175–179 (2003). Thaler and Sunstein argue that a ''status quo'' bias results in the continuance of existing arrangements even if better options are available. The authors illustrate their argument with higher rates of initial enrollments in employee savings plans when enrollment is automatic as compared to when employees must first complete an enrollment form.

[689] Because the fees charged under variable contracts investors are typically fixed when the contract is purchased, we recognize that cost savings realized by the insurance company may not be passed along to existing investors except in the case of contracts offered by mutualized insurance companies, which return any profits they make to their investors.

We note that we expect the benefit in terms of lower pricing of variable contracts would be small. We estimate the cost saving, per prospectus mailed, for the underlying portfolio company prospectuses to be $0.18. *See supra* note 700. The average value of a variable contract investor's investment is $106,187.

electronically upon request on an ad hoc basis, investors may experience additional burdens when accessing the prospectuses. As with the proposed summary prospectus for variable contracts discussed above, investors who prefer to review paper copies of the portfolio company prospectuses will be required to either affirmatively request delivery of paper copies, or bear the costs of printing the electronic versions of documents accessed through the website.

Also, as discussed with respect to variable contract prospectuses above, internet access is not universal among variable contract investors, and investors who would prefer paper copies of prospectuses would be required to request paper delivery of those prospectuses on an ad hoc basis which could, in turn, delay investor review of those prospectuses.[690] Further, to the extent that investors prefer paper copies of prospectuses, but do not request a paper copy or access the document online, there would be no investor review of those prospectuses.

b. Benefits and Costs for Insurers

i. Proposed Summary Prospectus for Variable Contracts

The total cost of providing disclosure in any particular framework is the sum of costs associated with producing the disclosure materials, including labor and legal fees, and the costs associated with delivery of the disclosure materials, including printing and mailing costs and costs of making the disclosures available on a website. Insurers will benefit from the options provided by the proposed rule, to the extent that providing layered disclosure through a summary contract prospectus regime (including costs of producing and delivering initial summary and updating summary prospectuses and of making statutory prospectuses, portfolio company prospectuses, and other documents available online) is less expensive than providing statutory prospectuses to new investors and updated statutory prospectuses to existing investors annually, along with portfolio company prospectuses and other related documents.

As discussed later in this section, because we expect a primary driver of the benefit for insurers providing summary prospectuses to be cost savings associated with no longer printing and mailing lengthy statutory prospectuses for investors that currently receive these documents in paper, the magnitude of the benefit depends in part on the extent to which investors currently elect electronic delivery of materials associated with their variable contract. The higher the percentage of investors currently electing electronic delivery rather than paper, the smaller the benefit derived from foregoing the printing and mailing costs. Accordingly, to estimate the potential cost reduction associated with the proposed rule, as noted above, we assume that 15% of the contract investors currently elect electronic delivery of the statutory prospectus both at sale, and annually thereafter.[691] Moreover, we assume that at least 15% of variable contract investors will continue to elect electronic delivery going forward.

To estimate the overall impact of the proposed rules on insurers' cost of prospectus delivery, we begin by estimating the number of variable contract statutory prospectuses delivered in paper format. This requires a number of assumptions:

- We estimate that insurers will ultimately use summary prospectuses for 95% of contracts[692] that do not operate in the manner that the Staff Letters describe.[693]
- Issuers of In-Force Alternative Disclosure Contracts provide alternative disclosures in lieu of statutory prospectuses.[694] Based on staff analysis, 54% of variable contract registration statements are for In-Force Alternative Disclosure Contracts, and these registration statements apply to up to 14% of variable annuity contracts.[695] We further assume that each investor in an In-Force Alternative Disclosure Contract owns exactly one policy issued under a registration statement for an In-Force Alternative Disclosure Contract.
- We assume 15% of investors elect electronic delivery of prospectuses.

Together with the baseline estimate of 18.7 million contracts in force at the end of 2017, these assumptions imply that insurers would no longer send approximately 13 million statutory prospectuses each year.[696]

Next, we estimate the number of statutory prospectuses that would no longer be provided to investors in paper in connection with new contract purchases. In 2017, there were 18.7 million contracts in force.[697] Total sales of variable annuity contracts for 2017 were $91.8 billion. Assuming that the average size of each variable contract sold in 2017 is similar to the average size of all variable contracts in force, we estimate the number of new contracts sold in 2017 was 865,000 contracts. Based on these estimates, we further estimate that among investors who elect to receive paper copies of prospectuses, the proposed new option to use a summary prospectus would be applied

[690] As we discuss in section II.B.2 above, we understand that sales agents assist investors by providing information about underlying portfolio companies and sometimes recommending that investors allocate their contract value into specific portfolio companies. We anticipate that this would continue under the proposed framework, and that sales agents would assist investors in understanding key facts about the portfolio companies, obtaining portfolio company prospectuses, and understanding the proposed portfolio company prospectus delivery framework. For this reason, to the extent that sales agents continue to play a significant role in providing information about portfolio companies to investors, even if investors were to no longer automatically receive paper copies of portfolio company prospectuses, we expect the proposal to yield lower costs and higher benefits for investors.

[691] We lack verifiable data on current electronic delivery election rates among variable contract investors but are estimating 15% based, in part, on the range of estimates provided by commenters and with consideration for the general increase in electronic delivery rates over time demonstrated in other investment products. *See supra* notes 656, 659, and 660. If variable contract investors exhibit lower electronic delivery rates today than we estimate, the cost savings from reducing the amount of paper mailings under the proposed amendments would be higher than estimated here. If variable contract investors exhibit higher electronic delivery rates today than we have estimated, the cost savings from reducing the amount of paper mailings under the proposed amendments would be lower than estimated here.

[692] In response to the 2012 Financial Literacy Study, the Committee of Annuity Insurers submitted a comment letter in which it states that ''The Committee believes the Commission should embrace the use of layered disclosure for variable annuities (and other retail products, including other SEC-registered annuities), as it has done for mutual funds.'' According to its comment letter, the Committee of Annuity Insurers ''represent more than 80% of the annuity business in the United States.'' Although the proposed layered disclosure framework for variable contracts is not identical to the corresponding framework for mutual funds and the creation of initial and updated summary prospectuses may be more costly for variable contracts than the creation of mutual fund summary prospectuses, we nevertheless anticipate that choosing to deliver summary prospectuses will provide cost savings for insurers. Given expressed industry support for layered disclosure with summary prospectuses, our experience that approximately 95% of mutual funds have adopted layered disclosure with summary prospectuses, and our anticipation that the proposed rule will provide costs savings to insurers, we believe it is appropriate to assume that 95% of insurers will choose delivery of summary prospectuses.

[693] *See supra* note 364 and accompanying text.

[694] *See supra* note 374 and accompanying text.

[695] *See supra* note 662.

[696] $18.7 \text{ million} \times (1 - 14\%) \times 95\% \times (1 - 15\%) = 13.0$ million contracts.

[697] *See supra* section III.B.1.

to 13 million existing contracts and 698,000 new contracts annually.[698]

We next estimate the cost difference, per prospectus, of sending summary prospectuses (initial summary prospectuses, as well as updating prospectuses) rather than statutory prospectuses.[699] We estimate that printing and mailing expenses for statutory prospectuses are $0.53 per statutory prospectus.[700] We estimate that printing and mailing expenses for initial summary prospectuses and updating summary prospectuses are $0.35.[701] Assuming the 2017 level of contracts in force and contract purchases remains stable, we estimate the printing and mailing cost to insurers of meeting their disclosure requirements, as they relate to the delivery of disclosure documents, using initial and updating prospectuses would decline by up to $108,180 and $2,340,000,[702] respectively, for aggregate cost savings of approximately $2,465,640.[703]

As noted earlier in this section, another key component of costs that insurer will consider when determining whether to provide summary prospectuses under the proposed rules is the cost of producing the initial and updating summary prospectuses. Insurers choosing to provide summary prospectuses would bear a one-time cost of preparing both the initial summary prospectus and the updating summary prospectus, as well as costs associated with preparing updated versions of both documents in the future on at least an annual basis.[704] We estimate the aggregate cost to prepare initial and updating summary prospectuses to be $4,908,960.[705]

Insurers that choose to provide summary prospectuses are required to make statutory prospectuses and other materials available online.[706] We estimate the aggregate cost to comply with the proposed website posting requirements of the rule for documents relating to variable contracts to be $329,581.[707]

Insurers are also required to include inter- and intra-document linking and special terms definitions. One linking requirement would allow the reader to move back and forth between a table of contents of the contract statutory prospectus or SAI, and the related sections of each document. Although prospectuses and SAIs are not required to have individual headings corresponding to the items in the registration forms, we assume that the sections of a prospectus or SAI would correspond with the item requirements of the forms. We estimate that Form N–3 filers would require 33 back-and-forth internal links, Form N–4 filers would require 27, and Form N–6 would require 28. The other linking requirement would allow the reader to move back and forth between each section of the summary prospectus and any related section of the contract statutory prospectus and SAI that provides additional detail. This back-and-forth movement could occur either directly from the summary prospectus to the relevant section of the statutory prospectus or SAI, or indirectly by linking from the summary prospectus to a table of contents in the statutory prospectus or SAI. For our analysis, we assume direct links as those will tend to be more costly when compared with indirect linking through a table of contents.

An initial summary prospectus for a Form N–3 registrant or a Form N–4 registrant includes eight sections and an initial summary prospectus for a Form N–6 registrant includes nine sections. However, the Key Information Table has instructions stating that, wherever feasible, a registrant should provide cross-references or links to the location in the statutory prospectus where the subject matter is described in greater detail. There are 11 sections of the Key Information Table. Therefore, we estimate that there would be 18 back-and-forth links between Form N–3 and Form N–4 registrant initial summary prospectuses and statutory prospectuses, and 19 back-and-forth links between Form N–6 registrant initial summary prospectuses and statutory prospectuses.

An updating summary prospectus for a Form N–3, Form N–4, or Form N–6 registrant includes three sections, one of which, the Key Information Table, includes 11 sections. One section is the ''Updated Information About Your Contract'' section. The number of links in this section would depend on the number of updates discussed. For example, assuming discussion of four updates, we estimate the number of back-and-forth links between a Form N–3, Form N–4, or Form N–6 registrant's updating summary prospectus and statutory prospectus to be 16.

The proposed rule would also require that investors either be able to view the definition of each special term used in an online summary prospectus upon command (*e.g.,* by ''hovering'' the computer's pointer or mouse over the term), or to move directly back-and-forth between each special term and the corresponding entry in any glossary or list of definitions that the summary

[698] *See supra* note 696. The number of new contracts falling within the proposed regime is calculated as: 865,000 contracts × (1 − 0.15) × 0.95 = 698,488 contracts.

[699] Variable contract issuers generally maintain current prospectuses for their products through the filing of annual post-effective amendments to the registration statements. *See supra* note 29. As a result, we assume updating prospectuses would be delivered annually.

[700] In response to the Investment Company Reporting Modernization rulemaking proposal in which we solicited information with respect to the cost of printing and mailing investment company shareholder reports, a commenter estimated that the cost of printing and mailing the reports to be $0.53. *See* Comment Letter of Broadridge Financial Solutions, Inc. on Investment Company Reporting Modernization, File No. S7–08–15 (Aug. 11, 2015) (''Broadridge Comment Letter''). Although those documents are different from documents at issue here, we do not have specific data regarding how the cost of printing and mailing those two sets of documents would differ. We inferred the $0.53 estimate from Broadridge's estimates as follows. Broadridge estimates total savings from using summary reports to be $130 million and savings per report to be $0.18. We use these two numbers to infer the total number of reports used in calculations to be approximately 722 million. Broadridge also estimates the total cost (FY18 estimate) of printing and mailing shareholder reports to be $382 million. Therefore, we infer the cost, per report, to be $0.53 (= 382/722).

[701] Broadridge Comment Letter. The commenter estimates summary reports are $0.18 cheaper to print and mail. $0.53 − $0.18 = $0.35. Although initial summary prospectuses and updating summary prospectuses are different documents, we do not have specific data regarding how the cost of printing and mailing those two documents would be different. Therefore, we infer the cost, per summary prospectus to be $0.35.

[702] Calculated as $0.18 × 13 million = $2,340,000 for updating summary prospectuses, and $0.18 × 698,000 = $125,640 for initial summary prospectuses. These calculations assume investors do not make ad hoc requests for paper prospectus delivery. As a corollary, insurers that choose to deliver initial summary prospectuses and updating summary prospectuses would incur delivery costs of approximately $4,550,000 for updating summary prospectus delivery, calculated as $0.35 × 13 million, and $244,300 for initial summary prospectus delivery, calculated as $0.35 × 698,000.

[703] Calculated as $2,340,000 + $125,640 = $2,465,640.

[704] We understand that even those contracts with existing initial summary prospectuses may have changes that need to be reflected in an initial summary prospectus sent to new investors, which will require modifications to the existing initial summary prospectus. However, we believe that once an initial summary prospectus is drafted for a particular contract, that document can serve as a basis for future versions of the initial summary prospectuses sent to new investors of the contract. Thus, we believe that drafting an ''updated'' initial summary prospectus will be less costly than drafting the original initial summary prospectus. Similarly, we believe that preparing subsequent updating summary prospectuses will be less costly than preparing the original updating summary prospectus.

[705] *See infra* note 842.

[706] The requirement that contract disclosure materials be available online for a period of 90 days mirrors the online availability requirement for disclosure materials associated with mutual funds using summary prospectuses, including most portfolio companies. While there are operational differences between the variable contract and mutual fund summary prospectus regimes, to the extent that the proposed rule harmonizes certain requirements, this could create efficiencies for contracts organized as UITs.

[707] *See infra* note 848.

prospectus includes. We assume that registrants could replicate links to a glossary or the computer code required to implement access to definitions by ''hovering'' over a term with little or no burden, but that there would be a burden associated with creating the requisite link or code for each special term. Accordingly, we estimate the aggregate cost to comply with the proposed requirement to include inter- and intra-document linking and special terms definitions as described above would include 4,138 burden hours and a cost of $552,000 annually.[708]

Finally, funds may incur costs in connection with the requirement to provide a statutory prospectus and other documents upon request of an investor. We estimate that the annual cost associated with printing and mailing these documents would be $500 per registrant.[709] We estimate that the aggregate annual costs associated with printing and mailing statutory prospectuses will be $344,850.[710]

ii. Proposed Approach to Portfolio Company Prospectus Delivery

Form N–4 and Form N–6 registrants that use summary prospectuses may also benefit from the option to provide prospectuses for all underlying portfolio companies online.[711] While there will be certain costs associated with complying with the requirements for posting the portfolio company materials online, as discussed below, we anticipate that this new optional delivery method will result in overall reduced costs due to a reduction in printing and mailing costs. To the extent that insurers bear these costs, we expect the reductions will benefit the insurance company, which may pass such cost savings on to new variable contract investors in the pricing of variable contracts offered in the future, and possibly to existing variable contract investors. To the extent that a portfolio company bears these costs, cost savings would typically be passed along to investors.

Moreover, as with the reduction in printing and mailing costs associated with the delivery of the contract statutory prospectus, the magnitude of these cost savings is dependent on the extent to which investors currently elect to receive electronic versions of the portfolio company prospectuses rather than receive them in paper. The higher the percentage of investors who currently receive paper copies of portfolio company prospectuses, the greater the reduction in printing and mailing costs arising from the new delivery option. We estimate that 85% of investors currently receive paper copies of these documents.[712]

We estimate that printing and mailing expenses for summary prospectuses for underlying portfolio companies to be $0.53 per set of prospectuses.[713] Assuming the 2017 level of contracts in force and contract purchases remains stable, we estimate the printing and mailing cost to insurers of meeting their disclosure requirements, as they relate to the delivery of disclosure documents, would decline by at least $6,890,000,[714] for aggregate cost savings of at least $7,260,000.[715] Registrants will incur costs associated with making the underlying portfolio company summary prospectus, statutory prospectus, SAI, and most recent shareholder reports available online under the conditions set forth in the proposed rule. We estimate the cost of making underlying portfolio summary prospectuses available online to be $478 per registrant.[716] In 2017, there were a total of 721 N–4 and N–6 registrants.[717] Therefore, we estimate the aggregate cost of making the underlying portfolio company summary prospectus, statutory prospectus, SAI, and most recent shareholder reports available online under the conditions set forth in the proposed rule to be $345,000.[718]

Funds may incur costs in connection with the requirement to provide summary prospectuses for underlying portfolio investments upon request of an investor. We estimate that the annual cost associated with printing and mailing these prospectuses would be $500 per registrant.[719] We estimate that the aggregate annual costs associated with printing and mailing portfolio

[708] In a separate rulemaking, we required registrants that file registration statements and reports subject to the exhibit requirements under Item 601 of Regulation S–K, or that file Forms F–10 or 20–F, to include a hyperlink for each exhibit listed in the exhibit index of these filings. *See* Exhibit Hyperlinks and HTML Format Adopting Release, *supra* note 682. We estimated the burden of including hyperlinks to be between one and four hours with 75% of the burden carried by the registrant internally and 25% of the burden carried by outside professionals retained by the registrant at an average cost of $400 per hour. Filings for which we estimated a burden of four hours had approximately 33 to 35 hyperlinks, on average. We do not have data on extent to which providing the ''two-way'' inter- and intra-document linking and special terms definitions differs from providing ''one-way'' hyperlinks from one document to another. We estimate the burden of including inter- and intra-document linking and special terms definitions to be eight hours with 75% of the burden carried by the registrant internally and 25% of the burden carried by outside professionals at an average cost of $400 per hour. We estimate the total burden hours to be 5,518 = (726 registrants) × (95% relying on rule) × (8 burden hours per registrant). We estimate the burden hours carried by the registrants internally to be 4,138 = 5,518 × .75. We estimate the cost of the burden carried by outside professionals to be $552,000 = (5,518 × .25) × $400.

[709] *See infra* note 849.

[710] *See infra* note 850.

[711] *See supra* section II.B. This new delivery option would not be available to Form N–3 registrants because they do not have underlying portfolio companies. As of the end of calendar 2017, 3,385 of 3,422 (99%) registrants were either Form N–4 registrants (2,393) or Form N–6 registrants (992).

[712] We recognize that by permitting the satisfaction of delivery obligations through the posting of portfolio company statutory prospectuses online (under the conditions specified in the proposed rule), there may be a disincentive for mutual funds to produce a summary prospectus, as concerns about costs of printing and mailing the statutory prospectus would be reduced. However, the proposed rule requires, as a condition of relying on the new delivery method, that the mutual fund summary prospectus be made available online. In addition, the Commission continues to believe that the costs of continuing to produce the mutual fund summary prospectus, which reflects a portion of the statutory prospectus, would be minimal. *See* 2009 Summary Prospectus Adopting Release, *supra* note 33.

[713] We estimate that the cost of printing and mailing a set of summary prospectuses for a variable contract's underlying portfolio companies is, on average, the same as the cost of printing and mailing a single registrant statutory prospectus. *See supra* note 700. Although those documents are different, we do not have specific data regarding how the cost of printing and mailing those two sets of documents would differ and so we have used the same cost for printing and mailing to arrive at a conservative estimate of cost savings associated with the proposed rule. We solicit public feedback to help refine these estimates.

[714] Calculated as $0.53 × 13 million = $6,890,000 for portfolio company summary prospectuses associated with existing contracts, and $0.53 × 698,000 = $369,940 for portfolio company summary prospectuses associated with new sales.

[715] Calculated as $6,890,000 + $369,940 = $7,259,940.

[716] We estimate that the average burden to comply with the proposed website posting requirements would be 2 hours per set of documents. We estimate the average wage based on published rates for webmasters to be $239. $478 = 2 × $239.

Although we do not have data on the use of summary prospectuses for the underlying portfolio companies offered in variable contracts, we understand that delivery of summary prospectuses is typical. To the extent that there are portfolio companies for which no summary prospectus has been created, there would be costs associated with the summary prospectus requirement. Those costs would include the cost of creating the document, making sure that the summary prospectus is structured appropriately, and costs associated with filing the summary prospectus after it is first used under rule 497. We believe that these costs would be small, however. For example, the content of a mutual fund summary prospectus is just Items 2 through 8 of Form N–1A, with the cover page as specified by rule 498.

[717] 721 = (500 N–4 registrants) + (221 N–6 registrants).

[718] $478 × 721 = $344,638.

[719] See *infra* note 854. Also, currently contract investors may request paper copies of online documents related to portfolio investments (*e.g.,* SAIs). As a result, we estimate the cost of updating systems to accommodate requests for paper copies of prospectuses for portfolio investments would be minimal.

summary prospectuses will be $342,475.[720]

Thus, we estimate a reduction of costs related to delivery of portfolio company summary prospectuses of $6,573,000.[721]

2. Treatment of Discontinued Variable Contracts

As discussed above, if the proposed summary prospectus framework is adopted, the Commission would take the position that Alternative Disclosure Contracts (contracts operating in the manner described in the Staff Letters as of the effective date of any final summary prospectus rules) are permitted to continue to operate in such a manner.[722] This position on Alternative Disclosure Contracts would recognize the industry's practice that has developed in light of the Staff Letters, the costs and burdens that issuers of In-Force Alternative Disclosure Contracts currently incur, and the costs and burdens that issuers would incur under the proposed summary prospectus framework. For all other contracts, the Commission's position would not be applicable, and therefore variable contract issuers would be required to file post-effective amendments to update their registration statements and provide updated prospectuses under current regulatory requirements, and could avail themselves of the summary prospectus framework as adopted.

The Commission's position on Alternative Disclosure Contracts recognizes that the proposed rule and form amendments are expected to significantly reduce certain burdens and costs associated with the current contract and portfolio company prospectus framework.[723] Most notably, we anticipate that registrants that choose to rely on proposed rule 498A could experience significant decreases in printing and mailing costs, compared to their current costs to print and mail the contract statutory prospectus.[724] These decreases in printing and mailing costs would be heightened to the extent that the registrant relies on the proposed rule's new option to satisfy portfolio company prospectus delivery requirements, because paper (or electronic) copies of the portfolio company prospectuses no longer would be required to be delivered to investors. Similar to the proposed rule, issuers of In-Force Alternative Disclosure Contracts currently experience reductions in printing and mailing costs associated with the contract prospectus, compared to other variable contract issuers. Issuers of In-Force Alternative Disclosure Contracts, however, would benefit from the expected reductions in printing and mailing costs associated with portfolio company prospectuses under the proposed rule.

Furthermore, we acknowledge that there are certain other costs and burdens that are currently reduced for issuers of In-Force Alternative Disclosure Contracts, but would not be similarly reduced under the proposed rule and form amendments. For example, a registrant that relies on proposed rule 498A would still bear burdens of maintaining and updating the contract registration statement,[725] preparing and filing updating summary prospectuses, delivering the updating summary prospectus to investors annually, and making the contract statutory prospectus and SAI available online. In addition, while the proposed form amendments would simplify certain current disclosure requirements,[726] in other instances they would result in new or amended disclosures that, in the aggregate, we anticipate would result in a net increase in the burden associated with preparing an initial registration statement and post-effective amendments thereto.[727] The Commission's position on Alternative Disclosure Contracts takes all of the foregoing under consideration, including the significant time period that the industry has operated in the manner that the Staff Letters describe.

We estimate that approximately 2.68 million existing variable annuity contracts were issued pursuant to registration statements for In-Force Alternative Disclosure Contracts.[728] For those contracts whose issuers are currently operating in the manner that the Staff Letters describe as of the effective date of final summary prospectus rules, we believe the Commission's position with respect to Alternative Disclosure Contracts will have minimal impact, compared to the baseline, on either insurers or investors. Under the Commission's position, insurers would continue to provide, and investors would continue to receive, the same alternative disclosures that the Staff Letters describe. We acknowledge, however, that insurers sponsoring Alternative Disclosure Contracts would potentially benefit from the Commission's position, because Commission action provides them with greater certainty about future disclosure obligations than staff no-action letters.

With respect to insurers with variable contracts outstanding and those issuing new contracts, the Commission's position on Alternative Disclosure Contracts likely will result in some costs. Existing contracts whose issuers are *not* currently operating in the manner described in the Staff Letters may have been structured or offered by insurers with the expectation that the insurer could provide alternative disclosures if a product launch is unsuccessful or the number of investors diminishes over time. The Commission's position may therefore result in those contracts experiencing unexpected future costs associated with updating the registration statement and delivering prospectuses under current regulatory requirements. However those contracts could avail themselves of the summary prospectus regime as adopted, which, as discussed above, may mitigate some of those costs. Many of the burdens that are currently reduced for issuers of In-Force Alternative Disclosure Contracts are also expected to be reduced under the proposed summary prospectus framework; in particular, we expect reductions in costs associated with printing and mailing the contract summary prospectus and underlying portfolio company prospectuses to investors.[729] However, to the extent that the option for summary prospectus does not fully mitigate unexpected future costs related to the Commission's position on Alternative Disclosure Contracts, insurers that experience these unexpected costs may seek to extinguish outstanding contracts with few remaining investors and consolidate investor assets. While insurers cannot terminate outstanding contracts, they could encourage investors to exchange old contracts for new ones or they may offer to buy out contracts.

At the same time, we believe that the Commission's position with respect to Alternative Disclosure Contracts will provide investors more pertinent information to monitor their contract,

[720] $500 × 95% × (500 Form N–4 registrants + 221 Form N–6 registrants) = $342,475.

[721] $7,259,940 − $344,638 − $342,475 = $6,572,827.

[722] *See supra* section II.C.

[723] *See supra* section III.C.1; *infra* section III.C.3.

[724] *See supra* section III.C.1.b.

[725] Even when there are not material updates to the contract, the updating process still would entail internal burdens (*e.g.,* for the registrant to confirm the continued accuracy of the information in the registration statement and to update information about the portfolio companies) and external expenses (*e.g.,* for outside legal and auditor services).

[726] For example, the proposed amendments to Form N–3 and Form N–4 would include certain changes that would significantly reduce burdens related to preparing and disclosing contract accumulation unit values. *See supra* notes 546–554 and accompanying text.

[727] *See infra* section III.C.3.b.

[728] *See supra* note 662.

[729] *See supra* section III.C.1.b.

either under the current regulatory requirements or under the proposed optional summary prospectus regime, compared to the alternative disclosures that they would receive under the circumstances that the Staff Letters identify. For example, investors would either receive, or have access to online, the contract prospectus under the standard prospectus delivery regime or the proposed summary prospectus regime, respectively. Moreover, as explained in detail above, we believe the proposed optional summary prospectus regime, if relied on by insurers, would provide significant benefits for investors in terms of facilitating the review and understanding of available disclosures.[730]

3. Changes to Forms N–3, N–4, and N–6

a. Benefits and Costs for Investors

The proposed amendments to Forms N–3, N–4, and N–6 are intended to reflect the evolution of variable contract features including, in particular, the prevalence of optional benefits that insurers offer under these contracts, and to provide greater consistency among the forms.

For example, under the proposed amendments, the statutory prospectus would include the same Key Information Table, tabular presentation of optional benefits, and tabular appendix of information about underlying portfolio companies that appears in the summary prospectus. This means that all variable contract investors, not just investors in contracts that use the summary prospectus, would have access to information as presented in summary prospectuses. Further, the proposed amendments would require additional information about standard and optional benefits that a contract may offer. There is no current form requirement regarding optional benefits. The proposed amendments would also increase consistency of disclosure presentation requirements among variable contracts that register on different form types. This increased consistency could help investors compare variable contracts across products that register across different form types.

Certain investors who are considering variable annuities may also be considering variable life insurance (and vice versa). We believe a consistent presentation and common disclosure of elements that we consider useful in explaining variable contracts' features and risks could reduce investor confusion and promote investor understanding across types of variable products. Also, we believe that more uniformity of disclosures across variable contract types may make it easier for investors to compare similar products.

We are proposing amendments to the General Instructions of Forms N–3, N–4, and N–6 regarding the preparation and filing of registration statements. First, these amendments would prescribe the ordering and location of the Overview of the Variable Annuity Contract, the Key Information Table, and the Fee Table. In particular, the proposed amendments would place this information at the beginning of the prospectus, and could benefit investors to the extent that this placement makes information about a variable contract's key features, costs, and risks more readily available. We do not anticipate that these proposed changes would impose substantial costs on investors. We acknowledge that investors familiar with the current ordering of information on Forms N–3, N–4, and N–6 could bear one-time costs associated with adjusting to the proposed presentation of information on these forms.

Second, we are proposing amendments to the General Instructions that would provide new guidance in each of the forms that addresses when a single prospectus may be used to describe multiple contracts and when multiple prospectuses may be included in a single registration statement. To the extent that ensuring that prospectuses and registration statements cover contracts with similar features, costs, and risks facilitates investors' understanding of contract characteristics, these proposed amendments may benefit investors. Similarly, to the extent that the proposed guidance results in presentation of information that investors are unaccustomed to, investors may bear costs associated with adjusting to a new presentation of variable contract information. While we do not have information available to quantify these benefits, we believe that these proposed amendments are consistent with current industry practice and we therefore do not expect these benefits to be substantial.

For Form N–3 and Form N–4 registrants, we propose to relocate the AUV tables from the prospectus to the SAI, and shorten the time period covered by the AUV tables. Further, we propose to include an instruction permitting registrants to omit AUV tables altogether if they provide each investor with an annual account statement that discloses, with respect to each class of accumulation units the investor holds, the actual performance of each subaccount during the prior fiscal year. Accumulation unit values and the number of accumulation units outstanding permit investors to derive summary information about the performance of the variable contracts covered by a statutory prospectus. While shortening the time period covered by the AUV tables could impose costs on investors by reducing the amount of historical AUV information available on a statutory prospectus, we do not believe these costs will be substantial. This is because we believe the proliferation in combinations of contract changes has generated a proliferation in separate classes of accumulation units disclosed on statutory prospectuses, rendering the current AUV tables less useful for investors.[731] To the extent Form N–3 and Form N–4 registrants choose to omit AUV tables altogether and instead provide individual investors with the prescribed annual account statement, this option should benefit investors by providing them with customized annual performance information that reflects the impact of insurance-related costs. However, permitting Form N–3 and N–4 registrants to omit AUV tables may impose costs on current investors and investors who are not currently account holders, to the extent that such investors could make use of historical summary performance information as part of their decision to make additional investments or their decision to choose between insurers or variable products.

b. Benefits and Costs for Insurers

The proposed form amendments would increase consistency of disclosure presentation requirements among variable contracts that register on different form types. We anticipate that this increased consistency among Forms N–3, N–4, and N–6 could have the benefit of reducing costs among sponsors that register variable contracts on multiple of these registration form types. For example, we anticipate that this would make the production of registration statements simpler, in that form instructions and content requirements would in many cases be the same (except in cases where structural differences or product differences that the different form types indicate would lead to requirements that would differ across the form types).[732]

[730] *See supra* section III.C.1.a.i(a).

[731] *See supra* section II.D.3.d.

[732] In 2017, four of the 62 (6%) insurers that registered separate accounts registered separate accounts on all three forms (N–3, N–4, and N–6).

For Form N–3 and Form N–4 registrants, we propose to relocate the AUV tables from the prospectus to the SAI, where they are more appropriately located with certain detailed information that traditionally appears in the SAI. We also propose to decrease the time periods for which the required information must be presented from 10 years to 5 years. Further, we propose to include an instruction permitting registrants to omit AUV tables altogether if they provide each investor with an annual account statement that discloses, with respect to each class of accumulation units the investor holds, the actual performance of each subaccount during the prior fiscal year. The proposed amendments should reduce the costs related to preparing registration statement disclosure of information relating to the contract's accumulation unit values for Form N–3 and Form N–4 registrants. We estimate the implementation costs for each of the three registrant types, while netting the reduced burden for Form N–3 and Form N–4 registrants, below.

Form N–3 Estimates. We estimate that there are currently five insurer separate accounts that file Form N–3. We estimate that these separate accounts will incur, in the aggregate, 152 hours additional internal annual burden hours, at an internal time cost equivalent of $51,072.[733] While we are revising our estimate of the methodology used to estimate external costs associated with Form N–3 as discussed below,[734] these changes in external cost estimates are not attributable to the proposed amendments to Form N–3.

Form N–4 Estimates. We estimate that there are currently 435 insurer separate accounts that file Form N–4. We estimate that these separate accounts will incur, in the aggregate, 13,320 additional internal annual burden hours, at an internal time cost equivalent of $4,475,345.[735] We do not estimate any change to the external costs associated with the proposed amendments to Form N–4.[736]

Form N–6 Estimates. We estimate that there are currently 238 insurer separate accounts that file Form N–6. We estimate that these separate accounts will incur, in the aggregate, 3,048 additional internal annual burden hours, at an internal time cost equivalent of $1,024,128.[737] We do not estimate any change to the external costs associated with the proposed amendments to Form N–6.[738]

In addition to these implementation costs, these proposed changes to forms could impose costs related to proposed changes presentation of information. In particular, the proposed amendments may impose costs on insurers to the extent that they limit insurers' flexibility in choosing the placement of information within the statutory prospectuses. While we do not have data necessary to quantify these costs, we do not expect them to be substantial.

4. Inline XBRL

The proposed amendments would require certain information from variable contract statutory prospectuses to be filed with the Commission in Inline XBRL. Inline XBRL is a specification of XBRL that is both human-readable and machine-readable for purposes of validation, aggregation, and analysis. The proposed Inline XBRL requirement is expected to benefit investors, filers, the Commission, and other data users, including third-party analysts, investment professionals, academic researchers, and other regulators. The availability of information from statutory prospectuses in Inline XBRL could enable variable contract investors, generally through information intermediaries such as third-party data aggregators (or by reviewing the disclosures directly), to capture and analyze disclosure information more quickly and at a lower cost, as well as to search and analyze the information dynamically, facilitate comparison of information across filers and reporting periods, and lead to better-informed investment decisions and potential gains in the efficiency of capital formation and allocation. These improvements could occur as a result of a reduction in the information barriers faced by investors and in the costs of collecting and analyzing disclosures. These benefits are expected to be greatest in instances of forms filed by a large number of registrants and for information from variable contract disclosures that is not aggregated by third-party sources today and therefore requires greater effort to extract and analyze on the part of investors. To the extent that some of the variable contract investors and third-party information providers also review disclosures of mutual funds and ETFs, those investors and information providers will have familiarity with using Inline XBRL to view and analyze disclosures from having reviewed prospectus risk/return summaries filed in Inline XBRL under the recently adopted Inline XBRL requirements for mutual funds and ETFs.[739]

Variable contract registrants would incur costs to tag and review the required information in Inline XBRL. Some filers may perform the tagging in-house while others may retain outside service providers. We expect the outside service providers to pass along their costs to filers. Various XBRL preparation solutions have been developed and used by operating companies and open-end fund filers, and some evidence suggests that, for operating companies, XBRL tagging costs have decreased over time.[740] Inline XBRL is a specification of XBRL that allows filers to embed XBRL data directly into an HTML document, eliminating the need to tag a copy of the information in a separate XBRL exhibit,[741] making Inline XBRL preparation more efficient, of higher quality, and less costly than filing an HTML document and a separate XBRL document duplicating the data. For filers that are required to report information for other investment products they offer, such as open-end funds, in Inline XBRL, before they would be required to file information about variable contracts in Inline XBRL, filing information about variable contracts in Inline XBRL under the proposed amendments would likely incur lower costs of compliance than filers adopting Inline XBRL for the first time.

Similar to the risk/return summary requirements for mutual funds and ETFs, the proposed amendments would require variable contract registrants to submit to the Commission in Inline XBRL certain information from registration statements, post-effective amendments, and prospectuses with certain information that varies from the registration statement (rule 497 forms of

Forty (65%) registered separate accounts on two forms. Overall, 44 (71%) insurers registered separate accounts on more than one form.

[733] *See infra* note 778.

[734] *See infra* note 780.

[735] *See infra* note 789.

[736] *See infra* section IV.B.

[737] *See infra* note 805.

[738] *See infra* section IV.C.

[739] *See* Inline XBRL Adopting Release, *supra* note 613.

[740] *See, e.g.,* XBRL Costs for Small Companies Have Declined 45%, According to AICPA Study, Aug. 15, 2018, available at *https://www.aicpa.org/press/pressreleases/2018/xbrl-costs-have-declined-according-to-aicpa-study.html* (stating that '' the cost of XBRL formatting for small reporting companies has declined 45 percent since 2014, according to an updated pricing survey . . . 68.6 percent of the companies paid $5,500 or less on an annual basis (as compared to 29.9 percent of companies in the 2014 survey) for fully outsourced creation and filing solutions for their XBRL filings. Meanwhile, 11.8 percent of the companies paid annual costs between $5,500 to as much as $8,000 for their full-service outsourced solutions.'')

[741] Inline XBRL Adopting Release, *supra* note 613, at n.78 and accompanying and following text.

prospectuses or ''stickers'') filed on Forms N–3, N–4, and N–6. Similar to the risk/return summary requirements for mutual funds and ETFs, the Interactive Data File would be submitted as a post-effective amendment to the registration statement. As with risk/return summary Inline XBRL requirements for funds, the Interactive Data File for a post-effective amendment under rule 485(b)(1)(i), (ii), (v), or (vii) would be submitted with the filing, which may make the filing incrementally more efficient.

Nevertheless, we recognize that some registrants affected by the proposed requirement likely would incur initial costs to acquire the necessary expertise and/or software as well as ongoing costs of tagging required information in Inline XBRL, and that any fixed costs of complying with the Inline XBRL requirement may have a relatively greater impact on smaller filers. On an ongoing basis, registrants are expected to expend time to review the tagged information in Inline XBRL using their in-house staff. Some registrants may also incur an initial cost to license filing preparation software with Inline XBRL capabilities from a software vendor, and some may also incur an ongoing licensing cost. Other registrants may incur an initial cost to modify their existing filing preparation software to accommodate Inline XBRL preparation. Some registrants would incur the costs of filing agent services to rely on a filing agent to prepare their Inline XBRL filings. Initial costs involving investments in expertise and modifications to disclosure preparation solutions, or switching to a different software vendor or outside service provider may result in a higher compliance cost during the first year of using Inline XBRL than in subsequent years. While the costs of compliance with the Inline XBRL requirement are likely to vary across registrants, on average we estimate that direct compliance costs for a variable contract registrant on Forms N–3, N–4, and N–6, respectively, will be approximately $21,960, $15,012, and $15,012 per year, respectively, in the first three years under the proposed amendments.[742]

The compliance dates under the proposed amendments are expected to give registrants additional time to obtain the necessary expertise and software, and mitigate the impact of transition on all filers, including smaller filers. However, we also expect that filers may realize benefits from the Inline XBRL requirement to the extent that making disclosures available in a structured format reduces some of the information barriers that make it costly for variable contract registrants to find appropriate sources of new investors, as discussed in section III.D below.

By making it easier to perform automated comparisons of disclosures across variable contracts, the proposed amendments also might affect sales agents. As we noted in section II.B.2 above, sales agents play a significant role in the distribution of variable contract products. For non-captive sales agents that independently compare variable contract products for recommendation to investors and prepare their own sales materials, we believe that those sales agents could benefit from the easier access and enhanced usability of information about variable contracts in a structured format, which may enable them to select variable contract offerings that are better tailored to investors' demands. Because having the required data in a structured format facilitates the analysis, aggregation, and comparison of information about variable contracts, the proposed amendments might increase competition for investor capital among sales agents offering variable contract products of individual insurers or a narrow range of variable contract products.[743]

D. Effects on Efficiency, Competition, and Capital Formation

This section describes the effects we expect the proposed rule to have on efficiency, competition, and capital formation.

Efficiency. To investors, the costs of purchasing a variable contract are more than just the dollar cost of the contract and include the value of an individual's time spent gaining an understanding of the contract as well as various aspects of the contract including optional benefits and fee structures, both prior to contract purchase and during the free look period following purchase. Further, for those investors who do not gain a full understanding of the contract, there could be a cost stemming from a potential mismatch between an investor's goals and the purchased contract. Depending on the size of an individual's potential purchase, certain of these additional costs could be considerable in comparison to the monetary costs associated with contract purchase and could discourage investors from considering variable contracts even in circumstances where investment in a variable contract would be beneficial.

For their part, insurers only supply variable contracts to the extent they expect the benefits derived from providing the contracts to be greater than cost of supplying the contract.[744] For insurers, costs include not only those costs associated with producing and servicing variable contracts, but also those costs associated with meeting various statutory and regulatory obligations.[745]

These costs borne by both insurers and individuals are examples of market ''frictions.'' Market frictions have the effect of reducing the benefits from contracting between market participants.[746] Rules that reduce costs for investors, insurers, or both, reduce market frictions. The proposed rule offers the opportunity for both insurers and investors to reduce their costs associated with variable contracts. Summary prospectuses provide information in a concise, user-friendly way that may allow investors to better understand variable products. The summary prospectus framework offers opportunities for insurers to reduce the costs of producing and delivering required disclosures to investors.[747]

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[742] For purposes of the PRA, during the first three years under the proposed Inline XBRL amendments to Form N–3, the average annual internal cost burden is estimated to be $20,160 (the monetized burden of in-house Inline XBRL preparation) and the average annual external cost burden per registrant (the additional cost of services of outside software vendors or filing agents) is estimated to be $1,800 ($900 + ($300 × 3)). $20,160 + $1,800 = $21,960. *See infra* notes 819 and 830.

For purposes of the PRA, during the first three years under the proposed Inline XBRL amendments to Form N–4, the average annual internal cost burden is estimated to be $14,112 and the average annual external cost burden per registrant is estimated to be $900. $14,112 + $900 = $15,012. *See infra* notes 822 and 829 and accompanying text.

For purposes of the PRA, during the first three years under the proposed Inline XBRL amendments to Form N–6, the average annual internal cost burden is estimated to be $14,112 and the average annual external cost burden per registrant is estimated to be $900. $14,112 + $900 = $15,012. *See infra* notes 825 and 829 and accompanying text.

[743] Requiring variable contract registrants to file certain key information in Inline XBRL could facilitate comparisons of information across registrants which could increase competition among variable contract registrants for investor capital. Also, requiring variable contract registrants to file certain key information in Inline XBRL could reduce barriers to entry for third-party aggregators and induce competition among firms that supply information about variable contracts to investors. These possibilities are discussed in greater detail below.

[744] Insurers who expect the benefits derived from supplying contracts to be equal to the cost of supplying the contract would be indifferent between supplying and not supplying the contract.

[745] *See supra* section III.B.2.

[746] If market frictions are sufficiently large, market frictions could eliminate exchange altogether.

[747] For example, as discussed above, greater investor understanding of variable products could lead to a better match between investor goals and purchased variable contracts. In other words, investment efficiency could increase.

Similarly, the proposed amendments to registration forms would make key information more salient for investors and would make the presentation of this information more consistent across variable contract types. Additional consistency across forms may also reduce compliance burdens for insurers that are required to file using multiple form types, as would reducing the amount of historical AUV information required to be disclosed. The resulting decrease in market frictions should lead to greater efficiency by reducing barriers that insurers may face in supplying variable contracts to investors, and reducing barriers investors may face in evaluating variable contracts sold to them by insurers, particularly during the free look period.[748] In addition, requiring variable contract registrants to file certain key information in Inline XBRL would enable investors, third-party information providers, Commission staff, and other data users to capture and analyze that information more quickly and efficiently than is possible using the same information provided in a static, text-based format.

These increases in efficiency could manifest as a higher likelihood that investors' make investment decisions that are informationally efficient. First, it may increase the likelihood that investors choose a level of participation in variable contracts that is consistent with their overall financial needs and objectives—a level that may be higher or lower than current levels. The proposal may help promote investment in variable contracts by investors who would benefit from them. Second, an increase in the informational efficiency of investor decisions could make it more likely that investors that invest in variable contracts choose the contracts that best meet their needs and reject those that do not. Third, improved access to information resulting from more concise disclosure could facilitate more efficient investor allocation of assets across portfolio companies within variable contracts. Finally, access to clearer information about the contract terms may reduce the chances that an investor surrenders a variable contract when the costs of surrender do not justify the benefits of surrender.

[748] As noted above, there may be investors who prefer to rely on statutory prospectuses when making an investment decision who may not take the steps necessary to access the statutory prospectus. To the extent there are both investors who prefer to rely on statutory prospectuses when making an investment decision and who do not take the steps necessary to access the statutory prospectus, the increased barrier (the steps necessary to access the statutory prospectus) could lead to reduced efficiency in investor evaluation of variable contracts.

Furthermore, we considered the potential impact of our position on Alternative Disclosure Contracts on efficiency. We recognize that our position likely will cause insurers issuing new contracts and issuers with variable contracts outstanding to incur additional costs due to the proposed disclosure obligations that they may not have anticipated. To the extent that these unexpected costs drive insurers to take actions to encourage investors to exchange old contracts for new contracts or to buy out existing contracts, the Commission's position may result in inefficiencies. In particular, insurer resources that are used to encourage exchanges or to buy out contract holders are resources that insurers may have put to other productive uses. However, we believe that this reduction in efficiency may be offset by the expected increase in informational efficiency associated with the enhanced disclosures that would be afforded to contract holders in lieu of the alternative disclosures described in the Staff Letters.

Competition. If the proposed rule increases efficiency of exchange in the variable contracts market, then we may observe a change in investment in variable contracts. For example, if there are individuals who currently do not invest in variable contracts (or invest less than they would have) because the costs other than the price of the contract (*e.g.,* the ongoing printing and mailing expenses passed through to investors from insurers) are too high, then to the extent the proposed rule lowers those costs we would expect to observe more people entering the variable contract market. Conversely, there may be investors who, because of the burden, choose not to read statutory prospectuses. To the extent those investors are more likely to read summary prospectuses, those investors may decide, as a result, that other investments or products are better suited to their investment goals. This could result in fewer investments in variable contracts. If there are insurers who limit their participation in the variable contract market, or limit the portfolio companies they offer as a result of the costs of current prospectus delivery requirements, those insurers may increase participation or increase the number of portfolio companies they offer as a result of this proposal. To the extent that competition in a market is related to the size of the market, the net effect of these potential changes in investor demand for, and insurer supply of, variable contracts could affect competition in the variable contract market.

The proposed rule could also affect competition by requiring that information about the variable contract be presented in a concise, user-friendly way in the summary prospectus, which could allow investors to compare information across products. Requiring variable contract registrants to file certain key information in Inline XBRL could further facilitate comparisons of information across registrants by making it easier for investors (directly or through third-party data aggregators) to extract and aggregate information through automated means for analysis and comparison, which could increase competition among variable contract registrants for investor capital, particularly in combination with the proposed free look period. For example, the proposed rule requires insurers to distill certain key product information into tables. The presentation of this information in a table facilitates comparison across different products. Greater comparison across different variable products could lead to greater competition. Furthermore, by reducing the costs associated with aggregating data across variable contracts, the proposed Inline XBRL requirement could reduce barriers to entry for third-party data aggregators and induce competition among firms that supply information about variable contracts to investors, including other third-party aggregators and sales agents.

The effect on competition between insurers could be limited, however, to the extent variable contract investors continue to rely on an agent to help them select and customize their variable insurance products and do not have access to broad comparisons of variable contracts enabled by the proposed Inline XBRL requirements at the time of sale or during the free look period.[749] Agents generally only provide their customers with a subset of all available variable insurance products available in the general marketplace. Thus, while the product information in summary prospectuses would facilitate comparison across products offered by the agent, the effect would likely be limited to the agent's set of products rather than to the broader market.

We recognize that any fixed costs of compliance with the proposed requirements, including Inline XBRL requirements, could have a relatively greater impact on small filers. However, the overall magnitude of such costs, discussed in greater detail in Section IV below, and thus the magnitude of the

[749] *See* IRI Fact Book, *supra* note 8, at 176.

associated competitive effects, is expected to be modest.

Finally, we also considered the potential impact of our position on Alternative Disclosure Contracts on competition between insurers. Above, we discussed the possibility that, because contracts whose issuers are not operating in the manner described in the Staff Letters as of the effective date of final summary prospectus rules could not provide alternative disclosures after such date, the Commission's position could cause these insurers to experience future costs of disclosure obligations that they may not have anticipated. The Commission's position thus may place at a competitive advantage those insurers with a greater proportion of contracts that operate in the manner described in the Staff Letters as of the effective date of final summary prospectus rules.

Capital Formation. As discussed in connection with the potential effects of the proposed rule on competition, if the proposed rule increases the efficiency of exchange in the variable contracts market, then we may observe a change in investment in variable contracts. Greater investment in variable contracts could lead to increased demand for securities held by the portfolio companies that underlie the variable contracts (or held directly by the separate account in the case of a Form N–3 registrant).[750] The increased demand for securities could, in turn, facilitate capital formation. Diminished investment, however, could lead to reduced demand for such securities. We would expect either of these effects to be small. We further note that to the extent increased or decreased investment in variable contracts reflects substitution from other investment vehicles, the effect on capital formation would be attenuated.

The proposed Inline XBRL requirements could increase the efficiency of capital formation to the extent that making disclosures available in a structured format reduces some of the information barriers that make it costly for variable contract registrants to find appropriate sources of new investors. Smaller registrants in particular may benefit more from enhanced exposure to investors. If reporting the disclosures in a structured format increases the availability, or reduces the cost of collecting and analyzing, key information about variable contracts, smaller variable contract registrants may benefit from improved coverage by third-party information providers and data aggregators.

To the extent that the proposed rule reduces costs for some variable contract registrants, we would expect reduced costs to increase the portion of investor money that is retained as the investor's contract value, rather than used to cover expenses, resulting, over time, in a net positive effect on the level of capital invested through variable contracts. Furthermore, to the extent that reductions in expenses have a positive effect on the performance of variable contracts and attract new investors or additional capital from existing investors, the proposed rule may result in greater capital formation. We expect this effect to be small. The opposite would be expected to hold for those variable contract registrants that experience cost increases under the proposed rule.

E. Reasonable Alternatives

1. Mandating Summary Prospectuses

Proposed new rule 498A would permit the use of two distinct types of contract summary prospectuses: (1) An initial summary prospectus covering variable contracts currently offered to new investors; and (2) an updating summary prospectus for existing investors. Alternatively, the Commission could mandate the use of summary prospectuses. Summary prospectuses may provide substantial net benefits to investors because they are shorter, simpler, and designed to make salient the most important variable contract terms. A mandatory regime would ensure that those benefits are available to all investors, not just those who have invested in variable contracts offered by insurers that would elect to deliver summary prospectuses.[751]

We believe that insurers will only choose to rely on the optional summary prospectus regime should benefits outweigh the costs. While we believe that reliance on the proposed summary prospectus regime would yield cost savings for insurers, we acknowledge that these cost savings will vary across insurers and there may be insurers that do not expect benefits in excess of the expected costs of relying on summary prospectuses. Imposing a mandatory summary prospectus regime would entail imposing net costs on these insurers.

Based on our analysis of cost savings above, our expectation is that most insurers will choose to rely on summary prospectuses. Based on these factors, we believe making the use of summary prospectuses voluntary for insurers strikes the appropriate balance between offering insurers flexibility in choosing delivery methods on one hand, and making variable contract disclosures more digestible by the majority of investors, on the other.

2. Summary Prospectuses Delivered With Statutory Prospectuses

The proposed rule would require the variable contract statutory prospectus, as well as the contract's SAI, to be publicly accessible, free of charge, at a website address specified on the cover of the summary prospectus. As we discuss above, investors who wish to use statutory prospectuses as well as summary prospectuses will bear an additional burden of accessing statutory prospectuses online. Alternatively, the proposed rule could require insurers to provide both summary and statutory prospectuses together in paper or, if the investor has elected to receive the document electronically, in electronic form. This alternative would offer the benefit, for those investors choosing to receive the documents in paper, that any investor wishing to use both summary and statutory prospectuses in his or her decision making would not be required to bear the additional burden of accessing statutory prospectuses online.

While providing both summary and statutory prospectuses together would eliminate the necessity of those investors who wish to use both summary and statutory prospectuses having to bear the burden of accessing statutory prospectuses online, we have decided not to propose this alternative for two reasons. First, rather than reducing printing and mailing costs, this alternative would create additional printing and mailing costs. We believe that the increased printing and mailing costs would cause few insurers to choose to provide both summary and statutory prospectuses. Thus, *de facto,* the potential benefits of layered disclosure would likely not be available to most investors.

Second, the proposed summary prospectuses would provide investors with key information relating to the

[750] This would be true to the extent funds invested in variable contracts would not otherwise have been invested in securities.

[751] As discussed above, we understand that some investors who prefer statutory prospectuses may experience costs if they are given summary prospectuses and need to request statutory prospectuses. Under a mandatory regime, this cost would be borne by all investors who prefer statutory prospectuses, not just those who have invested in variable contracts offered by insurers that would elect to deliver summary prospectuses. Regardless, as noted above, we believe the number of investors who would prefer statutory prospectuses, as well as the number of insurers that would not elect to deliver summary prospectuses, to be a minority.

contract's terms, benefits, and risks in a concise and more reader-friendly document. We are concerned that variable contract investors may not read or understand the disclosures they currently receive. If investors were to receive both summary and statutory prospectuses, the increase in materials received could lead to potentially fewer investors reading either of the documents.[752]

3. Contract-Specific Updating Summary Prospectuses

The proposed variable contract summary prospectus regime would require that the initial summary prospectus only describe a single contract that the registrant currently offers for sale, but would permit an updating summary prospectus to describe more than one contract covered in the statutory prospectus to which the updating summary prospectus relates. As an alternative, we could have proposed that the updating summary prospectus describe only a single contract.

Relative to the baseline, this alternative would be no different from the proposal in terms of the economic impacts related to the proposed initial summary prospectus, but would differ in economic effects related to the updating summary prospectus. An updating summary prospectus that describes solely the contract held by an investor could be easier for that investor to consume than an updating summary prospectus that describes more than one contract, and therefore could be more beneficial to investors than the proposed approach. The magnitude of this increase in benefits depends on the extent to which information about multiple contracts confuses investors or causes investors not to read the information, which, in turn, likely depends on the number of changes to contracts and the number of different contracts that would be presented in the updating summary prospectus. We acknowledge that this alternative would permit investors to easily focus on key information on a single contract. However, we preliminarily expect this increase in benefits to be limited because, based on our current understanding of variable contracts, there are a limited number of changes to contracts in any given year, and many of those changes (such as changes to the available portfolio companies or the addition of new optional benefits) typically apply to similar contracts in the same prospectus. Accordingly, although the section of the updating prospectus that describes changes to the contracts would cover multiple contracts, the number changes concerning any individual contract is expected to be relatively brief, thus minimizing the amount of inapplicable information the investor would read.

Under this alternative, insurers would be required to produce and deliver to investors a separate updating summary prospectus for each contract. An insurer could limit the costs associated with printing and mailing by only delivering those updating summary prospectuses to an investor that holds the contracts they describe. However, such a process would likely entail systems upgrades and changes to back-office operations needed to tailor mailings on an investor-by-investor basis.[753]

4. Do Not Provide Updating Summary Prospectuses

We considered two closely-related alternative approaches to the proposed summary prospectus regime in which only initial contract purchasers would receive a summary prospectus, and afterwards, investors who make additional purchase payments or who reallocate contract value would either (1) receive no updating summary prospectus or (2) receive only a notice that the statutory prospectus is available online. Such an alternative would likely yield larger cost savings for insurers because insurers would not be required to produce, print, and mail updating summary prospectuses and would instead incur only costs associated with providing the initial summary prospectus when an investor first purchases the contract or reallocates contract value.

However, under either of these alternatives, investors would not benefit from the ongoing layered disclosure provided by the updating summary prospectus. As discussed above, the Commission believes that the updating summary prospectus's brief description of any important changes to the contract that occurred within the prior year allow investors to better focus their attention on new or updated information relating to the contract. Relatedly, the updating summary prospectus would include certain information required in the initial summary prospectus that we consider most relevant to investors when making additional investment decisions or otherwise monitoring their contracts, and investors would not have access to this concise presentation of key information under either alternative. For these reasons, we have not proposed this alternative.

5. Inline XBRL

The proposed amendments would require variable contract registrants to file certain information from statutory prospectuses with the Commission in Inline XBRL.

As an alternative, we could allow but not require variable contract registrants to file the information in Inline XBRL. Compared to the proposed amendments, a fully voluntary Inline XBRL program would lower costs for those filers, particularly filers that do not already file information in Inline XBRL. However, a voluntary program would reduce the usability of the required data. If the information were not submitted by the registrant in a structured, machine-readable format, investors and other data users who wish to instantly analyze, aggregate, and compare the data would be required to incur the costs of paying a third-party provider to manually rekey the data, review the data for data quality problems during the duplication process, and disseminate the data to the users. Alternatively, investors or data users unwilling to pay a third-party provider would incur the time to do that process themselves. In either scenario, the data would not be usable in as timely a manner if it were made machine-readable. In addition, under a voluntary program, data that is not submitted in Inline XBRL would not be validated, thus decreasing the overall data quality of the data submitted. Poor data quality reduces any data user's ability to meaningfully analyze, aggregate, and compare data.

Under the proposed amendments, filing the information in Inline XBRL would be required for Key Information Table, Fee Table, Principal Risks of Investing in the Contract, Other Benefits Available Under the Contract, and/or Portfolio Companies [Investment Options] Available Under the Contract. The information proposed to be filed in Inline XBRL largely parallels the information that is required of mutual funds and ETFs, and we believe is likely to be of greatest utility for investors and

[752] We note that this effect is mitigated to the extent that investors want to receive the additional disclosure. For example, those investors who currently read statutory prospectuses in consideration of their investment decisions may find the incremental burden associated with receiving the additional disclosure in the form of summary prospectuses to be small.

[753] We understand that the process involved in drafting and printing an updating summary prospectus that only describes the changes made to a single contract (and then distributing a tailored updating summary prospectus to each investor based on their particular contract) is quite complex. In contrast, the same process with respect to the initial summary prospectus is relatively straightforward since the document, which would only describe the currently available contract, would be provided all new investors.

others that seek to use the information in a structured format to assist with decisions about variable products. As another alternative, we could require variable contract registrants to file all, or a larger subset, of the information from the statutory prospectus, rather than only the information covered by the proposed amendments, in Inline XBRL. Compared to the proposed amendments, this alternative would improve the timeliness and usability of the required disclosure information, but potentially impose additional costs on registrants. To the extent that the other required disclosures in the affected forms contain information that is more specific to individual registrants without any comparability or aggregation utility, the benefits of having those additional required disclosures in a structured format may be lower than the more limited subset of disclosures required to be filed in Inline XBRL under the proposed amendments.

The proposed amendments provide filers with an 18-month transition period after the effective date of the amendments to give registrants sufficient time to update their prospectuses and to prepare new registration statements that comply with the amendments, including with the Inline XBRL tagging requirement. As an alternative, we could provide filers with a shorter or longer transition period. Compared to the proposed amendments, a longer transition period would cause filers to defer Inline XBRL compliance costs and may ease the transition for filers, particularly smaller filers and filers that encounter challenges in acquiring expertise and software solutions needed to prepare Inline XBRL filings. However, a longer transition period also could defer the benefits of making the information available in a structured format to investors in variable contracts, compared to the proposed amendments. Conversely, compared to the proposed amendments, a shorter transition period would cause filers to incur Inline XBRL compliance costs earlier and may make the transition more difficult for smaller filers and filers that lack expertise and software solutions needed to prepare Inline XBRL filings. It also would allow investors to realize the benefits of access to key information in a structured format earlier than under the proposed amendments. Based on the state of the Inline XBRL standard today, and to allow filers the flexibility of additional time to comply, we are providing all filers with a transition period.

As another alternative, we could require the disclosures to be filed in another structured format, such as the XBRL or XML format. Compared to the proposed Inline XBRL requirement, the use of the XBRL format entails complete duplication of the data, which can adversely affect the quality and usability of the structured data as well as the efficiency and cost of preparation and review of the structured data. Compared to the proposed requirement to use Inline XBRL, the alternative to requiring the use of XML could result in lower costs for filers. However, compared to the proposed amendments, XML would provide less flexibility in tagging complex information as well as less extensive data quality validation capabilities. In addition, neither the XBRL nor XML options are human-readable. As a result, investors and other data users would not have the benefits of having a document that is both machine-readable and human-readable, or the benefits of the Inline Viewer when accessing the filing, such as enhanced search features, filtering capabilities, and built-in definitional references. Investors and other data users would need to access two different documents to view and analyze the same data. Filers would also have diminished data quality benefits. Because Inline XBRL embeds structured data directly into an HTML document, filers would not need to review a separate structured data document to identify and correct data quality errors. Moreover, by using an Inline XBRL viewer, filers can more easily identify discrepancies in their data before filing.

6. Alternatives to Form N–3, N–4, and N–6 Amendments

The Commission is proposing amendments to Forms N–3, N–4, and N–6. Collectively, these amendments are meant to update and enhance the disclosures to investors in variable annuity contracts, and to implement the proposed summary prospectus regime. An alternative would be for the Commission to propose a subset of the proposed amendments to the registration forms. Fewer amendments to the registration forms could be less costly for registrants, because registrants would be required to make fewer changes to their disclosure. However, the proposed form amendments also simplify certain current disclosure requirements, and so the net economic effects of proposing only a subset of the proposed amendments would depend on the particular subset of proposed amendments. As described in Section II.D. above, we believe that the form amendments that we propose promote investor understanding of variable contracts by presenting information in a clear manner and by reflecting industry developments. Proposing only a subset of these amendments could result in less investor understanding relative to the understanding resulting from the proposed amendments. For this reason, we have not proposed this alternative. However, we request comment above about each of the proposed amendments, and will assess, based on the comments we receive, if any of the proposed amendments would not further the goals of this rulemaking proposal.

Additionally, the Commission is proposing a new General Instruction in each of Forms N–3, N–4, and N–6 that is meant to encourage the use of disclosure effectiveness principles in variable contract disclosure. Specifically, proposed General Instruction C.3.(c) in each form would encourage registrants to use, as appropriate, question-and-answer presentations, tables, side-by-side comparisons, captions, bullet points, numeric examples, illustrations or similar presentation methods.[754] As an alternative to this proposed instruction, we could propose to mandate the use of any of these presentation methods. Investors might gain a clearer understanding of the features and risks of variable contracts as a result. We are concerned, however, that mandating a particular presentation method (besides the presentation methods that the proposed form amendments would specifically require, about which we request comment above) could provide less flexibility to registrants to describe variable contracts in the manner they think is most appropriate. Moreover, there could be a risk that mandating the use of certain presentation methods could unintentionally obscure, or not clearly explain, certain variable contract features and risks.

Also, the Commission is proposing a requirement that the Key Information Table include cross-references to the location in the statutory prospectus where the relevant subject matter is described in greater detail (and the requirement for cross-references in electronic versions of the summary prospectus and/or statutory prospectus to link directly to the location in the statutory prospectus where the topic is discussed in more detail). As an alternative to this proposed instruction, we could propose to require that, where a topic is summarized in the prospectus and is discussed in more detail elsewhere in the prospectus, the summarized topic must include a cross-reference (and a hyperlink in electronic document versions) to the location

[754] *See supra* note 399.

prospectus where the topic is discussed in more detail. This alternative requirement would make use of the layered disclosure approach that underlies the rulemaking proposal in a manner that could make information in the prospectus more accessible to investors and leverage technology in a way that could further assist investors in navigating the prospectus. We believe, however, that adding additional cross-references and hyperlinks would increase costs for insurers and could lead to greater uncertainty among registrants about where cross-references and hyperlinks are required (*i.e.,* whether a topic is summarized in one part of the prospectus and then discussed in more detail later could be viewed as a subjective determination). Further, we note that the benefits of cross-references and hyperlinks might be limited, given that proposed rule 498A would require electronic versions of the statutory prospectus to include a table of contents that would allow the reader to move directly between it and the related sections of the document.

7. Requiring All Variable Contracts (Including Currently Discontinued Contracts) To Prepare Updated Registration Statements and Deliver Statutory or Summary Prospectuses

Instead of permitting contracts whose issuers are currently operating in the manner that the Staff Letters describe to continue to operate in such manner, the Commission could require issuers of all contracts to prepare updated registration statements and comply with either the current standard prospectus delivery requirements or the optional summary prospectus regime. In this scenario, investors in In-Force Alternative Disclosure Contracts would benefit from the increased disclosure, either from receiving the statutory prospectus or the optional initial and updating summary prospectuses, while continuing to have access (either upon request or online, under the summary prospectus regime) to the financial statements they were receiving as part of the Staff Letters' alternative disclosures. Moreover, as explained in detail above, the optional summary prospectus regime, if relied on, could provide significant additional benefits for investors in terms of facilitating the review and understanding of available disclosures.[755] At the same time, the optional summary prospectus regime also permits insurers to satisfy delivery obligations for the underlying company prospectuses by making those documents available online, which could create a burden for investors who prefer to use those prospectuses when making allocation decisions and who received paper versions of those documents under the Staff Letters.

With respect to the impact on insurers, under this alternative, issuers of In-Force Alternative Disclosure Contracts would incur significant costs to update their registration statements, most of which have not been updated for many years.[756] As noted above, we also believe that amendments to the forms will result in a net increase in the burden associated with preparing an initial registration statement and post-effective amendments, which could further add to the cost of preparing these documents for these contract issuers. We estimated the cost of amendments to the forms above as $2.60 per contract.[757]

In addition, issuers of In-Force Alternative Disclosure Contracts would no longer incur costs to deliver financial statements, which we estimated at $0.27 per contract. However, they would incur printing and mailing costs to deliver the contract statutory prospectus, which we estimated at $0.53 per contract. Still, the proposed optional summary prospectus framework would likely mitigate those increases by only requiring delivery of a shorter summary prospectus, as described above. We estimated the cost of delivering the summary prospectus to be $0.35 per contract. Moreover, the proposed summary prospectus regime also permits electronic delivery of underlying portfolio company prospectuses, which, if relied on, may further mitigate costs that an insurer would incur if it were not able to operate in the manner that the Staff Letters describe. We estimated the cost of delivery of the portfolio company summary prospects to be $0.53 per contract.

On balance, given the burdens associated with preparing an updated registration statement and compliance with either standard prospectus delivery requirements or the proposed optional summary prospectus regime, we believe contracts whose issuers currently are operating in the manner that the Staff Letters describe should be permitted to continue doing so.

8. Alternatives to Commission's Position on Alternative Disclosure Contracts

As discussed above, the Commission is taking the position that, should it adopt the proposed summary prospectus framework, Alternative Disclosure Contracts (contracts operating in the manner described in the Staff Letters as of the effective date of any final summary prospectus rules) would be permitted to continue to operate in such a manner after the final rules' effective date. Under the proposed approach, all other current and future contracts would be subject to the proposed optional summary prospectus regime.[758] We discuss below two alternatives to the Proposed Framework, which would impose different disclosure requirements than either the current baseline (including the contracts whose issuers operate in the manner that the Staff Letters describe) or the Proposed Framework. We have considered the economic effects of these alternatives against the baseline set forth in section III.B. In addition, we also discuss how the economic effects of each alternative would likely differ from those of the Proposed Framework.

If the Commission were to adopt either of these alternatives, the Commission could take the position, as it does in the Proposed Framework, that Alternative Disclosure Contracts would be permitted to continuing operating in the manner described in the Staff Letters. Alternatively, the Commission could determine that the adopted alternative applies to *all* contracts, including contracts that would be Alternative Disclosure Contracts under the Commission's position. In describing the economic effects of each alternative, we take into account the different effects that would occur if the Commission were to determine that the adopted alternative were to replace the Commission's position on Alternative Disclosure Contracts for contracts that otherwise would be subject to that position.

Besides the economic effects described below with respect to existing contracts, to the extent the alternatives create benefits or costs that are different from the benefits and costs of operating in the manner described in the Staff Letters (which would effectively be the same costs and benefits for Alternative Disclosure Contracts under the Proposed Framework), they could affect the creation of new variable contracts in the future. For example, if contract fees

[755] *See supra* section III.C.1.a.i(a).

[756] In addition, we recognize that there are a number of contracts whose registration statements were prepared using predecessor forms to the current disclosure forms (Forms N–4 and N–6). For those contracts, updating a registration statement could be especially burdensome, particularly considering that these contracts are only offered to a limited number of investors.

[757] *See supra* section III.E.6.b.

[758] We refer to this combination of the optional summary prospectus regime and the Commission's position on Alternative Disclosure Contracts as ''the Proposed Framework.''

and charges are established with the expectation that an insurer could provide alternative disclosures if a product launch is unsuccessful or the number of contract investors diminishes over time, then to the extent the benefits and costs of the alternatives are different from the benefits and costs of operating in the manner described in the Staff Letters, the alternatives could affect fees and charges for future variable contracts. Similarly, they may affect insurers' willingness to offer new variable products in the first place.

a. Approach 1 To Applying the Proposed Framework to Discontinued Contracts

As an alternative to applying the Proposed Framework to discontinued contracts, the Commission could adopt final rules providing that a registrant would not have to comply with certain requirements to update the variable contract registration statement and deliver updated contract prospectuses to existing investors, so long as the registrant complies with certain conditions (''Approach 1,'' as discussed in more detail in section II.C above). The Commission could determine that these alternative requirements apply to *all* contracts, including In-Force Alternative Disclosure Contracts, or the Commission could take the position that Alternative Disclosure Contracts would be permitted to continuing operating in the manner described in the Staff Letters, as in the Proposed Framework.

Codification of Approach 1 would be similar to the proposed summary prospectus regime in certain respects, in terms of the information that is either (1) delivered to all investors, (2) made available online, or (3) delivered to those investors who so request.[759] For example, under both the proposed summary prospectus regime and Approach 1, the updated audited financial statements of the registrant would be available online and would be delivered (in paper or electronically) to investors upon request, and also filed with the Commission.[760] Under both frameworks, portfolio company prospectuses and shareholder reports would be delivered to all investors, or (if the insurer were to rely upon the proposed new option to satisfy portfolio company prospectus delivery requirements[761]) made available online and delivered (in paper or electronically) upon request.

As discussed in section II.C, the Staff Letters identified a set of circumstances in which the staff would not recommend enforcement action once the registration statement is no longer updated, including that financial statements, as well as portfolio company prospectuses and shareholder reports, are delivered to all investors. If the Commission were to codify Approach 1 and In-Force Alternative Disclosure Contracts were required to comply with the conditions of Approach 1 (rather than choosing to follow the conditions set forth in the Staff Letters, as in the Proposed Framework), codification of Approach 1 may yield reduced printing and mailing costs compared to the baseline because:

- Unlike the circumstances described in the Staff Letters, under Approach 1, insurers would make financial statements available online and would only deliver them to investors (in paper or electronically) upon request. We estimate that issuers of In-Force Alternative Disclosure Contracts currently incur $0.27 per contract to print and mail financial statements.[762]
- Under Approach 1, insurers could avail themselves of the proposed option to satisfy portfolio company prospectus delivery requirements by making prospectuses and shareholder reports available online and only delivering them to investors on request. This option, however, is not currently available for issuers of In-Force Alternative Disclosure Contracts. We estimate that issuers of In-Force Alternative Disclosure Contracts currently incur $0.53 per contract to deliver portfolio company prospectuses.[763]

Existing contracts that could be discontinued in the future, and that may have anticipated the option to operate in accordance with the Staff Letters, would likewise experience the same reduction in expected future costs.

In addition, if the Commission were to codify Approach 1, a registrant relying on the conditions of Approach 1 would not be required to create and maintain a current registration statement and make the statutory prospectus and SAI available online. This is consistent with the circumstances described in the Staff Letters, and thus would not represent a change for In-Force Alternative Disclosure Contracts or contracts that may become discontinued in the future. However, the Proposed Framework requires that all insurers offering variable contracts (other than In-Force Alternative Disclosure Contracts affected by the Commission's position) must create and maintain a current registration statement and make the statutory prospectus and SAI available online (as well to deliver initial summary prospectuses and updating summary prospectuses). Accordingly, for insurers sponsoring contracts that could be discontinued in the future, these provisions of Approach 1 would produce lower costs for insurers than the Proposed Framework.

However, under Approach 1, insurers are required to deliver an annual notice to investors, which would include information that is comparable to information that would be included in an updating summary prospectus. An equivalent condition is not included in the circumstances that the Staff Letters describe. So, if In-Force Alternative Disclosure Contracts are required to comply with the conditions of Approach 1 (rather than adhering to the conditions set forth in the Staff Letters, as in the Proposed Framework), this would impose new costs on insurers sponsoring In-Force Alternative Disclosure Contracts. Likewise, issuers of contracts that may become discontinued in the future who may have expected that they could operate in the future in the manner described in the Staff Letters may experience unexpected costs compared to the baseline. Because of the similarities between information in this notice and in the updating summary prospectus, however we believe the costs under Approach 1 for issuers of contracts that may become discontinued in the future of producing, printing, and mailing these notices would be approximately equal to the costs associated with producing, printing, and mailing updating summary prospectuses, or about $0.35 per prospectus.[764]

Investors may also incur costs and benefits under Approach 1 compared to both the baseline and the Proposed Framework. Specifically, as noted, investors would receive an annual notice providing disclosure of any material changes, as well as the same key information and portfolio company tables provided in an updating summary prospectus. If In-Force Alternative Disclosure Contracts are required to comply with the conditions of Approach 1 (rather than adhering to the conditions set forth in the Staff Letters, as in the Proposed Framework), this notice would benefit investors in those

[759] *See supra* Table 4.

[760] In the case of variable life insurance contracts, the financial statements instead would be the updated audited financial statements of the depositor. *See supra* note 368.

[761] Under Approach 1, registrants would be permitted to use the optional method to satisfy portfolio company prospectus delivery requirements as provided under proposed rule 498A.

[762] We estimate that financial statements require significantly less be spent on printing and mailing costs than statutory prospectuses given the smaller size of the documents. Accordingly, we estimate that each financial statement requires 50% of the printing and mailing costs associated with statutory prospectuses. $0.53 × 50% = $0.27.

[763] *See supra* note 716.

[764] *See supra* note 702.

contracts, relative to the baseline, by annually providing disclosures that are not delivered to them as part of the alternative disclosures described in the Staff Letters. Likewise, investors in contracts that may be discontinued in the future would incur benefits of enhanced disclosure in the future that they would not have received under the baseline.

Additionally, because the annual notice would be similar in content to the updating summary prospectus, Approach 1 would result in investors in contracts that previously relied on the summary prospectus regime receiving consistent disclosures for the full life of their contract. This represents a benefit to investors relative to the circumstances that the Staff Letters describe, under which investors receive a prospectus annually until the issuer begins to provide the alternative disclosures (and, similarly, investors in contracts that are not In-Force Alternative Disclosure Contracts receive a different set of disclosures than investors in In-Force Alternative Disclosure Contracts). This benefit to investors would similarly be present under the proposed summary prospectus regime, because an insurer choosing to use a summary prospectus would presumably do so for the full life of the contract.

Approach 1 also permits insurers to use the new optional portfolio company prospectus delivery method. To the extent that In-Force Alternative Disclosure Contracts are required to comply with the conditions of Approach 1 and insurers choose this option, the need to go to a website to access portfolio company prospectuses (or request electronic or paper copies) would create a burden for all investors relative to the baseline (including investors in In-Force Alternative Disclosure Contracts, and investors in contracts that could be discontinued in the future) who prefer to use these prospectuses when making allocation decisions. However, the impact of this burden may be mitigated by the inclusion of the portfolio company information table in the annual notice. The summary prospectus regime provides for the same optional approach to portfolio company prospectus delivery, and therefore the impact on investors in contracts that do not operate under the conditions of Approach 1 would be the same under the Proposed Framework.

Similarly, under Approach 1, insurers would not deliver financial statements to investors as they currently do if they are the issuers of In-Force Alternative Disclosure Contracts, but rather would make the statements available online (and deliver electronic or paper copies where requested by an investor). To the extent that In-Force Alternative Disclosure Contracts are required to comply with the conditions of Approach 1, investors in In-Force Alternative Disclosure Contracts who currently choose to rely on those financial statements would therefore face a burden in accessing them that they do not currently face under the baseline. Similarly, investors in contracts that may be discontinued in the future (and that would no longer be permitted to operate in the manner that the Staff Letters describe) may incur a future, unexpected burden to access those statements, though they would face this same burden under the proposed summary prospectus regime. Finally, because insurers under Approach 1 would not maintain an updated registration statement, this alternative may limit the potential liability of insurers to investors under certain liability provisions otherwise available under federal securities laws.[765]

b. Approach 2 To Applying the Proposed Framework to Discontinued Contracts

As a second alternative approach to applying the Proposed Framework to discontinued contract, the Commission could adopt final rules with a different set of conditions for relief from the requirements to update the variable contract registration statement and deliver updated contract prospectuses to existing investors (''Approach 2,'' as discussed in more detail in section II.C above). As with Approach 1, the Commission could determine that these alternative requirements apply to *all* contracts, including In-Force Alternative Disclosure Contracts, or the Commission could take the position that Alternative Disclosure Contracts would be permitted to continue operating in the manner described in the Staff Letters, as in the Proposed Framework.

Approach 2 would be identical to Approach 1 in terms of how financial statements and portfolio company prospectuses are delivered or made available to investors. In addition, Approach 2 and Approach 1 both would involve delivery of an annual notice to investors that includes information that is comparable to information that would be included in an updating summary prospectus. Approach 2 differs from Approach 1 chiefly in that, under Approach 2, a registrant would need to create and maintain a current registration statement and make the statutory prospectus and SAI available online. Under Approach 2, the registrant would only update the registration statement when there are material changes to the offering, since updated financial statements would be permitted to be forward incorporated by reference into the registration statement. We note, however, that updating the registration statement to reflect a material change to the offering[766] would entail some burden relative to the baseline (*i.e.,* the Staff Letters), which is not conditioned on any updating of the registration statement. For example, the registrant (and related service providers) would have to confirm the continued accuracy of the information in the registration statement as would the registrant's auditor as part of the auditor's attestation process.

Accordingly, issuers of contracts that may become discontinued in the future may incur certain unexpected future costs associated with this requirement; likewise, should Approach 2 apply to In-Force Alternative Disclosure Contracts, issuers of those contracts would incur these new costs compared to the baseline. In addition, because issuers of In-Force Alternative Disclosure Contracts do not maintain a current registration statement or make the statutory prospectus and SAI available online, should Approach 2 apply to In-Force Alternative Disclosure Contracts, insurers may incur initial costs to update the registration statement, which may not have been updated in years, and those costs may be significant.

The remaining conditions under Approach 2 are identical to those under Approach 1, and would produce equivalent economic effects, so that the aggregate impact is an increase in costs incurred by registrants under the proposed summary prospectus framework (assuming the effects of the Commission's position on Alternative Disclosure Contracts).

Under Approach 2, investors would receive an annual notice identical to the notice they receive under Approach 1. As described above, investors would benefit from this ongoing disclosure, compared to the alternative disclosures that they receive under the circumstances that the Staff Letters identify, as well as from the consistency with the disclosures provided in an updating summary prospectus. Like the proposed summary prospectus regime, Approach 2 would further benefit investors, relative to both the

[765] *See supra* notes 372 and 373 and accompanying text.

[766] *See supra* note 385.

circumstances that the Staff Letters identify and Approach 1, by requiring an insurer to provide online (and deliver in paper or electronically upon request) copies of the contract statutory prospectus and SAI. Additionally, as under the summary prospectus regime and unlike either Approach 1 or the circumstances that the Staff Letters identify, under Approach 2, insurers would maintain an updated registration statement due to the forward incorporation of the separate account and depositor financial statements. As a result, under Approach 2, investors would benefit from certainty as to the liability of insurers for statements made in the registration statement. The costs for investors under Approach 2 relative to the circumstances that the Staff Letters identify and the summary prospectus regime would be similar to those faced by investors under Approach 1.

F. Request for Comments

Throughout this release, we have discussed the anticipated benefits and costs of the proposed rule and its potential effect on efficiency, competition, and capital formation. While we do not have comprehensive information on all aspects of variable contract industry reporting, we are using the data currently available in considering the effects of the proposed rule. We request comment on all aspects of this initial economic analysis, including on whether the analysis has (1) identified all benefits and costs, including all effects on efficiency, competition, and capital formation; (2) given due consideration to each benefit and cost, including each effect on efficiency, competition, and capital formation; and (3) identified and considered reasonable alternatives to the proposed new rule. We request and encourage any interested person to submit comments regarding the proposed rule, our analysis of the potential effects of the rules and other matters that may have an effect on the proposed rules. We request that commenters identify sources of data and information with respect to variable contracts in general, but also with respect to variable life products in particular, as well as provide data and information to assist us in analyzing the economic consequences of the proposed rules. We are also interested in comments on the qualitative benefits and costs we have identified and any benefits and costs we may have overlooked. We urge commenters to be as specific as possible.

Comments on the following questions are of particular interest.

- We have characterized a goal of variable contract investors as seeking to address the risk that they may outlive their retirement assets. Have we correctly characterized that goal of variable contract investors? What other products or investments, purchased either with or without the aid of investment professionals, are available to investors to achieve that goal?
- Under the proposed rule, to what extent would insurers choose to meet their disclosure obligation by providing investors with summary prospectuses while making statutory and other documents available on a website? The benefits of the proposed rule for insurers are linked to the extent they would be replacing printing and mailing paper statutory prospectuses with summary prospectuses. To what extent do investors currently elect to receive prospectuses via electronic delivery rather in paper? To what extent do investors who elect to receive prospectuses via electronic delivery also request paper copies of prospectuses?
- Should we, as we have proposed, allow insurers to provide summary prospectuses by delivering them, in paper, at no charge? Would investors prefer that these materials be provided in this manner? Would the summary prospectus be more useful if provided in another manner? Would investors be more aware or less aware of the availability of the information in summary prospectuses and other documents if provided only electronically on a website at no charge?
- Would any positive or negative effect of the proposed rule on investors be disproportionately greater for certain investors than for others? If so, which investors would be disproportionately affected, to what extent, and how would such effects manifest? What, if any, additional measures could help mitigate any such disproportionate effects? Please provide supportive data to the extent available.
- Should we require the website on which the statutory prospectus and other documents are made accessible to incorporate safeguards to protect the anonymity of its visitors? For example, should we require similar conditions to those provided in rule 14a–16 under the Exchange Act relating to internet availability of proxy materials? Why or why not? If so, what specific requirements should we consider?
- To what extent would the proposed rule reduce burdens such as printing and mailing costs borne by insurers? Would these burden reductions ultimately accrue to investors in the form of lower total expenses? Please provide supportive data to the extent available.
- To what extent might reduced burdens (*e.g.,* printing and mailing cost savings) borne by insurers be passed on to existing investors? Under what circumstances, and in what form, would insurers pass benefits through to existing investors?
- To what extent would the proposed rule affect the ability of investors to understand the investment risks of variable contracts and to efficiently allocate capital? Would investors be more likely to allocate additional capital to variable products? What would be the effect on insurer competition for investor capital?
- To what extent do investors use statutory prospectus information to compare alternative variable product investments? To what extent should we expect that to change if insurers provide summary prospectuses rather than statutory prospectuses?
- Our estimates rely on several assumptions, such as 95% of insurers will choose to use a summary prospectus, all insurers who use a summary prospectus will choose to use the new optional delivery method for portfolio company prospectuses, and 15% of investors currently elect to receive electronic delivery of disclosure documents. Do commenters agree with these and other assumptions included in our analysis of the economic consequences of the proposed rule? Why or why not? Please provide supportive data to the extent possible.
- We estimate above that a maximum of approximately 2.68 million variable annuity contracts are In-Force Alternative Disclosure Contracts. Do commenters believe this estimate is reasonable? Why or why not? Please provide supportive data to the extent possible.
- This proposed rule would allow insurers and investors to take advantage of a summary disclosure regime designed to increase investor understanding of variable contract products through greater readability of and access to disclosures. Do commenters believe there are effective means by which we could measure the effectiveness of this rule if adopted? Why or why not? Please provide specific suggested methodologies.

IV. Paperwork Reduction Act

Certain provisions of the proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[767] We are submitting the proposed collections of information to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[768] The titles for the existing collections of information are: (1) ''Form N–3, Registration Statement under the Securities and Investment Co. Acts for Insurance Co. Separate Accounts Issuing Variable Annuity Contracts'' (OMB Control No. 3235–0316); (2) ''Form N–4, Registration Statement under the Securities and Investment Co. Acts for Insurance Co. Separate Accounts Issuing Variable Annuity Contracts'' (OMB Control No. 3235–0318); (3) ''Form N–6 under the Investment Company Act of 1940 and the Securities Act of 1933, Registration Statement of Variable Life Insurance Separate Accounts Registered as Unit Investment Trusts'' (OMB Control No. 3235–0503); and ''Mutual Fund Interactive Data'' (OMB Control No. 3235–0642) (which we propose to

[767] 44 U.S.C. 3501–3521.

[768] 44 U.S.C. 3507(d); 5 CFR 1320.11.

re-title as ''Registered Investment Company Interactive Data'').

We are also submitting a new collection of information for proposed rule 498A under the Securities Act to be used by separate accounts offering variable annuity or variable life insurance contracts that choose to send or give a summary prospectus (either an initial summary prospectus or an updating summary prospectus) to investors. The title for this new collection of information would be ''Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts.'' The Commission also intends to use a Feedback Flier to obtain information from investors about a sample variable annuity summary prospectus under the proposal.[769]

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The proposed amendments to Forms N–3, N–4, and N–6, if adopted, would update and enhance the required disclosures provided to variable contract investors. For example, the proposed amendments would summarize certain key information about the contract at the beginning of the prospectus, as well as update the presentation of fee information and require additional information about standard and optional benefits that a contract may offer. They also would standardize presentation requirements to make the information more accessible to retail investors, while retaining key elements of the disclosure that is available today.

In addition, we are proposing to amend Forms N–3, N–4, and N–6, along with certain rules that effectuate the Commission's requirements regarding the use of Inline XBRL format for the submission of certain required disclosures,[770] to require the use of the Inline XBRL format for the submission of certain required disclosures in variable contract statutory prospectuses. This aspect of our proposal is intended to harness technology to allow investors (directly and through their investment professionals), data aggregators, financial analysts, Commission staff, and other data users to efficiently analyze and compare the available information about variable contracts, as their particular needs and circumstances may require.

Proposed rule 498A, if adopted, would permit a person to satisfy its prospectus delivery obligations under the Securities Act for a variable contract by providing a summary prospectus to investors and making the statutory prospectus available online. The proposed rule also would consider a person to have met its prospectus delivery obligations for any portfolio companies associated with a variable contract if these prospectuses are posted online. Registrants would also be required to send these documents to the investor upon request.

Finally, proposed amendments to rule 497, if adopted, would provide the requirements for filing summary prospectuses with the Commission and for submitting information to the Commission in Inline XBRL format. These amendments would not constitute a separate collection of information under rule 497. The burden required by these amendments is part of the collection of information under proposed rule 498A, and—for filings of Interactive Data Files—would be part of the re-titled ''Registered Investment Company Interactive Data'' collection of information.

A. Form N–3

Form N–3 is the form used by separate accounts offering variable annuity contracts that are organized as management investment companies to register under the Investment Company Act and/or to register and offer their securities under the Securities Act. Form N–3, including the proposed amendments, contains collection of information requirements. Compliance with the disclosure requirements of Form N–3 is mandatory. Responses to the disclosure requirements are not confidential. We currently estimate for Form N–3 a total hour burden of 2500 hours, and a total annual external cost burden of $164,144.[771] The hour and cost burden estimates for preparing and filing reports on Form N–3 are based on the Commission's experience with the contents of the form. The number of burden hours and cost may vary depending on, among other things, the complexity of the filing and whether preparation of the form is performed by internal staff or outside counsel.

We are proposing amendments to Form N–3 to update and enhance the disclosures to investors in variable annuity contracts, and to implement the proposed summary prospectus regime.[772] We propose to amend certain disclosure requirements that Form N–3 currently includes: For example, requirements to disclose the separate account's investment objectives and risks, management of the registrant, investment advisory and other services, portfolio managers, and brokerage allocation and other practices. In addition, Form N–3 as we propose to amend it would require certain new disclosure requirements regarding, among other things: An overview of the contract, key information, principal risks, optional benefits, loans, and the available investment options. We also propose to eliminate or reduce certain disclosures currently required by the form, such as disclosure of condensed financial information for each class of accumulation units of the registrant for the last five fiscal years, as opposed to the last ten fiscal years as is currently required.

Form N–3 generally imposes two types of reporting burdens on investment companies: (1) The burden of preparing and filing the initial registration statement; and (2) the burden of preparing and filing post-effective amendments to a previously-effective registration statement. Based on a review of Form N–3 filings made with the Commission, our staff estimates that there will be no initial filings and that eight post-effective amendments would be made on Form N–3 per year.[773] Commission staff further estimates these filings would be made by five registrants and would

[769] *See* Appendix C. The Commission has determined that this usage is in the public interest and will protect investors, and therefore is not subject to the requirements of the Paperwork Reduction Act of 1995. *See* section 19(e) and (f) of the Securities Act. Additionally, for the purpose of developing and considering any potential rules relating to this rulemaking, the agency may gather information from and communicate with investors or other members from the public. *See* section 19(e)(1) and (f) of the Securities Act.

[770] Specifically, we propose to amend rules 485 and 497 of Regulation C (OMB Control No. 3235–0074), which describes the procedures to be followed in preparing and filing registration statements with the Commission, and rules 11 and 405 of Regulation S–T (OMB Control No. 3235–0424), which specifies the requirements that govern the electronic submission of documents. However, the additional collection of information burden that will result from these changes, as well as the burdens that will result from the proposed amendments to the General Instructions of Forms N–3, N–4, and N–6, are included in our burden estimates the ''Registered Investment Company Fund Interactive Data'' collection of information, and do not impose any separate burden aside from that described in our discussion of the burden estimates for this collection of information.

[771] These estimates are based on the last time the rule's information collections were approved, pursuant to a submission for PRA renewal in 2017.

[772] *See supra* section II.D.

[773] Commission staff reviewed initial filings and post-effective amendments for Form N–3 filed with the Commission from January 1, 2015 to December 31, 2017. There were no initial filings of Form N–3 during that time period. There were eleven, seven, and six post-effective amendments filed during 2015, 2016, and 2017, respectively. Averaging those post-effective amendments over three years results in an average of eight post-effective amendments per year. This estimate is based on the following calculation: (11 + 7 + 6)/3 years = 8 per year.

cover an average of three investment options per registration statement or post-effective amendment filing.[774] We separately discuss the additional internal hours and external cost burdens that would apply as a result of the proposed amendments.

Internal Hour Burden

The proposed amendments would include certain disclosure changes and new disclosures, but also would simplify certain current disclosure requirements in Form N–3. Based on this, we estimate that, on a net basis, the proposed amendments to Form N–3 would increase the burden of preparing an initial registration statement on Form N–3 by 5 hours per investment option per filing. Amortizing this burden over a three-year period results in an estimated average annual burden of 1.7 hours per year, at an estimated internal time cost equivalent of $571.[775] However, because Commission staff estimates there would be no initial filings using Form N–3, we estimate that the proposed amendments would result in no change to the total annual hour burden for initial filings on Form N–3.

We further estimate a one-time burden of an additional 20 hours per registration statement to update disclosures that are not related to the contract's investment options the first time the registration statement is amended by post-effective amendment following adoption of the proposed amendments. Subsequently, we estimate an ongoing burden of an additional 5 hours per registration statement per year to prepare and file a post-effective amendment to update these disclosures. Amortizing these burdens over a three-year period results in an estimated average annual burden of an additional 10 hours per registration statement to prepare and file the post-effective amendment, at an estimated internal time cost equivalent of $3,360.[776]

In addition, we estimate a further burden of 6 hours per contract investment option to update registration statement disclosures that are related to the contract's investment options, the first time the registration statement is amended by post-effective amendment following adoption of the proposed amendments. Subsequently, we estimate an ongoing burden of an additional 1.5 hours per investment option per year to prepare and file a post-effective amendment to update these disclosures. Amortizing these burdens over a three-year period results in an estimated average annual burden of an additional 3 hours per investment option to prepare and file a post-effective amendment, at an estimated internal time cost equivalent of $3,360.[777]

In the aggregate, we estimate that the proposed amendments to Form N–3 would cause registrants to incur an additional annual burden of 152 hours, at an internal time cost equivalent of $51,072.[778] We estimate the total annual hour burden as a result of the proposed amendments to be 1,402 hours.[779] This decrease in the total annual hour burden is due to the change in our methodology regarding burdens attributable to investment options, notwithstanding the increase in the estimated number of investment options associated with Form N–3 registrants, as well as the increased burden hours per filing as a result of the proposed amendments.[780]

External Cost Burden

Registrants would also bear external costs to prepare and update registration statements and post-effective amendments on Form N–3, such as costs for the services of independent auditors, outside counsel, or consultants.

In our most recently approved Paperwork Reduction Act submission for Form N–3, Commission staff estimated the cost burden for preparing and filing a post-effective amendment to a previously-effective registration statement is $10,259 per investment option, with a total annual approved external cost burden of $164,144.[781] Consistent with the change in our methodology for estimating burdens attributable to investment options, we are revising those estimates.

We estimate that the cost burden for preparing and filing a post-effective amendment to a previously-effective registration statement would be $10,259 per registration statement to update disclosures that are not related to the contract's investment options, and an additional $3,420 per investment option to update disclosures that are related to the contract's investment options.[782] Therefore, we estimate the total external cost burden as a result of the proposed amendments would be $164,152, which would represent an increase due to the change in our methodology for

[774] In our most recently approved Paperwork Reduction Act submission, we used the term ''portfolio'' instead of ''investment option.'' Although these terms have the same meaning in this context, for purposes of this Paperwork Reduction Act analysis, we are using the term ''investment option'' to conform with the term that we propose to use in Form N–3.

Based on a review of filings with the Commission, we are increasing our estimate of the current number of investment options per filing from two to three investment options. There are currently five registration statements filed with the Commission on Form N–3 that cover 14 investment options. For purposes of this Paperwork Reduction Act analysis, we assume each registration statement would cover an average of three investment options. 14 investment options/5 registration statements = 2.8 investment options per registration statement.

[775] The estimate of 1.7 hours is based upon the following calculation: (5 + 0 + 0)/3 years = 1.67. We are assuming 0 hours in years 2 and 3 because, after year 1, the registrant would prepare and file post-effective amendments to the registration statement, and the hour burden of this is captured in the paragraph accompanying *infra* note 776.

The internal time cost equivalent of $571 is calculated by multiplying the hour burden (1.7 hours) by the estimated hourly wage of $336. The estimated wage figure is based on published rates for Compliance Attorneys ($352) and Senior Programmers ($319). These hourly figures are from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1,800-hour work year; multiplied by 5.35 to account for bonuses, firm size, employee benefits and overheard; and adjusted to account for the effects of inflation. The estimated wage rate was further based on the estimate that Compliance Attorneys and Senior Programmers would divide time equally, resulting in a weighted wage rate of $336 (($352 + $319)/2 = 335.5).

[776] The estimate of 15 hours is based upon the following calculation: (20 hours in year 1 + (5 hours in year 2) + (5 hours in year 3)/3 years = 10 hours. The internal time cost equivalent of $3,360 is calculated by multiplying the hour burden (10 hours) by the estimated hourly wage of $336. *See supra* note 775.

[777] The estimate of 3 hours is based upon the following calculation: (6 hours in year 1 + (1.5 hours in year 2) + (1.5 hours in year 3)/3 years = 3 hours. The internal time cost equivalent of $1,008 is calculated by multiplying the hour burden (3 hours) by the estimated hourly wage of $336. *See supra* note 775. In our most recently approved Paperwork Reduction Act submission, we estimated that a registrant with multiple investment options would experience a burden of complying with the requirements of Form N–3 that is proportional to the number of investment options that the registrant offers. Since many of the disclosure requirements of Form N–3 do not depend on the number of investment options offered by the registrant, we have revised that estimate to reflect an incremental burden per investment option, as opposed to a burden that is proportional to the number of investment options that the registrant offers.

[778] The estimate of 152 hours is based upon the following calculation: (10 hours per post-effective amendment × 8 post-effective amendments) + (3 hours per investment option per post-effective amendment × 3 investment options per registration statement × 8 post-effective amendments). The estimate of $51,072 is based upon the following calculation: 152 hours × $336/hour = $51,072.

[779] This estimate is based on the following calculation: 0 initial registration statements + (8 post-effective amendments × (156.2 hours current burden + 10 hours under proposed amendments)) + (8 post-effective amendments × 3 hours per investment option × 3 investment options) = approximately 1,402 hours.

[780] *See supra* note 777.

[781] This estimate is based on the following calculation: 0 initial registration statements + ($10,259 per investment option per post-effective amendment × 8 post-effective amendments per year × 2 investment options per post-effective amendment) = $164,144.

[782] *See supra* note 777. Based on staff experience, we estimate that the external cost burden to update disclosures associated with each investment option would be approximately ⅓ of the cost burden to update disclosures associated with the registration statement. $10,259/3 = $3,420. We request comment on this assumption and this estimate.

estimating burdens attributable to investment options.[783]

B. Form N–4

Form N–4 is the form used by separate accounts offering variable annuity contracts that are organized as unit investment trusts to register under the Investment Company Act and/or to register and offer their securities under the Securities Act. Form N–4, including the proposed amendments, contains collection of information requirements. Compliance with the disclosure requirements of Form N–4 is mandatory. Responses to the disclosure requirements are not confidential. We currently estimate for Form N–4 a total hour burden of 343,117 hours, and a total annual external cost burden of $36,308,889.[784] The hour and cost burden estimates for preparing and filing reports on Form N–4 are based on the Commission's experience with the contents of the form. The number of burden hours and cost may vary depending on, among other things, the complexity of the filing and whether preparation of the form is performed by internal staff or outside counsel.

We are proposing amendments to Form N–4 to update and enhance the disclosures to investors in variable annuity contracts, and to implement the proposed summary prospectus regime.[785] We propose to amend certain disclosure requirements that Form N–4 currently requires. In addition, Form N–4 as we propose to amend it would require certain new disclosures regarding, among other things: An overview of the contract, key information, principal risks, optional benefits, loans, and the available portfolio companies. We also propose to eliminate or reduce certain disclosures currently required by the form, such as disclosure of condensed financial information for each class of accumulation units of the registrant for the last five fiscal years, as opposed to the last ten fiscal years as is currently required.

Form N–4 generally imposes two types of reporting burdens on investment companies: (1) The burden of preparing and filing the initial registration statement; and (2) the burden of preparing and filing post-effective amendments to a previously-effective registration statement. Based on a review of Form N–4 filings made with the Commission, our staff estimates 35 initial filings on Form N–4 and 1,326 post-effective amendments would be made on Form N–4 per year.[786] We separately discuss the additional internal hours and external cost burdens that would apply as a result of the proposed amendments.

Internal Hour Burden

The proposed amendments would include certain disclosure changes and new disclosures, but also would simplify certain current disclosure requirements in Form N–4. Based on this, we estimate that, on a net basis, the proposed amendments to Form N–4 would increase the burden of preparing an initial registration statement on Form N–4 by 5 hours per initial registration statement. Amortizing this burden over a three-year period results in an estimated average annual burden of 1.7 hours per year, at an estimated internal time cost equivalent of $571.[787]

We estimate a one-time burden of an additional 20 hours per registration statement the first time the registration statement is amended by post-effective amendment following adoption of the proposed amendments. Subsequently, we estimate an ongoing burden of an additional 5 hours per registration statement to prepare and file a post-effective amendment. Amortizing these burdens over a three-year period results in an estimated average annual burden of an additional 10 hours per registration statement to prepare and file a post-effective amendment, at an estimated internal time cost equivalent of $3,360.[788]

In the aggregate, we estimate that the proposed amendments to Form N–4 would cause registrants to incur an additional annual burden of 13,320 hours, at an internal time cost equivalent of $4,475,345.[789] We estimate the total annual hour burden as a result of the proposed amendments to be approximately 284,621 hours.[790] This increase is due to the increased burden hours per filing as a result of the proposed amendments.

External Cost Burden

Registrants would also bear external costs to prepare and update registration statements and post-effective amendments on Form N–4, such as the services of independent auditors and outside counsel.

In our most recently approved Paperwork Reduction Act submission for Form N–4, Commission staff estimated the annual cost burden for preparing and filing an initial Form N–4 filing is $23,013 per filing,[791] with a total approved external cost burden of $4,832,730 annually for initial filings on Form N–4.[792] In this same submission, Commission staff estimated that the annual cost burden for preparing and filing a post-effective amendment to a previously-effective registration statement is $21,813 per filing, with a total approved external cost burden of

[783] This estimate is based on the following calculation: 0 initial registration statements + ($10,259 per registration statement per post-effective amendment × 8 post-effective amendments per year) + ($3,420 per investment option × 3 investment options × 8 post-effective amendments) = $164,152.

[784] These estimates are based on the last time the rule's information collections were approved, pursuant to a submission for PRA renewal in 2015.

[785] *See supra* section II.C.

[786] Based on a review of initial filings and post-effective amendments on Form N–4 filed with the Commission from January 1, 2015 to December 31, 2017. There were 34, 44, and 26 initial Form N–4 filings filed during 2015, 2016, and 2017, respectively. Averaging those initial Form N–4 filings over three years results in an average of approximately 35 initial Form N–4 filings per year. This estimate is based on the following calculation: (34 + 44 + 26)/3 years = 34.67 per year.

There were 1,315, 1,415, and 1,247 post-effective amendments filed during 2015, 2016, and 2017, respectively. Averaging those post-effective amendments over three years results in an average of approximately 1,326 post-effective amendments per year. This estimate is based on the following calculation: (1,315 + 1,415 + 1,247)/3 years = 1,325.67 per year.

[787] The estimate of 1.7 hours is based upon the following calculation: (5 + 0 + 0)/3 years = 1.67. We are assuming 0 hours in years 2 and 3 because, after year 1, the registrant would prepare and file post-effective amendments to the registration statement, and the hour burden of this is captured in the paragraph accompanying *infra* note 788. The internal time cost equivalent of $571 is calculated by multiplying the hour burden (1.7 hours) by the estimated hourly wage of $336. *See supra* note 775.

[788] The estimate of 10 hours is based upon the following calculation: (20 hours in year 1 + (5 hours in year 2) + (5 hours in year 3)/3 years = 10 hours. The internal time cost equivalent of $3,360 is calculated by multiplying the hour burden (10 hours) by the estimated hourly wage of $336. *See supra* note 775.

[789] The estimate of 13,320 hours is based upon the following calculation. For initial registration statements: 1.7 hours × 35 initial filings on Form N–4 = approximately 60 hours. For post-effective amendments: 10 hours × 1,326 post-effective amendments = 13,260 hours. 60 + 13,260 = 13,320.

The estimate of $4,475,345 is based upon the following calculation. For initial registration statements: $571 × 35 initial filings on Form N–4 = $19,985. For post-effective amendments: $3,360 × 1,326 post-effective amendments = $4,455,360. $19,985 + $4,455,360 = $4,475,345.

[790] This estimate is based on the following calculation. For initial registration statements: 35 initial filings × (278.5 hours current burden + 1.7 hours under proposed amendments) = 9,807 hours. For post-effective amendments: 1,326 post-effective amendments × (197.25 hours current burden + 10 hours under proposed amendments) = 274,813.5 hours. 9,807 + 274,813.5 = 284,620.5 hours.

[791] The staff estimated this amount per ''portfolio,'' with one portfolio per filing, in the most recently approved Paperwork Reduction Act submission for Form N–4. For purposes of this Paperwork Reduction Act analysis, we now estimate this amount per ''filing'' to conform with the terminology that we use elsewhere in this analysis.

[792] This estimate is based on the following calculation: $23,013 per filing × 210 initial filings per year = $4,832,730.

$31,476,159 annually for post-effective amendments.[793] The total estimated annual cost burden for Form N–4 in this submission is therefore $36,308,889 ($4,832,730 + $31,476,159).

We do not estimate any change to the external costs per filing associated with the proposed amendments to Form N–4. In the aggregate, we estimate registrants on Form N–4 would incur annual external costs of $29,729,493.[794] This decrease reflects a decrease in the estimated numbers of filings on Form N–4.

C. Form N–6

Form N–6 is the form used by separate accounts organized as unit investment trusts that offer variable life insurance contracts to register under the Investment Company Act and/or to register and offer their securities under the Securities Act. Form N–6, including the proposed amendments, contains collection of information requirements. Compliance with the disclosure requirements of Form N–6 is mandatory. Responses to the disclosure requirements are not confidential. We currently estimate for Form N–6 a total hour burden of 85,269 hours, and a total annual external cost burden of $5,316,892.[795] The hour and cost burden estimates for preparing and filing reports on Form N–6 are based on the Commission's experience with the contents of the form. The number of burden hours and cost may vary depending on, among other things, the complexity of the filing and whether preparation of the form is performed by internal staff or outside counsel.

We are proposing amendments to Form N–6 to update and enhance the disclosures to investors in variable life insurance contracts, and to implement the proposed summary prospectus regime.[796] We propose to amend certain disclosure requirements that Form N–6 currently requires (but to a lesser extent than the proposal would amend the disclosure requirements that are currently in Form N–3 and Form N–4).[797] In addition, Form N–6 as we propose to amend it would require certain new disclosures regarding, among other things: An overview of the contract, key information, principal risks, optional benefits, loans, and the available portfolio companies. We also propose to reduce certain disclosures currently required by the form (but to a lesser extent than the proposal would reduce the disclosure requirements in Form N–3 and N–4).[798]

Form N–6 generally imposes two types of reporting burdens on investment companies: (1) The burden of preparing and filing the initial registration statement; and (2) the burden of preparing and filing post-effective amendments to a previously-effective registration statement. Based on a review of Form N–6 filings made with the Commission, our staff estimates 8 initial filings on Form N–6 and 380 post-effective amendments would be made on Form N–6 per year.[799] We separately discuss the additional internal hours and external cost burdens that would apply as a result of the proposed amendments.

Internal Hour Burden

The proposed amendments would include certain disclosure changes and new disclosures, but also would simplify certain current disclosure requirements in Form N–6. Based on this, we estimate that, on a net basis, the proposed amendments to Form N–6 would increase the burden of preparing an initial registration statement on Form N–6 by 4 hours per registrant.[800] Amortizing this burden over a three-year period results in an estimated average annual burden of 1 hour per year, at an estimated internal time cost equivalent of $336.[801]

We estimate a one-time burden of an additional 15 hours per registration statement the first time the registration statement is amended by post-effective amendment following adoption of the proposed amendments.[802] Subsequently, we estimate an ongoing burden of an additional 4 hours per registration statement to prepare and file a post-effective amendment.[803] Amortizing these burdens over a three-year period results in an estimated average annual burden of an additional 8 hours per registration statement to prepare and file a post-effective amendment, at an estimated internal time cost equivalent of $2,688.[804]

In the aggregate, we estimate that the proposed amendments to Form N–6 would cause registrants to incur an additional annual burden of 3,048 hours, at an internal time cost equivalent of $1,024,128.[805] We estimate the total annual hour burden as a result of the proposed amendments to be 34,860 hours.[806] This increase is due

[793] This estimate is based on the following calculation: $21,813 per filing × 1,443 post-effective amendments per year = $31,476,159.

[794] The estimate of $29,729,493 is based upon the following calculation. For initial registration statements: $23,013 × 35 initial filings on Form N–4 = $805,455. For post-effective amendments: $21,813 × 1,326 post-effective amendments = $28,924,038. $805,455 + $28,924,038 = $29,729,493.

[795] These estimates are based on the last time the rule's information collections were approved, pursuant to a submission for PRA renewal in 2015.

[796] *See supra* section II.C.

[797] *See, e.g.,* section II.D.4.a (discussing proposed amendments to conform Part C items of Forms N–3 and N–4 to current presentation in Form N–6).

[798] Form N–6 does not include the requirement to include AUV tables, whose preparation would be simplified substantially by the proposed amendments to Forms N–3 and N–4. *See* ''Accumulation Unit Value Disclosure'' in *supra* section II.D.3.d.

[799] Based on a review of initial filings and post-effective amendments on Form N–6 filed with the Commission from January 1, 2015 to December 31, 2017. There were ten, seven, and six initial Form N–6 filings filed during 2015, 2016, and 2017, respectively. Averaging those initial Form N–6 filings over three years results in an average of approximately eight initial Form N–6 filings per year. This estimate is based on the following calculation: (10 + 7 + 6)/3 years = 7.67 per year.

There were 373, 420, and 346 post-effective amendments filed during 2015, 2016, and 2017, respectively. Averaging those post-effective amendments over three years results in an average of approximately 380 post-effective amendments per year. This estimate is based on the following calculation: (373 + 420 + 346)/3 years = 379.67 per year.

[800] This is a lower estimate than the parallel estimate used to calculate the increased hour burden of preparing an initial registration statement on Form N–3 or Form N–4, because we are proposing relatively fewer amendments to Form N–6 than we are to Form N–3 or Form N–4 (even taking into account that we do not expect the proposal to reduce the burden associated with current disclosure requirements in Form N–6 to the extent that it would in Form N–3 or Form N–4 (*see supra* note 798 and accompanying text)).

[801] The estimate of 1 hour is based upon the following calculation: (4 + 0 + 0)/3 years = 1.33. We are assuming 0 hours in years 2 and 3 because, after year 1, the registrant would prepare and file post-effective amendments to the registration statement, and the hour burden of this is captured in the paragraph accompanying *infra* note 804. The internal time cost equivalent of $336 is calculated by multiplying the hour burden (1 hour) by the estimated hourly wage of $336. *See supra* note 775.

[802] This is a lower estimate than the parallel estimate used to calculate the increased hour burden of preparing an initial registration statement on Form N–3 or Form N–4 because we are proposing fewer amendments to Form N–6. *See supra* note 800.

[803] *See id.*

[804] The estimate of 8 hours is based upon the following calculation: (15 hours in year 1 + (4 hours in year 2) + (4 hours in year 3)/3 years = 7.67 hours. The internal time cost equivalent of $2,688 is calculated by multiplying the hour burden (8 hours) by the estimated hourly wage of $336. *See supra* note 775.

[805] The estimate of 3,048 hours is based upon the following calculation. For initial registration statements: 1 hour × 8 initial filings on Form N–6 = 8 hours. For post-effective amendments: 8 hours × 380 post-effective amendments = 3,040 hours. 8 + 3,040 = 3,048.

The estimate of $1,024,128 is based upon the following calculation. For initial registration statements: $336 × 8 initial filings on Form N–6 = $2,688. For post-effective amendments: $2,688 × 380 post-effective amendments = $1,021,440. $2,688 + $1,021,440 = $1,024,128.

[806] This estimate is based on the following calculation. For initial registration statements: 8 initial filings × (770.25 hours current burden + 1 hour under proposed amendments) = 6,170 hours. For post-effective amendments: 380 post-effective amendments × (67.5 hours current burden + 8 hours under proposed amendments) = 28,690 hours. 6,170 + 28,690 = 34,860 hours.

to the increased burden hours per filing as a result of the proposed amendments.

External Cost Burden

Registrants would also bear external costs to prepare and update registration statements and post-effective amendments on Form N–6, such as the services of independent auditors and outside counsel.

In our most recently approved Paperwork Reduction Act submission for Form N–6, Commission staff estimated the annual cost burden for preparing and filing an initial Form N–6 filing is $24,169 per portfolio, with one portfolio per filing,[807] with a total approved external cost burden of $1,836,844 annually for initial filings on Form N–6.[808] In this same submission, Commission staff estimated that the annual cost burden for preparing and filing a post-effective amendment to a previously-effective registration statement is $8,788 per portfolio, with one portfolio per filing, with a total approved external cost burden of $3,480,048 annually for post-effective amendments.[809] The total estimated annual cost burden for Form N–6 in this submission is therefore $5,316,892 ($1,836,844 + $3,480,048).

We do not estimate any change to the external costs per filing associated with the proposed amendments to Form N–6. In the aggregate, we estimate registrants on Form N–6 would incur annual external costs of $3,532,792. This decrease reflects a decrease in the estimated numbers of filings on Form N–6.

D. Registered Investment Company Interactive Data

We are proposing amendments to the General Instructions of Forms N–3, N–4, and N–6, rules 485 and 497 under the Securities Act, and rules under Regulation S–T,[810] to require the use of Inline XBRL format for the submission of certain required disclosures in variable contract statutory prospectuses. Specifically, registrants would submit the following information in Inline XBRL format in registration statements or post-effective amendments, as well as in forms of prospectuses filed pursuant to rule 497(c) or 497(e) under the Securities Act that include information that varies from the registration statement:

- *Form N–3 registrants:* Information provided in response to proposed Items 3, 4, 5, 12, 19, and 20 of Form N–3;
- *Form N–4 registrants:* Information provided in response to proposed Items 3, 4, 5, 11, and 18 of Form N–4; and
- *Form N–6 registrants:* Information provided in response to proposed Items 3, 4, 5, 11, and 18 of Form N–6.

The title of the collection of information affected by these amendments is ''Mutual Fund Interactive Data,'' which we would propose to re-title as ''Registered Investment Company Interactive Data.'' Compliance with these disclosure requirements would be mandatory, and responses would not be confidential. We currently estimate a total annual hour burden of 178,803 hours for this collection of information, and a total annual external cost burden of $10,000,647.[811]

The proposed amendments would generally impose two types of reporting burdens on investment companies: (1) The burden of submitting certain information in Inline XBRL to the Commission in registration statements or post-effective amendments filed on Form N–3, Form N–4, and Form N–6; and (2) the burden of submitting certain information in Inline XBRL to the Commission in forms of prospectuses filed pursuant to rule 497(c) or 497(e) under the Securities Act that include information that varies from the registration statement. We separately discuss the additional internal hours and external cost burdens that would apply as a result of the proposed amendments.

As a threshold matter, we estimate that registrants on Forms N–3, N–4, and N–6 would require approximately 18 burden hours of in-house personnel time to tag and submit the required disclosure information in Inline XBRL format for each post-effective amendment[812] in the first year, and the same task in subsequent years would require approximately 12 hours for each post-effective amendment.[813] Therefore, we estimate the average annual burden over a three-year period for each post-effective amendment would be 14 hours.[814] We further estimate that the burden for each rule 497 filing would be 25% of that, or 3.5 hours per response.[815] With respect to Form N–3 registrants, we estimate an additional burden of 2 hours per investment option to tag and submit the required disclosure information for each post-effective amendment.

We estimate a weighted burden average of approximately 3 responses per year per registrant to file initial and post-effective registration statements and rule 497 filings, based on weighting the burden for each rule 497 filing as one quarter of the burden of a post-effective amendment filing, averaging the burden for each form equally, and estimating (based on a survey by Commission staff of filings made pursuant to rule 497) that 75% of rule 497 filings by registrants on each form would contain data that would be required to be submitting in Inline XBRL format.[816] Accordingly, for simplicity, we are estimating that

[807] The staff estimated this amount per ''portfolio,'' with one portfolio per filing, in the most recently approved Paperwork Reduction Act submission for Form N–6. For purposes of this Paperwork Reduction Act analysis, we now estimate this amount per ''filing'' to conform with the terminology that we use elsewhere in this analysis.

[808] This estimate is based on the following calculation: $24,169 per filing × 76 initial filings per year = $1,836,844.

[809] This estimate is based on the following calculation: $8,788 per filing × 396 post-effective amendments per year = $3,480,048.

[810] *See supra* note 770.

[811] These estimates are referenced in the most-recent information collection submission, reflecting the Commission's 2018 adoption of amendments to require the use of Inline XBRL format for the submission of mutual fund risk/return summary information. *See* Inline XBRL Adopting Release, *supra* note 613.

[812] We are not including estimates for Form N–3 initial registration statements, as none have been filed in the past three years.

[813] Our estimates are based on our prior experience with Inline XBRL. *See, e.g.,* Inline XBRL Adopting Release, *supra* note 613. We are largely following the same approach to estimating hourly burdens for variable contracts as we did in the context of mutual funds in the Inline XBRL Adopting Release.

[814] (18 hours for the first submission + 12 hours for the second submission + 12 hours for the third submission)/3 years = 14 hours.

[815] Because rule 497 filings are typically 1–3 pages in length, we are estimating that the burden would be only 25% of the burden associated with tagging the relevant disclosures in a full registration statement filing.

[816] For Form N–3, we estimate a burden of 2.3 responses per year. This estimate is based on the following calculation: ((0 initial registration statements + 8 post-effective amendments) + (19 rule 497 filings × 0.75 of which will contain data that will need to be tagged × 0.25 weighted burden))/5 Form N–3 registrants = approximately 2.3 responses per year per registrant.

For Form N–4, we estimate a burden of 4.7 responses per year. This estimate is based on the following: ((35 initial registration statements + 1,326 post-effective amendments) + (3,555 rule 497 filings × 0.75 of which will contain data that will need to be tagged × 0.25 weighted burden))/435 Form N–4 registrants = approximately 4.7 responses per year per registrant.

For Form N–6, we estimate a burden of 2.3 responses per year. This estimate is based on the following calculation: ((8 initial registration statements + 380 post-effective amendments) + (836 rule 497 filings × 0.75 of which will contain data that will need to be tagged × 0.25 weighted burden))/238 Form N–6 registrants = approximately 2.3 responses per year per registrant.

Overall, we estimate approximately 3 responses per year. This estimate is based upon the following calculation: (2.2 responses per N–3 registrant + 4.7 responses per N–4 registrant + 2.3 responses per N–6 registrant)/3 = 3.1 responses per year.

registrants on each of the 3 forms will file 3 responses per year.

Internal Hour Burden

Form N–3 Registrants. Based on a review of Form N–3 filings made with the Commission, our staff estimates there would be no initial filings each year, eight post-effective amendments, and 19 rule 497 filings made on Form N–3 per year.[817] Accordingly, we estimate that, in the aggregate, adoption of the proposed Inline XBRL requirements would result in 300 burden hours for each of the first three years for Form N–3 registrants.[818] This amounts to a collective internal cost burden of approximately $100,800 to tag and submit the required Form N–3 disclosure information in Inline XBRL.[819]

Form N–4 Registrants. Based on a review of Form N–4 filings made with the Commission, our staff estimates there would be 35 initial filings each year, 1,326 post-effective amendments, and 3,555 rule 497 filings made on Form N–3 per year.[820] Accordingly, we estimate that, in the aggregate, adoption of the proposed Inline XBRL requirements would result in 18,270 burden hours for each of the first three years for Form N–4 registrants.[821] This amounts to a collective internal cost burden of approximately $6,138,720 to tag and submit the required Form N–4 disclosure information in Inline XBRL.[822]

Form N–6 Registrants. Based on a review of Form N–6 filings made with the Commission, our staff estimates there would be 8 initial filings each year, 380 post-effective amendments, and 1,115 rule 497 filings made on Form N–6 per year.[823] Accordingly, we estimate that, in the aggregate, adoption of the proposed Inline XBRL requirements would result in 9,996 burden hours for each of the first three years for Form N–6 registrants.[824] This amounts to a collective internal cost burden of approximately $3,358,656 to tag and submit the required Form N–6 disclosure information in Inline XBRL.[825]

Aggregate Internal Hours Burden for Form N–3, N–4, and N–6 Registrants. In the aggregate, we estimate that the adoption of the proposed Inline XBRL requirements would result in 28,566 burden hours for each of the first three years for Form N–3, N–4, and N–6 registrants.[826] Converted into dollars, this amounts to a collective internal cost burden of approximately $9,598,176 to tag and submit the required Form N–3, N–4, and N–6 disclosure information in Inline XBRL.[827] We therefore estimate the aggregate total hour burden for the re-titled ''Registered Investment Company Interactive Data'' collection of information would be 207,369 hours as a result of the proposed amendments.[828]

External Cost Burden

Compliance with the proposed Inline XBRL requirements would entail certain external costs, such as for software and/or the services of consultants and filing agents. For Form N–4 and Form N–6 registrants, we estimate an external cost burden of $900 per registrant for the cost of goods and services purchased to comply with the proposed Inline XBRL requirements, which is based on the estimated average external cost burden associated with the Inline XBRL preparation expenses for mutual funds and ETFs.[829] We understand that annual software licensing costs generally would be included in the cost of hiring external professionals, in which case registrants may receive tagging software at no cost, while others may create their own software in-house. For Form N–3 registrants, we estimate an additional cost of $300 per investment option for the cost of goods and services purchased to comply with the proposed Inline XBRL requirements for an estimated external cost burden of $1,800 per registrant.[830]

Based on the estimate of five Form N–3 registrants,[831] 435 Form N–4 registrants,[832] and 238 Form N–6 registrants,[833] we estimate that, in the aggregate, the total external costs to Form N–3, N–4, and N–6 registrants associated with the proposed requirements to tag and submit certain information in Inline XBRL would be approximately $614,700.[834] We

[817] *See supra* note 773 (discussing initial filings and post-effective amendments on Form N–3). In addition, Commission staff reviewed rule 497 filings for Form N–3 filed with the Commission from January 1, 2015 to December 31, 2017. There were 19, 22, and 16 rule 497 filings during 2015, 2016, and 2017, respectively. Averaging those rule 497 filings over three years results in an average of 19 post-effective amendments per year. This estimate is based on the following calculation: (19 + 22 + 16)/3 years = 19 per year. Commission staff further estimates these filings would include an average of three investment options per registration statement or post-effective amendment filing. *See supra* note 774.

[818] 5 registrants × 3 responses per year per registrant × (14 hours per registrant + (2 hours per investment option × 3 investment options per registrant)) = 300 burden hours/year.

Currently, there are five Form N–3 registrants. *See supra* note 23. We estimate the hourly burden on a per-registrant basis to be 60 hours/year. (300 burden hours per year/5 registrants = 60 burden hours/year).

[819] The internal time cost equivalent of $100,800 is calculated by multiplying the total hour burden (300 hours) by the estimated hourly wage of $336. *See supra* note 775.

On a per registrant basis, the internal cost equivalent associated with Inline XBRL for Form N–3 registrants is estimated to be $20,160/year ($100,800/5 registrants = $20,160/year).

[820] *See supra* note 786 (discussing initial filings and post-effective amendments on Form N–4). In addition, Commission staff reviewed rule 497 filings for Form N–4 filed with the Commission from January 1, 2015 to December 31, 2017. There were 3,098, 3,759, and 3,808 rule 497 filings during 2015, 2016, and 2017, respectively. Averaging those rule 497 filings over three years results in an average of 3,555 post-effective amendments per year. This estimate is based on the following calculation: (3,098 + 3,759 + 3,808)/3 years = 3,555 per year.

[821] 435 registrants × 3 responses per year per registrant × 14 hours per registrant = 18,270 burden hours/year.

Currently, there are 435 Form N–4 registrants. *See supra* note 24. We estimate the hourly burden on a per-registrant basis to be 42 hours/year. (18,270 burden hours per post-effective amendment/435 registrants = 42 burden hours/year).

[822] The internal time cost equivalent of $6,138,720 is calculated by multiplying the total hour burden (18,270 hours) by the estimated hourly wage of $336. *See supra* note 787.

On a per-registrant basis, the internal cost equivalent associated with Inline XBRL is estimated to be $14,112/year ($6,138,720/435 registrants = $14,112/year).

[823] *See supra* note 799 (discussing initial filings and post-effective amendments on Form N–6). In addition, Commission staff reviewed rule 497 filings for Form N–6 filed with the Commission from January 1, 2015 to December 31, 2017. There were 1,095, 1,166, and 1,083 rule 497 filings during 2015, 2016, and 2017, respectively. Averaging those rule 497 filings over three years results in an average of 1,115 post-effective amendments per year. This estimate is based on the following calculation: (1,095 + 1,166 + 1,083)/3 years = 1,115 per year.

[824] 238 registrants × 3 responses per year per registrant × 14 hours per registrant = 9,996 hours per year.

Currently, there are 238 Form N–6 registrants. *See supra* note 25. We estimate the hourly burden on a per-registrant basis to be 42 hours/year (9,996 burden hours per year/238 registrants = 42 burden hours/year).

[825] The internal time cost equivalent of $3,358,656 is calculated by multiplying the total hour burden (9,996 hours) by the estimated hourly wage of $336. *See supra* note 801.

On a per-registrant basis, the internal cost equivalent associated with Inline XBRL is estimated to be $14,112/year ($3,358,656/238 registrants = $14,112/year).

[826] 300 burden hours for Form N–3 registrants + 18,270 burden hours for Form N–4 registrants + 9,996 burden hours for Form N–6 registrants = 28,566 hours.

[827] $100,800 for Form N–3 registrants + $6,138,720 for Form N–4 registrants + $3,358,656 for Form N–6 registrants = $9,598,176.

[828] 178,803 annual burden hours (current estimated annual hour burden) + additional 28,566 burden hours resulting from the proposed amendments = 207,369.

[829] *See* Inline XBRL Adopting Release, *supra* note 613.

[830] $900 per registrant + (3 investment options per registrant × $300 per investment option) = $1,800 per Form N–3 registrant.

[831] *See supra* note 23.

[832] *See supra* note 29.

[833] *See supra* note 25.

[834] (5 Form N–3 registrants + 435 Form N–4 registrants + 238 Form N–6 registrants) × $900 per

therefore estimate the aggregate total external cost burden for the re-titled ''Registered Investment Company Interactive Data'' collection of information would be $10,615,347 as a result of the proposed amendments.[835]

E. Proposed Rule 498A

Proposed rule 498A would contain collection of information requirements. The likely respondents to this information collection are variable annuity and variable life insurance separate accounts registered or registering with the Commission.[836] Under proposed rule 498A, use of the summary prospectus would be voluntary, but the rule's requirements would be mandatory for variable annuity and variable life insurance separate accounts that elect to send or give a summary prospectus in reliance upon proposed rule 498A. The information provided under proposed rule 498A would not be kept confidential.

The summary prospectus is voluntary, so the percentage of variable annuity and variable life insurance separate accounts that will choose to utilize it is uncertain. Given this uncertainty, we have assumed that 95% of all separate accounts would choose to use a summary prospectus under proposed rule 498A.[837]

Preparation of Initial Summary Prospectus and Updating Summary Prospectus

For registrants that choose to rely upon proposed rule 498A, we estimate a one-time collective burden of 40 hours per registration statement to prepare and file both a new initial summary prospectus and a new updating summary prospectus for offerings on Forms N–4 or N–6.[838] In addition, we estimate an ongoing collective burden of 10 hours per registration statement during each subsequent year for the registrant to prepare and file updates of the initial summary prospectus and updating summary prospectus for offerings on Forms N–4 or N–6.

For offerings on Form N–3, we estimate a one-time collective burden of 40 hours per registration statement to prepare and file both a new initial summary prospectus and a new updating summary prospectus, plus a further burden of 12 hours per contract investment option. Subsequently, we estimate an ongoing collective burden of 10 hours per registration statement that would be incurred each following year to prepare and file updates of summary prospectuses, plus a further burden of 3 hours per investment option. We estimate that each registration statement filed on Form N–3 would include three investment options.[839]

Because the PRA estimates represent the average burden over a three-year period, we estimate the average annual hour burden per registration statement to prepare initial and updating summary prospectuses would be 20 hours for filings on Form N–4 or N–6.[840] For Form N–3, we estimate the average annual hour burden per registration statement to prepare initial and updating summary prospectuses would be 38 hours.[841]

We estimate the aggregate annual hour burden to prepare initial and updating summary prospectuses for offerings on Forms N–3, N–4, and N–6 would be 14,610 hours, at an internal cost equivalent of $4,908,960.[842]

Registrants may also bear external costs to prepare and update the initial and updating summary prospectuses, such as the services of independent auditors and outside counsel. However, any external costs associated with filing the summary prospectuses as exhibits to the registration statements would already be reflected in the external costs associated with those registration statements.

For registrants that choose to rely upon proposed rule 498A, we estimate a one-time collective external cost burden of $10,000 per registration statement to prepare both a new initial summary prospectus and a new updating summary prospectus for offerings on Forms N–4 or N–6. In addition, we estimate an ongoing collective burden of $2,500 per registration statement during each subsequent year for the registrant to prepare updates of the initial summary prospectus and updating summary prospectus for offerings on Forms N–4 or N–6. For offerings on Form N–3, we estimate a one-time collective burden of $10,000 per registration statement to prepare and file both a new initial summary prospectus and a new updating summary prospectus, plus a further burden of $3,000 per contract investment option. Subsequently, we estimate an ongoing collective burden of $2,500 per registration statement during each following year to prepare and file updates of summary prospectuses, plus a further burden of $750 per investment option. We estimate that each registration statement filed on Form N–3 would include three investment options.[843]

Because the PRA estimates represent the average burden over a three-year period, we estimate the average annual hour burden per registration statement to prepare and update initial and updating summary prospectuses would be $5,000 for filings on Form N–4 or N–

registrant = 610,200) + (5 Form N–3 registrants × 3 investment options per registrant × $300 per investment option) = $614,700.

[835] $10,000,647 (current estimated external cost burden) + additional $614,700 = $10,615,347.

[836] As drafted, proposed rule 498A could be broadly relied upon by any person to satisfy prospectus delivery obligations under section 5(b)(2) under the Securities Act for a variable contract or portfolio company. However, we expect the hour and cost burdens of the rule (*i.e.,* to create and file initial and updating summary prospectuses and to make certain documents available online and to distribute them upon request) would generally be borne by registrants. We base this expectation in part on the fact that our proposed amendments would require prospectuses and summary prospectuses to include the website address where the documents required to be posted online would be located, and contact information to call or email to obtain paper copies of those documents, and we expect registrants to list their own website and their own contact information to satisfy these requirements, as opposed to directing investors to various financial intermediaries who may be involved in distributing those contracts.

[837] Given expressed industry support for layered disclosure with summary prospectuses, our experience that approximately 95% of mutual funds have adopted layered disclosure with summary prospectuses, and our anticipation that the proposed rule will provide costs savings to insurers, we believe it is appropriate to assume that 95% of insurers will choose delivery of summary prospectuses. *See supra* note 44.

[838] We are aware that more than one prospectus may be filed as part of a registration statement. Our proposal would provide guidance clarifying the circumstances under which this would be appropriate. *See supra* text preceding and accompanying note 400. We do not have data regarding how many registration statements currently include more than one prospectus, nor are we able to determine how the number of prospectuses per registration statement might be affected by our proposed guidance. For these reasons, we assume one prospectus is filed per registration statement.

[839] *See supra* note 774 and accompanying text.

[840] The estimate of 20 hours is based upon the following calculation: (40 hours to prepare a new initial and updating summary prospectus in year 1) + (10 hours in year 2) + (10 hours in year 3)/3 years = 20 hours.

[841] The estimate of 38 hours is based upon the following calculation: 40 hours to prepare summary prospectuses + (12 hours per investment option × 3 investment options) = 76 hours in year 1. 10 hours + (3 hours per investment option × 3 investment options) = 19 hours in each of year 2 and year 3. (76 hours in year 1) + (19 hours in year 2) + (19 hours in year 3)/3 years = 38 hours.

[842] The estimate of 14,610 hours is based upon the following calculation: ((38 hours × 5 registrants on Form N–3) + (20 hours × 500 registrants on Form N–4) + (20 hours × 221 registrants on Form N–6)) × 95% = 14,610 hours.

The internal time cost equivalent of $4,908,960 is calculated by multiplying the hour burden (14,610 hours) by the estimated hourly wage of $336. *See supra* note 775.

[843] *See supra* note 774 and accompanying text.

6.[844] For Form N–3, we estimate the average annual hour burden per registration statement to prepare and update initial and updating summary prospectuses would be $9,500.[845]

We estimate the aggregate annual external cost burden to prepare and update initial and updating summary prospectuses for offerings on Forms N–3, N–4, and N–6 would be $3,469,875.[846]

Online Availability of Contract Statutory Prospectus and Certain Other Documents Relating to the Contract

Registrants that choose to rely upon proposed rule 498A would be required to make certain documents relating to the contract available online, including a variable contract's initial summary prospectus, updating summary prospectus, statutory prospectus, and SAI for contracts registered on Forms N–3, N–4, or N–6, and the contract's most recent annual and semi-annual reports to shareholders under rule 30e-1 in the case of a variable annuity contract registered under Form N–3.

We estimate the average burden to comply with the proposed website posting requirements would be 2 hours per set of documents associated with a single registration statement, both in the first year and annually thereafter.[847]

In total, we estimate the annual burden to comply with the proposed website posting requirements of the rule for documents relating to variable contracts would be 1,379 hours, at an internal cost equivalent of $329,581.[848]

Furthermore, we also estimate that registrants may incur external costs in connection with the requirement to provide these documents upon request of a shareholder. We estimate that the average annual costs associated with printing and mailing these documents upon request would be collectively $500 for all documents associated with a single registrant.[849] Accordingly, we estimate that the aggregate annual external costs associated with printing and mailing these documents upon request would be $344,850.[850]

Online Availability of Portfolio Company Statutory Prospectuses and Certain Other Documents Relating to Portfolio Companies

Registrants on Forms N–4 and N–6 that choose to rely on the new delivery option for portfolio company prospectuses would also be required to post online the portfolio company's summary prospectus, statutory prospectus, SAI, and most recent annual and semi-annual shareholder reports.[851]

We estimate the average burden to comply with the proposed website posting requirements would be 2 hours per set of documents associated with a single registration statement, both in the first year and annually thereafter. In total, we estimate the annual burden to comply with the proposed website posting requirements of the rule for documents relating to portfolio companies would be 1,370 hours, at an internal cost equivalent of $327,430.[852]

Furthermore, we also estimate that registrants may incur external costs in connection with the requirement to provide these documents upon investor request. We estimate that the average annual costs associated with printing and mailing these documents upon request would be collectively $500 for all documents associated with a single registrant.[853] Accordingly, we estimate that the aggregate annual external costs associated with printing and mailing these documents upon request would be $342,475.[854]

Total Hour Burden Associated With Proposed Rule 498A

Accordingly, we estimate the total annual hour burden for registrants under proposed rule 498A to prepare, file and update both the initial summary prospectus and updating summary prospectuses, and post the required variable contract and portfolio company documents to a website would be 17,359 hours, at an internal time cost equivalent of $5,565,971.[855] In addition,

[844] The estimate of $5,000 is based upon the following calculation: ($10,000 to prepare a new initial and updating summary prospectuses in year 1) + ($2,500 in year 2) + ($2,500 in year 3)/3 years = $5,000.

[845] The estimate of $9,500 is based upon the following calculation: $10,000 to prepare new initial and updating summary prospectuses + ($3,000 per investment option × 3 investment options) = $19,000 in year 1. $2,500 + ($750 per investment option × 3 investment options) = $4,750 in each of year 2 and year 3. ($19,000 in year 1) + ($4,750 in year 2) + ($4,750 in year 3)/3 = $9,500.

[846] The estimate of $3,469,875 is based upon the following calculation: (($9,500 × 5 registrants on Form N–3) + ($5,000 × 500 registrants on Form N–4) + ($5,000 × 221 registrants on Form N–6)) × 95% = $3,469,875.

[847] We note that separate account registrants are generally larger entities, and therefore, based on our experience with these registrants, we assume that all separate account registrants already have their own website and would not experience any burdens associated with developing a website.

[848] The estimate of 1,379 hours is based on the following calculation: 95% reliance on the rule × ((2 hours per registration statement × 5 registration statements on Form N–3) + (2 hours per registration statement × 500 registration statements on Form N–4) + (2 hours per registration statement × 221 registration statements on Form N–6)) = approximately 1,379 hours.

The internal time cost equivalent of $329,581 is calculated by multiplying the hour burden (1,379 hours) by the estimated hourly wage based on published rates for webmasters ($239). This hourly figure is from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1,800-hour work year; multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead; and adjusted to account for the effects of inflation.

[849] We do not have specific data regarding how the cost of printing and mailing the two sets of proposed documents would differ, nor are we able to specifically identify how the cost of printing and mailing the documents at issue here might be affected by the amendments to the forms we are proposing today. For these reasons, we are continuing to use the estimate of $500 per year to collectively print and mail upon request all documents associated with a single registrant for purposes of our analysis. However, we are requesting comment on this estimate.

Investors could also request to receive these documents electronically. We estimate that there would be negligible external costs associated with emailing electronic copies of these documents.

[850] This estimate is based upon the following calculations: 95% reliance on the rule × $500 per registrant × (5 registration statements on Form N–3 + 500 registration statements on Form N–4 + 221 registration statements on Form N–6)) = $344,850.

[851] The obligation to post these documents online would fall upon the party that has the prospectus delivery obligation for the portfolio company prospectus. For purposes of this Paperwork Reduction Act analysis, we assume that delivery of portfolio company prospectuses would be done by registrants, rather than portfolio companies or financial intermediaries such as broker-dealers. In some situations, portfolio company documents may already be posted online, such as in the case of portfolio companies that already use summary prospectuses and therefore are subject to the document posting requirements of rule 498. However, for purposes of this Paperwork Reduction Analysis, we still assume that the registrant would bear the burden of posting those documents since we expect the registrant would repost those documents to make them available on a single website. *See supra* note 836.

[852] The estimate of 1,370 hours is based on the following calculation: 95% reliance on the rule × 2 hours per registration statement × (500 registration statements on Form N–4 + 221 registration statements on Form N–6) = approximately 1,370 hours.

The internal time cost equivalent of $327,430 is calculated by multiplying the hour burden (1,370 hours) by the estimated hourly wage based on published rates for Webmasters ($239).

[853] Investors could also request to receive these documents electronically. We estimate that there would be negligible external costs associated with emailing electronic copies of these documents.

[854] This estimate is based upon the following calculations: 95% reliance on the rule × $500 per printing and mailing × (500 registration statements on Form N–4 + 221 registration statements on Form N–6) = $342,475. For purposes of this Paperwork Reduction Act analysis, based upon our experience, we assume that the burden of emailing these documents would be outsourced to third-party service providers and therefore would be included within these external cost estimates.

[855] The internal hours estimate is based upon the following calculation: 14,610 hours to prepare, file, and update initial and updating summary prospectuses for offerings on Forms N–3, N–4, and N–6 + 1,379 hours to comply with the proposed website posting requirements for documents relating to variable contracts + 1,370 hours to comply with the proposed website posting requirements for documents relating to portfolio companies = 17,359 hours.

This internal time cost equivalent estimate is based upon the following calculation: $4,908,960 to prepare, file, and update initial and updating summary prospectuses for offerings on Forms N–3,

we estimate the total external cost to the variable contract industry would be $4,157,200 to prepare and update both the initial summary prospectus and the updating summary prospectus and print and mail the required variable contract and portfolio company documents upon request.[856]

F. Request for Comments

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comments to: (1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of our estimate of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) determine whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

In addition to these general requests for comment, we also request comment specifically on the following issues:

- Our analysis relies upon certain assumptions, such as all registrants on Forms N–3, N–4, and N–6 already have websites, and 95% of these registrants would choose to use a summary prospectus under proposed rule 498A. Do commenters agree with these assumptions?
- We also assume that 100% of registrants that rely on 498A to deliver contract summary prospectuses also would rely on the rule for the new delivery option for portfolio company prospectuses. Do commenters agree with these assumptions?

Persons wishing to submit comments on the collection of information requirements of the proposed rules and amendments should direct them to the OMB, Attention Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to, Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File No. S7–23–18. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–23–18, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this release.

V. Regulatory Flexibility Certification

Section 3(a) of the Regulatory Flexibility Act of 1980 (''RFA'') [857] requires us to undertake an initial regulatory flexibility analysis (''IRFA'') of the proposed rule and proposed form amendments on small entities unless we certify that the rule and form amendments, if adopted, would not have a significant economic impact on a substantial number of small entities.[858] Pursuant to 5 U.S.C. 605(b), we hereby certify that proposed new rule 498A under the Securities Act and proposed amendments to Forms N–3, N–4, and N–6 under the Securities Act and the Investment Company Act, would not, if adopted have a significant economic impact on a substantial number of small entities.

We are proposing new rule 498A under the Securities Act pursuant to authority set forth in Sections 5, 6, 7, 10, 19, and 28 of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, 77s, and 77z–3] and Sections 8, 24(a), 24(g), 30, and 38 of the Investment Company Act [15 U.S.C. 80a–8, 80a–24(a), 80a–24(g), 80a–29, and 80a–37]. Proposed rule 498A would provide a new option that would permit a person to satisfy its variable annuity and variable life insurance contract prospectus delivery obligations under the Securities Act by providing a summary prospectus to investors.

A person would have the option of satisfying its prospectus delivery obligations for variable contracts under section 5(b)(2) of the Securities Act by: (1) Sending or giving to new investors the key information contained in a variable contract statutory prospectus in the form of an initial summary prospectus; (2) sending or giving to existing investors each year a brief description of certain changes to the contract, and a subset of the information in the initial summary prospectus, in the form of an updating summary prospectus; and (3) providing the statutory prospectus and other materials online. The proposed rule would require a registrant (or the financial intermediary distributing the variable contact) to send the variable contract statutory prospectus and other materials to the investor in paper or by email upon request. Additionally, the proposed rule would permit satisfaction of any portfolio company prospectus delivery obligations by posting the portfolio company summary and statutory prospectuses online at the website address specified on the variable contract summary prospectus.[859]

Investors would also be able to request and receive those documents in paper or electronically at no cost. No variable contract separate accounts would be required to send or give a summary prospectus.

We are also proposing amendments to Forms N–3, N–4, and N–6 pursuant to authority set forth in Sections 5, 6, 7, 10, and 19(a) of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, and 77s(a)] and Sections 8, 24(a), 24(g), 30, and 38 of the Investment Company Act [15 U.S.C. 80a–8, 80a–24(a), 80a–24(g), 80a–29, and 80a–37]. The proposed amendments to Forms N–3, N–4, and N–6 are intended to update and enhance the disclosures to investors in variable annuity and variable life insurance contracts, and to implement the proposed summary prospectus framework.

Specifically, the proposed amendments would add new disclosures requiring, among other things, an overview of the contract, key information, consolidated risk disclosures, a list of the available portfolio companies with expense and performance information, and information about standard and optional benefits that a contract may offer. The proposed amendments also would standardize presentation requirements across registration statement forms to make the information more accessible to retail investors. We are also proposing to require variable contracts to use the

N–4, and N–6 + $329,581 to comply with the proposed website posting requirements for documents relating to variable contracts + $327,430 to comply with the proposed website posting requirements for documents relating to portfolio companies = $5,565,971.

[856] This estimate is based on the following calculation: $3,469,875 to prepare and update initial and updating summary prospectuses for offerings on Forms N–3, N–4, and N–6 + $344,850 to comply with the proposed printing and mailing requirements for documents relating to variable contracts + $342,475 to comply with the proposed printing and mailing requirements for documents relating to portfolio companies = $4,157,200.

[857] 5 U.S.C. 603(a).

[858] 5 U.S.C. 605(b).

[859] This option would not apply to Form N–3 registrants, which do not have underlying portfolio companies due to a single-tier investment company structure.

The obligation to post these documents online would fall upon the party that has the prospectus delivery obligation for the portfolio company prospectus. For purposes of this Regulatory Flexibility Act analysis, we assume that delivery of portfolio company prospectuses would be done by registrants, rather than portfolio companies or financial intermediaries such as broker-dealers. *See supra* note 851 (making the same assumption for purposes of the Paperwork Reduction Act analysis).

Inline XBRL format for the submission of certain required disclosures in the variable contract statutory prospectus.[860] All insurance company separate accounts offering variable annuity and variable life insurance contracts would be subject to the proposed disclosure and reporting requirements, regardless of size.

Generally, an investment company is a small entity if, together with other investment companies in the same group of related investment companies, it has net assets of $50 million or less as of the end of its most recent fiscal year.[861] The analysis is slightly different for insurance company separate accounts. Because state law generally treats separate account assets as the property of the sponsoring insurance company, rule 0–10 aggregates each separate account's assets with the assets of the sponsoring insurance company, together with assets held in other sponsored separate accounts.[862] As a result, the Commission expects few, if any, separate accounts to be treated as small entities.

For this reason, we believe the new proposed rule 498A and the proposed amendments to Forms N–3, N–4, and N–6, would not, if adopted, have a significant economic impact on a substantial number of small entities.

We encourage written comments regarding this certification. We solicit comment as to whether new rule 498A and the proposed amendments to Forms N–3, N–4, and N–6 could have an effect on small entities that has not been considered. We ask that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of such impact.

VI. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,'' [863] the Commission must advise OMB whether a proposed regulation constitutes a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results in or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on whether our proposal would be a ''major rule'' for purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VII. Statutory Authority and Text of Proposed Amendments

The Commission is proposing the rules and forms contained in this document under the authority set forth in the Securities Act, particularly, sections 10, 19, and 28 thereof [15 U.S.C. *77a et seq.*], the Exchange Act, particularly, section 23 thereof [15 U.S.C. 78a *et seq.*], the Investment Company Act, particularly, sections 8, 30, and 38 thereof [15 U.S.C. 80a *et seq.*], and 44 U.S.C. 3506, 3507.

List of Subjects

17 CFR Parts 230, 270, and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

17 CFR Part 232

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 239 and 240

Reporting and recordkeeping requirements, Securities.

Text of Proposed Rule and Form Amendments

For reasons set forth in the preamble, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

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

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

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

■ 2. Amend § 230.159A by revising paragraph (a)(2) to read as follows:

§ 230.159A Certain definitions for purposes of Section 12(a)(2) of the Act.

(a) * * *

(2) Any free writing prospectus as defined in § 230.405 (Rule 405) relating to the offering prepared by or on behalf of the issuer or used or referred to by the issuer and, in the case of an issuer that is an open-end management company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or a separate account (as defined in Section 2(a)(14) of the Securities Act) (15 U.S.C. 77b(a)(14)) registered under the Investment Company Act of 1940 on §§ 239.17a and 274.11b of this chapter (Form N–3), §§ 239.17b and 274.11c of this chapter (Form N–4), or §§ 239.17c and 274.11d of this chapter (Form N–6), any summary prospectus relating to the offering provided pursuant to § 230.498 (Rule 498) or § 230.498A (Rule 498A), respectively;

* * * * *

■ 3. Amend § 230.421 by adding paragraph (e) to read as follows:

§ 230.421 Presentation of information in prospectuses.

* * * * *

(e) A summary prospectus prepared and filed (except a summary prospectus filed by an open-end management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or a separate account (as defined in Section 2(a)(14) of the Securities Act (15 U.S.C. 77b(a)(14)) registered under the Investment Company Act of 1940 on §§ 239.17a and 274.11b of this chapter (Form N–3), §§ 239.17b and 274.11c of this chapter (Form N–4), or §§ 239.17c and 274.11d of this chapter (Form N–6)) as part of a registration statement in accordance with this rule shall be deemed to be a prospectus permitted under section 10(b) of the Act (15 U.S.C. 77j(b)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)) if the form used for registration of the securities to be offered provides for the use of a summary prospectus and the following conditions are met:

■ 4. Amend § 230.431 by revising the introductory text to paragraph (a) to read as follows:

§ 230.431 Summary prospectuses.

(a) A summary prospectus prepared and filed (except a summary prospectus filed by an open-end management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or a separate account (as defined in Section 2(a)(14) of the Securities Act (15 U.S.C. 77b(a)(14)) registered under the Investment Company Act of 1940 on §§ 239.17a and 274.11b of this chapter (Form N–3), §§ 239.17b and 274.11c of this chapter (Form N–4), or §§ 239.17c and 274.11d of this chapter (Form N–6) as part of a registration statement in accordance with this rule shall be

[860] *See supra* note 615.

[861] 17 CFR 270.0–10(a).

[862] Rule 0–10(b).

[863] 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).

deemed to be a prospectus permitted under section 10(b) of the Act (15 U.S.C. 77j(b)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)) if the form used for registration of the securities to be offered provides for the use of a summary prospectus and the following conditions are met:

* * * * *

■ 5. Amend § 230.482 by revising paragraph (a) to read as follows:

§ 230.482 Advertising by an investment company as satisfying requirements of section 10.

(a) *Scope of rule.* This rule applies to an advertisement or other sales material (*advertisement*) with respect to securities of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (*1940 Act*), or a business development company, that is selling or proposing to sell its securities pursuant to a registration statement that has been filed under the Act. This section does not apply to an advertisement that is excepted from the definition of prospectus by section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)), § 230.498(d), § 230.498A(g), or § 230.498A(j)(2), or to a summary prospectus under § 230.498 or § 230.498A. An advertisement that complies with this section, which may include information the substance of which is not included in the prospectus specified in section 10(a) of the Act (15 U.S.C 77j(a)), will be deemed to be a prospectus under section 10(b) of the Act (15 U.S.C. 77j(b)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)).

Note to paragraph (a): The fact that an advertisement complies with this section does not relieve the investment company, underwriter, or dealer of any obligations with respect to the advertisement under the antifraud provisions of the federal securities laws. For guidance about factors to be weighed in determining whether statements, representations, illustrations, and descriptions contained in investment company advertisements are misleading, see § 230.156. In addition, an advertisement that complies with this section is subject to the legibility requirements of § 230.420.

* * * * *

■ 6. Amend § 230.485 by revising paragraph (c)(3) to read as follows:

§ 230.485 Effective date of post-effective amendments filed by certain registered investment companies.

* * * * *

(c) * * *

(3) A registrant's ability to file a post-effective amendment, other than an amendment filed solely for purposes of submitting an Interactive Data File, under paragraph (b) of this section is automatically suspended if a registrant fails to submit any Interactive Data File as required by General Instruction C.3.(g) of §§ 239.15A and 274.11A of this chapter (Form N–1A), General Instruction C.3.(h) of §§ 239.17a and 274.11b of this chapter (Form N–3), General Instruction C.3.(h) of §§ 239.17b and 274.11c of this chapter (Form N–4), or General Instruction C.3.(h) of §§ 239.17c and 274.11d of this chapter (Form N–6). A suspension under this paragraph (c)(3) shall become effective at such time as the registrant fails to submit an Interactive Data File as required by General Instruction C.3.(g) of Form N–1A, or General Instruction C.3.(h) of Form N–3, General Instruction C.3.(h) of Form N–4, or General Instruction C.3.(h) of Form N–6. Any such suspension, so long as it is in effect, shall apply to any post-effective amendment that is filed after the suspension becomes effective, but shall not apply to any post-effective amendment that was filed before the suspension became effective. Any suspension shall apply only to the ability to file a post-effective amendment pursuant to paragraph (b) of this section and shall not otherwise affect any post-effective amendment. Any suspension under this paragraph (c)(3) shall terminate as soon as a registrant has submitted the Interactive Data File as required by General Instruction C.3.(g) of Form N–1A, General Instruction C.3.(h) of Form N–3, General Instruction C.3.(h) of Form N–4, or General Instruction C.3.(h) of Form N–6.

* * * * *

■ 7. Amend § 230.497 by revising paragraphs (c), (e), and (k) to read as follows:

§ 230.497 Filing of investment company prospectuses—number of copies.

* * * * *

(c) For investment companies filing on §§ 239.15A and 274.11A of this chapter (Form N–1A), §§ 239.14 and 274.11a-1 of this chapter (Form N–2), §§ 239.17a and 274.11b of this chapter (Form N–3), §§ 239.17b and 274.11c of this chapter (Form N–4), or §§ 239.17c and 274.11d of this chapter (Form N–6), within five days after the effective date of a registration statement or the commencement of a public offering after the effective date of a registration statement, whichever occurs later, 10 copies of each form of prospectus and form of Statement of Additional Information used after the effective date in connection with such offering shall be filed with the Commission in the exact form in which it was used. Investment companies filing on Forms N–1A, N–3, N–4, or N–6 must, if applicable pursuant to General Instruction C.3.(g) of Form N–1A, General Instruction C.3.(h) of Form N–3, General Instruction C.3.(h) of Form N–4, or General Instruction C.3.(h) of Form N–6, submit an Interactive Data File (as defined in § 232.11 of this chapter).

* * * * *

(e) For investment companies filing on §§ 239.15A and 274.11A of this chapter (Form N–1A), §§ 239.14 and 274.11a-1 of this chapter (Form N–2), §§ 239.17a and 274.11b of this chapter (Form N–3), §§ 239.17b and 274.11c of this chapter (Form N–4), or §§ 239.17c and 274.11d of this chapter (Form N–6), after the effective date of a registration statement, no prospectus that purports to comply with Section 10 of the Act (15 U.S.C. 77j) or Statement of Additional Information that varies from any form of prospectus or form of Statement of Additional Information filed pursuant to paragraph (c) of this section shall be used until five copies thereof have been filed with, or mailed for filing to the Commission. Investment companies filing on Forms N–1A, N–3, N–4, or N–6 must, if applicable pursuant to General Instruction C.3.(g) of Form N–1A, General Instruction C.3.(h) of Form N–3, General Instruction C.3.(h) of Form N–4, or General Instruction C.3.(h) of Form N–6, submit an Interactive Data File (as defined in § 232.11 of this chapter).

* * * * *

(k) Summary Prospectus filing requirements. This paragraph (k), and not the other provisions of § 230.497, shall govern the filing of summary prospectuses under § 230.498 and § 230.498A. Each definitive form of a summary prospectus under § 230.498 and § 230.498A shall be filed with the Commission no later than the date that it is first used.

■ 8. Amend § 230.498 by revising paragraph (c)(2) to read as follows:

§ 230.498 Summary Prospectuses for open-end management investment companies.

* * * * *

(c) * * *

(2) The Summary Prospectus is not bound together with any materials, except that a Summary Prospectus for a Fund that is available as an investment option in a variable annuity or variable life insurance contract may be bound together with the Statutory Prospectus for the contract (or a summary prospectus for the contract provided under § 230.498A) and Summary Prospectuses and Statutory Prospectuses

for other investment options available in the contract, provided that:

(i) All of the Funds to which the Summary Prospectuses and Statutory Prospectuses that are bound together relate are available to the person to whom such documents are sent or given; and

(ii) A table of contents identifying each Summary Prospectus, Statutory Prospectus, and summary prospectus under § 230.498A that is bound together, and the page number on which it is found, is included at the beginning or immediately following a cover page of the bound materials;

* * * * *

■ 9. Add § 230.498A to read as follows:

§ 230.498A Summary Prospectuses for separate accounts offering variable annuity and variable life insurance contracts.

(a) *Definitions.* For purposes of this section:

(1) *Class* means a class of a Contract that varies principally with respect to distribution-related fees and expenses.

(2) *Contract* means a Variable Annuity Contract or a Variable Life Insurance Contract as defined in paragraphs (a)(14) and (a)(15) of this section, respectively.

(3) *Depositor* means the person primarily responsible for the organization of the Registrant and the person, other than the trustee or custodian, who has continuing functions or responsibilities with respect to the administration of the affairs of the Registrant. ''Depositor'' includes the sponsoring insurance company that establishes and maintains the Registrant.

(4) *Initial Summary Prospectus* means the initial summary prospectus described in paragraph (b) of this section.

(5) *Investment Option* means any portfolio of investments in which a Registrant on Form N–3 invests and which may be selected as an option by the investor.

(6) *Portfolio Company* means any company in which a Registrant on Form N–4 or Form N–6 invests and which may be selected as an option by the investor.

(7) *Portfolio Company Prospectus* means the Statutory Prospectus of a Portfolio Company and a summary prospectus of a Portfolio Company permitted by § 230.498 of this chapter.

(8) *Prospectus Supplement* means a correction or update to a prospectus filed with the Commission pursuant to § 230.497(e) of this chapter.

(9) *Registrant* means a separate account (as defined in section 2(a)(14) of the Securities Act (15 U.S.C. 77b(a)(14)) that has an effective registration statement on §§ 239.17a and 274.11b (Form N–3), §§ 239.17b and 274.11c (Form N–4), or §§ 239.17c and 274.11d (Form N–6) and that has a current prospectus that satisfies the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)).

(10) *Statement of Additional Information* means the statement of additional information required by Part B of Form N–1A, Form N–3, Form N–4, or Form N–6.

(11) *Statutory Prospectus* means a prospectus that satisfies the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)).

(12) *Summary Prospectus* refers to both the Initial Summary Prospectus and the Updating Summary Prospectus.

(13) *Updating Summary Prospectus* means the updating summary prospectus described in paragraph (c) of this section.

(14) *Variable Annuity Contract* means any accumulation contract or annuity contract, any portion thereof, or any unit of interest or participation therein pursuant to which the value of the contract, either during an accumulation period or after annuitization, or both, may vary with the investment performance of any separate account.

(15) *Variable Life Insurance Contract* means a life insurance contract that provides for death benefits and cash values that may vary with the investment performance of any separate account.

(b) *General Requirements for Initial Summary Prospectus.* An Initial Summary Prospectus that complies with this paragraph will be deemed to be a prospectus that is authorized under section 10(b) of the Act (15 U.S.C. 77j(b)) and section 24(g) of the Investment Company Act (15 U.S.C. 80a–24(g)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)).

(1) *Scope of Initial Summary Prospectus.* An Initial Summary Prospectus may only describe a single Contract (but may describe more than one Class of the Contract) currently offered by the Registrant under the Statutory Prospectus to which the Initial Summary Prospectus relates.

(2) *Cover Page or Beginning of Initial Summary Prospectus.* Include on the front cover page or the beginning of the Initial Summary Prospectus:

(i) The Depositor's name.

(ii) The Registrant's name.

(iii) The name of the Contract, and the Class or Classes if any, to which the Initial Summary Prospectus relates.

(iv) A statement identifying the document as a ''Summary Prospectus for New Investors.''

(v) The approximate date of the first use of the Initial Summary Prospectus.

(vi) The following legend:

This Summary Prospectus summarizes key features of the [name of Contract]. You should read this Summary Prospectus carefully, particularly the section titled Important Information You Should Consider About the [Contract].

Before you invest, you should review the prospectus for the [name of Contract], which contains more information about the [Contract], including its features, benefits, and risks. You can find the prospectus and other information about the [Contract] online at [____]. You can also obtain this information at no cost by calling [____] or by sending an email request to [____].

You may cancel your [Contract] within 10 days of receiving it without paying fees or penalties. In some states, this cancellation period may be longer. Upon cancellation, you will receive either a full refund of the amount you paid with your application or your total contract value. You should review the prospectus, or consult with your investment professional, for additional information about the specific cancellation terms that apply.

Additional information about certain investment products, including [variable annuities/variable life insurance contracts], has been prepared by the Securities and Exchange Commission's staff and is available at *Investor.gov*.

(A) A registrant may modify the legend so long as the modified legend contains comparable information.

(B) The legend must provide an internet address, other than the address of the Commission's electronic filing system; toll-free telephone number; and email address that investors can use to obtain the Statutory Prospectus and other information, request other information about the Contract, and to make investor inquiries. The internet website address must be specific enough to lead investors directly to the Statutory Prospectus and other materials that are required to be accessible under paragraph (h)(1) of this section, rather than to the home page or other section of the website on which the materials are posted. The website could be a central site with prominent links to each document. The legend may indicate, if applicable, that the Statutory Prospectus and other information are available from a financial intermediary (such as a broker-dealer) through which the Contract may be purchased or sold.

(C) If a Registrant incorporates any information by reference into the Summary Prospectus, the legend must

identify the type of document (*e.g.,* Statutory Prospectus) from which the information is incorporated and the date of the document. If a Registrant incorporates by reference a part of a document, the legend must clearly identify the part by page, paragraph, caption, or otherwise. If information is incorporated from a source other than the Statutory Prospectus, the legend must explain that the incorporated information may be obtained, free of charge, in the same manner as the Statutory Prospectus.

(vii) The following legend that indicates that the Securities and Exchange Commission has not approved or disapproved of the Contract or passed upon the accuracy or adequacy of the disclosure in the summary prospectus and that any contrary representation is a criminal offense. The legend may be in one of the following or other clear and concise language:

Example A to paragraph (b)(2)(vii): The Securities and Exchange Commission has not approved or disapproved the [Contract] or passed upon the adequacy of this summary prospectus. Any representation to the contrary is a criminal offense.

Example B to paragraph (b)(2)(vii): The Securities and Exchange Commission has not approved or disapproved of the [Contract] or determined if this summary prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

(3) *Back Cover Page or Last Page of Initial Summary Prospectus.* Include on the bottom of the back cover page or the last page of the Initial Summary Prospectus the EDGAR contract identifier for the contract in type size smaller than that generally used in the prospectus (*e.g.,* 8-point modern type).

(4) *Table of Contents.* An Initial Summary Prospectus may include a table of contents meeting the requirements of § 230.481(c) of this chapter.

(5) *Contents of Initial Summary Prospectus.* An Initial Summary Prospectus must contain the information required by this paragraph (b)(5) with respect to the applicable registration form, and only the information required by this paragraph (b)(5), in the order provided below.

(i) Under the heading ''Overview of the [Variable Annuity/Life Insurance Contract],'' the information required by Item 2 of Form N–3, Item 2 of Form N–4, or Item 2 of Form N–6.

(ii) Under the heading ''Important Information You Should Consider About the [Contract],'' the information required by Item 3 of Form N–3, Item 3 of Form N–4, or Item 3 of Form N–6.

(iii) Under the heading ''Standard Death Benefit,'' the information required by Item 11(a) of Form N–3, Item 10(a) of Form N–4, or Item 10(a) of Form N–6.

(iv) Under the heading ''Other Benefits Available Under the [Contract],'' the information required by Item 12(a) of Form N–3, Item 11(a) of Form N–4, or Item 11(a) of Form N–6.

(v) Under the heading ''Buying the [Contract],'' the information required by Item 13(a) of Form N–3, Item 12(a) of Form N–4, or Items 9(a) through 9(e) of Form N–6.

(vi) Under the heading ''How Your [Contract] Can Lapse,'' the information required by Item 14 of Form N–6.

(vii) Under the heading ''Surrendering Your [Contract] or Making Withdrawals: Accessing the Money in Your [Contract],'' the information required by Item 14(a) of Form N–3, Item 13(a) of Form N–4, or Item 12(a) of Form N–6.

(viii) Under the heading ''Additional Information About Fees,'' the information required by Item 4 of Form N–3, Item 4 of Form N–4, or Item 4 of Form N–6.

(ix) Under the heading ''Appendix: [Portfolio Companies] Available Under the [Contract],'' include as an appendix the information required by Item 19 of Form N–3, Item 18 of Form N–4, or Item 18 of Form N–6. If the appendix includes the information required by Item 19 of Form N–3, the appendix shall also include the following introductory legend: ''The following is a list of [Investment Options] currently available under the [Contract], which is subject to change as discussed in [the Statutory Prospectus for the Contract]. More information about the [Investment Options] is available in [the Statutory Prospectus for the Contract], which can be requested at no cost by following the instructions on [the front cover page or beginning of the Summary Prospectus].'' This introductory legend also may indicate, if applicable, that the prospectus and other information are available from a financial intermediary (such as an insurance sales agent or broker-dealer) through which the Contract may be purchased or sold. Alternatively, an Initial Summary Prospectus for a Contract registered on Form N–3 may include the information required by Item 20 of Form N–3 under the heading ''Additional Information About Investment Options Available Under the Contract.''

(c) *General Requirements for Updating Summary Prospectus.* An Updating Summary Prospectus that complies with this paragraph (c) will be deemed to be a prospectus that is authorized under section 10(b) of the Act (15 U.S.C. 77j(b)) and section 24(g) of the Investment Company Act (15 U.S.C. 80a–24(g)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)).

(1) *Use of Updating Summary Prospectus.* A Registrant may only use an Updating Summary Prospectus if the Registrant uses an Initial Summary Prospectus for each currently offered Contract described under the Statutory Prospectus to which the Updating Summary Prospectus relates.

(2) *Scope of Updating Summary Prospectus.* An Updating Summary Prospectus may describe one or more Contracts (and more than one Class) described under the Statutory Prospectus to which the Updating Summary Prospectus relates.

(3) *Cover Page or Beginning of Updating Summary Prospectus.* Include on the front cover page or at the beginning of the Updating Summary Prospectus:

(i) The Depositor's name.

(ii) The Registrant's name.

(iii) The name of the Contract(s) and the Class or Classes, if any, to which the Updating Summary Prospectus relates.

(iv) A statement identifying the document as an ''Updating Summary Prospectus.''

(v) The approximate date of the first use of the Updating Summary Prospectus.

(vi) The following legend, which must meet the requirements of paragraphs (b)(2)(vi)(A) through (C) of this section:

You should read this Summary Prospectus carefully, particularly the section titled Important Information You Should Consider About the [Contract].

An updated prospectus for the [Contract] is currently available online, which contains more information about the [Contract], including its features, benefits, and risks. You can find the prospectus and other information about the [Contract] online at [____]. You can also obtain this information at no cost by calling [____] or by sending an email request to [____].

Additional information about certain investment products, including [variable annuities/variable life insurance contracts], has been prepared by the Securities and Exchange Commission's staff and is available at *Investor.gov.*

(vii) The legend required by paragraph (b)(2)(vii) of this section.

(4) *Back Cover Page or Last Page of Updating Summary Prospectus.* Include on the bottom of the back cover page or the last page of the Updating Summary

Prospectus the EDGAR contract identifier(s) for each contract in type size smaller than that generally used in the prospectus (*e.g.,* 8-point modern type).

(5) *Table of Contents.* An Updating Summary Prospectus may include a table of contents meeting the requirements of § 230.481(c) of this chapter.

(6) *Contents of Updating Summary Prospectus.*

An Updating Summary Prospectus must contain the information required by this paragraph (c)(6) with respect to the applicable registration form, in the order provided below.

(i) If any changes have been made with respect to the Contract after the Registrant has sent or given its most recent Updating Summary Prospectus or Statutory Prospectus with respect to the availability of Investment Options (for Registrants on Form N–3) or Portfolio Companies (for Registrants on Forms N–4 and N–6) under the Contract, or the disclosure that the Registrant included in response to Item 4 (Fee Table), Item 11 (Standard Death Benefit), or Item 12 (Other Benefits Available Under the Contract) of Form N–3 ; Item 4 (Fee Table), Item 10 (Standard Death Benefit), or Item 11 (Other Benefits Available Under the Contract) of Form N–4; and Item 4 (Fee Table), Item 10 (Standard Death Benefit), or Item 11 (Other Benefits Available Under the Contract) of Form N–6, include the following as applicable, under the heading ''Updated Information About Your [Contract]'':

(A) The following legend: ''The information in this [Updating Summary Prospectus] is a summary of certain [Contract] features that have changed since the [Updating Summary Prospectus] dated [date]. This may not reflect all of the changes that have occurred since you entered into your Contract.''

(B) As applicable, provide a concise description of each change specified in paragraph (c)(6)(i) of this section. Provide enough detail to allow investors to understand the change and how it will affect investors.

(ii) In addition to the changes specified in paragraph (c)(6)(i) of this section, a Registrant may provide a concise description of any other change with respect to the Contract within the time period that paragraph (c)(6)(i) of this section specifies, under the same heading that paragraph (c)(6)(i) of this section specifies. Any additional information included pursuant to this paragraph should not, by its nature, quantity, or manner of presentation, obscure or impede understanding of the information that paragraph (c)(6)(i) of this section requires.

(iii) Under the heading ''Important Information You Should Consider About the [Contract],'' provide the information required by Item 3 of Form N–3, Item 3 of Form N–4, or Item 3 of Form N–6.

(iv) Under the heading ''Appendix: [Portfolio Companies/Investment Options] Available Under the [Contract],'' include as an appendix the information required by Item 19 of Form N–3, Item 18 of Form N–4, or Item 18 of Form N–6. If the appendix includes the information required by Item 19 of Form N–3, the appendix shall also include the following introductory legend: ''The following is a list of [Investment Options] currently available under the [Contract], which is subject to change as discussed in [the Statutory Prospectus for the Contract]. More information about the [Investment Options] is available in [the Statutory Prospectus for the Contract], which can be requested at no cost by following the instructions on [the front cover page or beginning of the Summary Prospectus].'' This introductory legend also may indicate, if applicable, that the prospectus and other information are available from a financial intermediary (such as an insurance sales agent or broker-dealer) through which the Contract may be purchased or sold. Alternatively, an Updating Summary Prospectus for a Contract registered on Form N–3 may include, under the heading ''Additional Information About Investment Options Available Under the Contract,'' the information required by Item 20 of Form N–3.

(d) *Incorporation by Reference into a Summary Prospectus.* (1) Except as provided by paragraph (d)(2) of this section, information may not be incorporated by reference into a Summary Prospectus. Information that is incorporated by reference into a Summary Prospectus in accordance with paragraph (d)(2) of this section need not be sent or given with the Summary Prospectus.

(2) A Registrant may incorporate by reference into a Summary Prospectus any or all of the information contained in the Registrant's Statutory Prospectus and Statement of Additional Information, and any information from the Registrant's reports under § 270.30e–1 (Rule 30e–1) that the Registrant has incorporated by reference into the Registrant's Statutory Prospectus, provided that:

(i) The conditions of paragraphs (b)(2)(vi)(B), (c)(3)(vi), and (h) of this section are met;

(ii) A Registrant may not incorporate by reference into a Summary Prospectus information that paragraphs (b) and (c) of this section require to be included in an Initial Summary Prospectus or Updating Summary Prospectus, respectively; and

(iii) Information that is permitted to be incorporated by reference into the Summary Prospectus may be incorporated by reference into the Summary Prospectus only by reference to the specific document that contains the information, not by reference to another document that incorporates such information by reference.

(3) For purposes of § 230.159 of this chapter, information is conveyed to a person not later than the time that a Summary Prospectus is received by the person if the information is incorporated by reference into the Summary Prospectus in accordance with paragraph (d)(2) of this section.

(e) *Definitions.* Define special terms used in the Initial Summary Prospectus and Updating Summary Prospectus using any presentation style that clearly conveys their meaning to investors.

(f) *Transfer of the Contract Security.* Any obligation under section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)) to have a Statutory Prospectus precede or accompany the carrying or delivery of a Contract security in an offering registered on Form N–3, Form N–4, or Form N–6 is satisfied if:

(1) A Summary Prospectus is sent or given no later than the time of the carrying or delivery of the Contract security (an Initial Summary Prospectus in the case of a purchase of a new Contract, or an Updating Summary Prospectus in the case of additional purchase payments in an existing Contract);

(2) The Summary Prospectus is not bound together with any materials except Portfolio Company Prospectuses for Portfolio Companies available as investment options under the Contract, provided that:

(i) All of the Portfolio Companies are available as investment options to the person to whom such documents are sent or given; and

(ii) A table of contents identifying each Portfolio Company Prospectus that is bound together, and the page number on which each document is found, is included at the beginning or immediately following a cover page of the bound materials.

(3) The Summary Prospectus that is sent or given satisfies the requirements of paragraph (b) or paragraph (c) of this section, as applicable, at the time of the carrying or delivery of the Contract security; and

(4) The conditions set forth in paragraph (h) of this section are satisfied.

(g) *Sending Communications.* A communication relating to an offering registered on Form N–3, Form N–4, or Form N–6 sent or given after the effective date of a Contract's registration statement (other than a prospectus permitted or required under section 10 of the Act) shall not be deemed a prospectus under section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)) if:

(1) It is proved that prior to or at the same time with such communication a Summary Prospectus was sent or given to the person to whom the communication was made;

(2) The Summary Prospectus is not bound together with any materials, except as permitted by paragraph (f)(2) of this section;

(3) The Summary Prospectus that was sent or given satisfies the requirements of paragraph (b) or paragraph (c) of this section, as applicable, at the time of such communication; and

(4) The conditions set forth in paragraph (h) of this section are satisfied.

(h) *Availability of the Statutory Prospectus and Certain Other Documents.*

(1) The current Initial Summary Prospectus, Updating Summary Prospectus, Statutory Prospectus, Statement of Additional Information, and in the case of a Registrant on Form N–3, the Registrant's most recent annual and semi-annual reports to shareholders under § 270.30e–1, are publicly accessible, free of charge, at the website address specified on the cover page or beginning of the Summary Prospectuses, on or before the time that the Summary Prospectuses are sent or given and current versions of those documents remain on the website through the date that is at least 90 days after:

(i) In the case of reliance on paragraph (f) of this section, the date that the Contract security is carried or delivered; or

(ii) In the case of reliance on paragraph (g) of this section, the date that the communication is sent or given.

(2) The materials that are accessible in accordance with paragraph (h)(1) of this section must be presented on the website in a format, or formats, that:

(i) Are human-readable and capable of being printed on paper in human-readable format;

(ii) Permit persons accessing the Statutory Prospectus or Statement of Additional Information for the Contract to move directly back and forth between each section heading in a table of contents of such document and the section of the document referenced in that section heading; provided that, in the case of the Statutory Prospectus, the table of contents is either required by § 230.481(c) of this chapter or contains the same section headings as the table of contents required by § 230.481(c) of this chapter; and

(iii) Permit persons accessing a Summary Prospectus to move directly back and forth between:

(A) Each section of the Summary Prospectus and any section of the Statutory Prospectus and Contract Statement of Additional Information that provides additional detail concerning that section of the Summary Prospectus; or

(B) Links located at both the beginning and end of the Summary Prospectus, or that remain continuously visible to persons accessing the Summary Prospectus, and tables of contents of both the Statutory Prospectus and the Contract Statement of Additional Information that meet the requirements of paragraph (h)(2)(ii) of this section.

(iv) Permit persons accessing the Summary Prospectus to view the definition of each special term used in the Summary Prospectus (as required by paragraph (e) of this section) upon command (*e.g.,* by moving or ''hovering'' the computer's pointer or mouse over the term, or selecting the term on a mobile device); or permits persons accessing the Contract Summary Prospectus to move directly back and forth between each special term and the corresponding entry in any glossary or list of definitions in the Contract Summary Prospectus (as described in paragraph (e) of this section).

(3) Persons accessing the materials specified in paragraph (h)(1) of this section must be able to permanently retain, free of charge, an electronic version of such materials in a format, or formats, that meet each of the requirements of paragraphs (h)(2)(i) and (ii) of this section.

(4) The conditions set forth in paragraphs (h)(1), (h)(2), and (h)(3) of this section shall be deemed to be met, notwithstanding the fact that the materials specified in paragraph (h)(1) of this section are not available for a time in the manner required by paragraphs (h)(1), (h)(2), and (h)(3) of this section, provided that:

(i) The Registrant has reasonable procedures in place to ensure that the specified materials are available in the manner required by paragraphs (h)(1), (h)(2), and (h)(3) of this section; and

(ii) The Registrant takes prompt action to ensure that the specified documents become available in the manner required by paragraphs (h)(1), (h)(2), and (h)(3) of this section, as soon as practicable following the earlier of the time at which it knows or reasonably should have known that the documents are not available in the manner required by paragraphs (h)(1), (h)(2), and (h)(3) of this section.

(i) *Other Requirements*—(1) *Delivery Upon Request.* If paragraph (f) or (g) of this section is relied on with respect to a Contract, the Registrant (or a financial intermediary through which the Contract may be purchased) must send, at no cost to the requestor and by U.S. first class mail or other reasonably prompt means, a paper copy of the Contract Statutory Prospectus, Contract Statement of Additional Information, and in the case of a Registrant on Form N–3, the Registrant's most recent annual and semi-annual reports to shareholders under § 270.30e–1, to any person requesting such a copy within three business days after receiving a request for a paper copy. If paragraph (f) or (g) of this section is relied on with respect to a Contract, the Registrant (or a financial intermediary through which Contract may be purchased) must send, at no cost to the requestor, and by email, an electronic copy of any of the documents listed in this paragraph (i)(1) to any person requesting a copy of such document within three business days after receiving a request for an electronic copy. The requirement to send an electronic copy of a document may be satisfied by sending a direct link to the online document; provided that a current version of the document is directly accessible through the link from the time that the email is sent through the date that is six months after the date that the email is sent and the email explains both how long the link will remain useable and that, if the recipient desires to retain a copy of the document, he or she should access and save the document.

(2) *Greater Prominence.* If paragraph (f) or (g) of this section is relied on with respect to a Contract, the Summary Prospectus shall be given greater prominence than any materials that accompany the Summary Prospectus.

(3) *Convenient for Reading and Printing.* If paragraph (f) or (g) of this section is relied on with respect to a Contract:

(i) The materials that are accessible in accordance with paragraph (h)(1) of this section must be presented on the website in a format, or formats, that are convenient for both reading online and printing on paper; and

(ii) Persons accessing the materials that are accessible in accordance with

paragraph (h)(1) of this section must be able to permanently retain, free of charge, an electronic version of such materials in a format, or formats, that are convenient for both reading online and printing on paper.

(4) *Website Addresses and Cross-References.* Any website address or cross-reference that is included in an electronic version of the Summary Prospectus must be an active hyperlink. This requirement does not apply to electronic versions of a Summary Prospectus that are filed on the EDGAR system. Rule 105 of Regulation S–T (§ 232.105 of this chapter) prohibits hyperlinking to websites, locations, or other documents that are outside of the EDGAR system.

(5) *Compliance with paragraph (i) not a condition to reliance on paragraphs (f) or (g).* Compliance with this paragraph (i) of this section is not a condition to the ability to rely on paragraph (f) or (g) of this section with respect to a Contract, and failure to comply with paragraph (i) does not negate the ability to rely on paragraph (f) or (g) of this section.

(j) *Portfolio Company Prospectuses.* (1) *Delivery.* Any obligation under section 5(b)(2) of the Act to deliver a Statutory Prospectus for a Portfolio Company available as an investment option under a Contract is satisfied if:

(i) An Initial Summary Prospectus is used for each currently offered Contract described under the related registration statement;

(ii) A summary prospectus is used for the Portfolio Company (if the Portfolio Company is registered on Form N–1A); and

(iii) The current summary prospectus, Statutory Prospectus, Statement of Additional Information, and most recent annual and semi-annual reports to shareholders under § 270.30e–1 of this chapter for the Portfolio Company are publicly accessible, free of charge, at the website address specified on the cover page or beginning of the Contract Summary Prospectuses, and are accessible under the conditions set forth in paragraphs (h)(1), (h)(2)(i) and (ii), (h)(3), and (h)(4) of this section, and paragraphs (i)(1) and (i)(3) of this section, with respect to the availability of documents relating to the Contract.

(2) *Communications.* Any communication relating to a Portfolio Company (other than a prospectus permitted or required under section 10 of the Act) shall not be deemed a prospectus under section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)) if the conditions set forth in paragraph (j)(1) of this section are satisfied.

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 10. The authority citation for part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78*o*(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, 7201 *et seq.,* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 11. Amend § 232.11 by revising the definition of ''Related Official Filing'' to read as follows:

§ 232.11 Definition of terms used in part 232.

* * * * *

Related Official Filing. The term *Related Official Filing* means the ASCII or HTML format part of the official filing with which all or part of an Interactive Data File appears as an exhibit or, in the case of a filing on §§ 239.15A and 274.11A of this chapter (Form N–1A), General Instruction C.3.(h) of §§ 239.17a and 274.11b of this chapter (Form N–3), General Instruction C.3.(h) of §§ 239.17b and 274.11c of this chapter (Form N–4), and General Instruction C.3.(h) of §§ 239.17c and 274.11d of this chapter (Form N–6), the ASCII or HTML format part of an official filing that contains the information to which an Interactive Data File corresponds.

* * * * *

■ 12. Amend § 232.405 by revising the introductory text, paragraphs (a)(2), (a)(3)(i) introductory text, (a)(3)(ii), (a)(4), (b)(1) introductory text, (b)(2), (f)(1)(i) introductory text and the Note to § 232.405 to read as follows:

§ 232.405 Interactive Data File submissions.

This section applies to electronic filers that submit Interactive Data Files. Section 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S–K), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of § 239.40 of this chapter) (Form F–10), paragraph 101 of the Instructions as to Exhibits of § 249.220f of this chapter (Form F–20), paragraph B.(15) of the General Instructions to § 249.240f of this chapter (Form 40–F), paragraph C.(6) of the General Instructions to § 249.306 of this chapter (Form 6–K), General Instruction C.3.(g) of §§ 239.15A and 274.11A of this chapter (Form N–1A), General Instruction C.3.(h) of §§ 239.17a and 274.11b of this chapter (Form N–3), General Instruction C.3.(h) of §§ 239.17b and 274.11c of this chapter (Form N–4), and General Instruction C.3.(h) of §§ 239.17c and 274.11d of this chapter (Form N–6) specify when electronic filers are required or permitted to submit an Interactive Data File (as defined in § 232.11), as further described in the note to this section. This section imposes content, format and submission requirements for an Interactive Data File, but does not change the substantive content requirements for the financial and other disclosures in the Related Official Filing (as defined in § 232.11).

(a) * * *

(2) Be submitted only by an electronic filer either required or permitted to submit an Interactive Data File as specified by § 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S–K), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of § 239.40 of this chapter (Form F–10), paragraph 101 of the Instructions as to Exhibits of § 249.220f of this chapter (Form 20–F), paragraph B.(15) of the General Instructions to § 249.240f of this chapter (Form 40–F), paragraph C.(6) of the General Instructions to § 249.306 of this chapter (Form 6–K), General Instruction C.3.(g) of §§ 239.15A and 274.11A of this chapter (Form N–1A), General Instruction C.3.(h) of §§ 239.17a and 274.11b of this chapter (Form N–3), General Instruction C.3.(h) of §§ 239.17b and 274.11c of this chapter (Form N–4), or General Instruction C.3.(h) of §§ 239.17c and 274.11d of this chapter (Form N–6), as applicable;

(3) * * *

(i) If the electronic filer is neither an open-end management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*) nor a separate account (as defined in Section 2(a)(14) of the Securities Act) (15 U.S.C. 77b(a)(14)) registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), and is not within one of the categories specified in paragraph (f)(1)(i) of this section, as partly embedded into a filing with the remainder simultaneously submitted as an exhibit to:

* * * * *

(ii) If the electronic filer is either an open-end management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*) or a separate account (as defined in Section 2(a)(14) of the Securities Act) registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), and is not within one of the categories specified in paragraph (f)(1)(ii) of this section, as partly embedded into a filing with the

remainder simultaneously submitted as an exhibit to a filing that contains the disclosure this section requires to be tagged;

(4) Be submitted in accordance with the EDGAR Filer Manual and, as applicable, either § 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S–K), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of § 239.40 of this chapter (Form F–10), paragraph 101 of the Instructions as to Exhibits of § 249.220f of this chapter (Form 20–F), paragraph B.(15) of the General Instructions to § 249.240f of this chapter (Form 40–F), paragraph C.(6) of the General Instructions to § 249.306 of this chapter (Form 6–K), General Instruction C.3.(g) of §§ 239.15A and 274.11A of this chapter (Form N–1A), General Instruction C.3.(h) of §§ 239.17a and 274.11b of this chapter (Form N–3), General Instruction C.3.(h) of §§ 239.17b and 274.11c of this chapter (Form N–4), or General Instruction C.3.(h) of §§ 239.17c and 274.11d of this chapter (Form N–6).

(b)(1) If the electronic filer is neither an open-end management investment company registered under the Investment Company Act of 1940 nor a separate account (as defined in Section 2(a)(14) of the Securities Act) registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), an Interactive Data File must consist of only a complete set of information for all periods required to be presented in the corresponding data in the Related Official Filing, no more and no less, from all of the following categories:

* * * * *

(2) If the electronic filer is an open-end management investment company registered under the Investment Company Act of 1940) or a separate account (as defined in Section 2(a)(14) of the Securities Act) registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), an Interactive Data File must consist of only a complete set of information for all periods required to be presented in the corresponding data in the Related Official Filing, no more and no less, from the risk/return summary information set forth in (i) Items 2, 3, and 4 of §§ 239.15A and 274.11A of this chapter (Form N–1A), (ii) Items 3, 4, 5, 12, 19 and 20 of §§ 239.17a and 274.11b of this chapter (Form N–3), (iii) Items 3, 4, 5, 11 and 18 of §§ 239.17b and 274.11c of this chapter (Form N–4), or (iv) Items 3, 4, 5, 11 and 18 §§ 239.17c and 274.11d of this chapter (Form N–6) as applicable.

* * * * *

(f) * * * (1) * * *

(i) In the manner specified in paragraph (f)(2) of this section rather than as specified by paragraph (a)(3)(i) of this section: Any electronic filer that is neither an open-end management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*) nor a separate account (as defined in Section 2(a)(14) of the Securities Act) registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), if it is within one of the following categories, provided, however, that an Interactive Data File first is required to be submitted in the manner specified by paragraph (a)(3)(i) of this section for a periodic report on § 249.308a of this chapter (Form 10–Q) if the filer reports on Form 10–Q:

* * * * *

Note to § 232.405: Section 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S–K) specifies the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to § 239.11 of this chapter (Form S–1), § 239.13 of this chapter (Form S–3), § 239.25 of this chapter (Form S–4), § 239.18 of this chapter (Form S–11), § 239.31 of this chapter (Form F–1), § 239.33 of this chapter (Form F–3), § 239.34 of this chapter (Form F–4), § 249.310 of this chapter (Form 10–K), § 249.308a of this chapter (Form 10–Q), and § 249.308 of this chapter (Form 8–K). Paragraph (101) of Part II—Information not Required to be Delivered to Offerees or Purchasers of § 239.40 of this chapter (Form F–10) specifies the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to Form F–10. Paragraph 101 of the Instructions as to Exhibits of § 249.220f of this chapter (Form 20–F) specifies the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to Form 20–F. Paragraph B.(15) of the General Instructions to § 249.240f of this chapter (Form 40–F) and Paragraph C.(6) of the General Instructions to § 249.306 of this chapter (Form 6–K) specify the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to § 249.240f of this chapter (Form 40–F) and § 249.306 of this chapter (Form 6–K). Section 229.601(b)(101) (Item 601(b)(101) of Regulation S–K), paragraph (101) of Part II—Information not Required to be Delivered to Offerees or Purchasers of Form F–10, paragraph 101 of the Instructions as to Exhibits of Form 20–F, paragraph B.(15) of the General Instructions to Form 40–F, and paragraph C.(6) of the General Instructions to Form 6–K all prohibit submission of an Interactive Data File by an issuer that prepares its financial statements in accordance with 17 CFR 210.6–01 through 210.6–10 (Article 6 of Regulation S–X). For an issuer that is an open-end management investment company or separate account registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), General Instruction C.3.(g) §§ 239.15A and 274.11A of this chapter (Form N–1A), General Instruction C.3.(h) of §§ 239.17a and 274.11b of this chapter (Form N–3), General Instruction C.3.(h) of §§ 239.17b and 274.11c of this chapter (Form N–4), or General Instruction C.3.(h) of §§ 239.17c and 274.11d of this chapter (Form N–6), as applicable, specifies the circumstances under which an Interactive Data File must be submitted.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 13. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.;* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1887 (2010); and secs. 503 and 602, Pub. L. 112–106, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

■ 14. Amend § 240.14a–16 by revising paragraph (f)(2)(iii) to read as follows:

§ 240.14a–16 internet availability of proxy materials.

* * * * *

(f) * * *

(2) * * *

(iii) In the case of an investment company registered under the Investment Company Act of 1940, the company's prospectus, a summary prospectus that satisfies the requirements of § 230.498(b), § 230.498A(b), or § 230.498A(c) of this chapter, a Notice under § 270.30e–3 of this chapter, or a report that is required to be transmitted to stockholders by section 30(e) of the Investment Company Act (15 U.S.C. 80a–29(e)) and the rules thereunder; and

* * * * *

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 15. The general authority citation for part 270 continues to read, and sectional authority for § 270.6e–3 is added to read, as follows:

Authority: 15 U.S.C. 80a–1 *et seq.,* 80a–34(d), 80a–37, 80a–39, and Pub. L. 111–203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

Section 270.6e–3 is also issued under 15 U.S.C. 80a–5(e).

* * * * *

■ 16. Amend § 270.0–1 by revising paragraph (e) introductory text and paragraph (e)(2) to read as follows:

§ 270.0–1 Definition of terms used in this part.

* * * * *

(e) Definition of separate account and conditions for availability of exemption under §§ 270.6c–6, 270.6c–7, 270.6c–8, 270.11a–2, 270.14a–2, 270.15a–3, 270.16a–1, 270.22c–1, 270.22d–3, 270.22e–1, 270.26a–1, 270.27i–1, and 270.32a–2 of this chapter.

* * * * *

(2) As conditions to the availability of exemptive Rules 6c–6, 6c–7, 6c–8, 11a–2, 14a–2, 15a–3, 16a–1, 22c–1, 22d–3, 22e–1, 26a–1, 27i–1, and 32a–2, the separate account shall be legally segregated, the assets of the separate account shall, at the time during the year that adjustments in the reserves are made, have a value at least equal to the reserves and other contract liabilities with respect to such account, and at all other times, shall have a value approximately equal to or in excess of such reserves and liabilities; and that portion of such assets having a value equal to, or approximately equal to, such reserves and contract liabilities shall not be chargeable with liabilities arising out of any other business which the insurance company may conduct.

■ 17. Amend § 270.6c–7 by revising the introductory text to read as follows:

§ 270.6c–7 Exemptions from certain provisions of sections 22(e) and 27 for registered separate accounts offering variable annuity contracts to participants in the Texas Optional Retirement Program.

A registered separate account, and any depositor of or underwriter for such account, shall be exempt from the provisions of sections 22(e), 27(i)(2)(A), and 27(d) of the Act (15 U.S.C. 80a–22(e), 80a–27(i)(2)(A), and 80a–27(d), respectively) with respect to any variable annuity contract participating in such account to the extent necessary to permit compliance with the Texas Optional Retirement Program (''Program''), Provided, That the separate, account, depositor, or underwriter for such account:

* * * * *

■ 18. Amend § 270.6c–8 by revising paragraphs (b) and (c) to read as follows:

§ 270.6c–8 Exemptions for registered separate accounts to impose a deferred sales load and to deduct certain administrative charges.

* * * * *

(b) A registered separate account, and any depositor of or principal underwriter for such account, shall be exempt from the provisions of Sections 22(c) and 27(i)(2)(A) of the Act (15 U.S.C. 80a–22(c) and 80a–27(i)(2)(A), respectively) and § 270.22c–1 (Rule 22c–1) to the extent necessary to permit them to impose a deferred sales load on any variable annuity contract participating in such account; provided that the terms of any offer to exchange another contract for the contract are in compliance with the requirements of paragraph (d) or (e) of § 270.11a–2 (Rule 11a–2).

(c) A registered separate account, and any depositor of or principal underwriter for such account, shall be exempt from Sections 22(c) and 27(i)(2)(A) of the Act (15 U.S.C. 80a–22(c) and 80a–27(i)(2)(A), respectively) and § 270.22c–1 (Rule 22c–1) to the extent necessary to permit them to deduct from the value of any variable annuity contract participating in such account, upon total redemption of the contract prior to the last day of the year, the full annual fee for administrative services that otherwise would have been deducted on that date.

■ 19. Revise § 270.6e–2 to read as follows:

§ 270.6e–2 Exemptions for certain variable life insurance separate accounts.

(a) A separate account, and the investment adviser, principal underwriter and depositor of such separate account, shall, except for the exemptions provided in paragraph (b) of this section, be subject to all provisions of the Act and rules and regulations promulgated thereunder as though such separate account were a registered investment company issuing periodic payment plan certificates if:

(1) Such separate account is established and maintained by a life insurance company pursuant to the insurance laws or code of:

(i) Any state or territory of the United States or the District of Columbia; or

(ii) Canada or any province thereof, if it complies to the extent necessary with § 270.7d–1 (Rule 7d–1) under the Act;

(2) The assets of the separate account are derived solely from the sale of variable life insurance contracts as defined in paragraph (c) of this section, and advances made by the life insurance company which established and maintains the separate account (''life insurer'') in connection with the operation of such separate account;

(3) The separate account is not used for variable annuity contracts or for funds corresponding to dividend accumulations or other contract liabilities not involving life contingencies;

(4) The income, gains and losses, whether or not realized, from assets allocated to such separate account, are, in accordance with the applicable variable life insurance contract, credited to or charged against such account without regard to other income, gains or losses of the life insurer;

(5) The separate account is legally segregated, and that portion of its assets having a value equal to, or approximately equal to, the reserves and other contract liabilities with respect to such separate account are not chargeable with liabilities arising out of any other business that the life insurer may conduct;

(6) The assets of the separate account have, at each time during the year that adjustments in the reserves are made, a value at least equal to the reserves and other contract liabilities with respect to such separate account, and at all other times, except pursuant to an order of the Commission, have a value approximately equal to or in excess of such reserves and liabilities; and

(7) The investment adviser of the separate account is registered under the Investment Advisers Act of 1940.

(b) If a separate account meets the requirements of paragraph (a) of this section, then such separate account and the other persons described in paragraph (a) of this section shall be exempt from the provisions of the Act as follows:

(1) Section 7 (15 U.S.C. 80a–7);

(2) Section 8 (15 U.S.C. 80a–8) to the extent that:

(i) For purposes of paragraph (a) of Section 8, the separate account shall file with the Commission a notification on § 274.301 (Form N–6EI–1) which identifies such separate account; and

(ii) For purposes of paragraph (b) of Section 8, the separate account shall file with the Commission a form to be designated by the Commission within 90 days after filing the notification on Form N–6EI–1; provided, however, that if the fiscal year of the separate account ends within this 90 day period the form may be filed within ninety days after the end of such fiscal year.

(3) Section 9 (15 U.S.C. 80a–9) to the extent that:

(i) The eligibility restrictions of Section 9(a) shall not be applicable to those persons who are officers, directors and employees of the life insurer or its affiliates who do not participate directly in the management or administration of the separate account or in the sale of variable life insurance contracts funded by such separate account; and

(ii) A life insurer shall be ineligible pursuant to paragraph (3) of Section 9(a) to serve as investment adviser, depositor of or principal underwriter for a variable life insurance separate account only if an affiliated person of such life insurer, ineligible by reason of paragraph (1) or (2) of Section 9(a), participates directly in the management or administration of the separate account or in the sale of variable life insurance contracts funded by such separate account.

(4) Section 13(a) (15 U.S.C. 80a–13(a)) to the extent that:

(i) An insurance regulatory authority may require pursuant to insurance law or regulation that the separate account make (or refrain from making) certain investments which would result in changes in the subclassification or investment policies of the separate account;

(ii) Changes in the investment policy of the separate account initiated by contractholders or the board of directors of the separate account may be disapproved by the life insurer, provided that such disapproval is reasonable and is based upon a determination by the life insurer in good faith that:

(A) Such change would be contrary to state law; or

(B) Such change would be inconsistent with the investment objectives of the separate account or would result in the purchase of securities for the separate account which vary from the general quality and nature of investments and investment techniques utilized by other separate accounts of the life insurer or of an affiliated life insurance company, which separate accounts have investment objectives similar to the separate account;

(iii) Any action taken in accordance with paragraph (b)(4) (i) or (ii) of this section and the reasons therefor shall be disclosed in the proxy statement for the next meeting of variable life insurance contractholders of the separate account.

(5) Section 14(a) (15 U.S.C. 80a–14(a));

(6)(i) Section 15(a) (15 U.S.C. 80a–15(a)) to the extent this Section requires that the initial written contract pursuant to which the investment adviser serves or acts shall have been approved by the vote of a majority of the outstanding voting securities of the registered company; provided that:

(A) Such investment adviser is selected and a written contract is entered into before the effective date of the registration statement under the Securities Act of 1933, as amended, for variable life insurance contracts which are funded by the separate account, and that the terms of the contract are fully disclosed in such registration statement, and

(B) A written contract is submitted to a vote of variable life insurance contractholders at their first meeting after the effective date of the registration statement under the Securities Act of 1933, as amended, on condition that such meeting shall take place within one year after such effective date, unless the time for the holding of such meeting shall be extended by the Commission upon written request for good cause shown;

(ii) Sections 15 (a), (b) and (c) (15 U.S.C. 80a–15(a), (b), and (c)) to the extent that:

(A) An insurance regulatory authority may disapprove pursuant to insurance law or regulation any contract between the separate account and an investment adviser or principal underwriter;

(B) Changes in the principal underwriter for the separate account initiated by contractholders or the board of directors of the separate account may be disapproved by the life insurer; provided that such disapproval is reasonable;

(C) Changes in the investment adviser of the separate account initiated by contractholders or the board of directors of the separate account may be disapproved by the life insurer; provided that such disapproval is reasonable and is based upon a determination by the life insurer in good faith that:

(*1*) The rate of the proposed investment advisory fee will exceed the maximum rate that is permitted to be charged against the assets of the separate account for such services as specified by any variable life insurance contract funded by such separate account; or

(*2*) The proposed investment adviser may be expected to employ investment techniques which vary from the general techniques utilized by the current investment adviser to the separate account, or advise the purchase or sale of securities which would be inconsistent with the investment objectives of the separate account, or which would vary from the quality and nature of investments made by other separate accounts of the life insurer or of an affiliated life insurance company, which separate accounts have investment objectives similar to the separate account;

(D) Any action taken in accordance with paragraph (b)(6)(ii)(A), (B), or (C) of this section and the reasons therefor shall be disclosed in the proxy statement for the next meeting of variable life insurance contractholders of the separate account.

(7) Section 16(a) (15 U.S.C. 80a–16(a)) to the extent that:

(i) Persons serving as directors of the separate account prior to the first meeting of such account's variable life insurance contractholders are exempt from the requirement of Section 16(a) that such persons be elected by the holders of outstanding voting securities of such account at an annual or special meeting called for that purpose; provided that:

(A) Such persons have been appointed directors of such account by the life insurer before the effective date of the registration statement under the Securities Act of 1933, as amended, for variable life insurance contracts which are funded by the separate account and are identified in such registration statement (or are replacements appointed by the life insurer for any such persons who have become unable to serve as directors), and

(B) An election of directors for such account shall be held at the first meeting of variable life insurance contractholders after the effective date of the registration statement under the Securities Act of 1933, as amended, relating to contracts funded by such account, which meeting shall take place within one year after such effective date, unless the time for holding such meeting shall be extended by the Commission upon written request for good cause shown;

(ii) A member of the board of directors of such separate account may be disapproved or removed by the appropriate insurance regulatory authority if such person is ineligible to serve as a director of the separate account pursuant to insurance law or regulation of the jurisdiction in which the life insurer is domiciled.

(8) Section 17(f) (15 U.S.C. 80a–17(f)) to the extent that the securities and similar investments of the separate account may be maintained in the custody of the life insurer or an insurance company which is an affiliated person of such life insurer; provided that:

(i) The securities and similar investments allocated to such separate account are clearly identified as to ownership by such account, and such securities and similar investments are maintained in the vault of an insurance company which meets the qualifications set forth in paragraph (b)(8)(ii) of this section, and whose procedures and activities with respect to such safekeeping function are supervised by the insurance regulatory authorities of

the jurisdiction in which the securities and similar investments will be held;

(ii) The insurance company maintaining such investments must file with an insurance regulatory authority of a State or territory of the United States or the District of Columbia an annual statement of its financial condition in the form prescribed by the National Association of Insurance Commissioners, must be subject to supervision and inspection by such authority and must be examined periodically as to its financial condition and other affairs by such authority, must hold the securities and similar investments of the separate account in its vault, which vault must be equivalent to that of a bank which is a member of the Federal Reserve System, and must have a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of not less than $1,000,000 as set forth in its most recent annual statement filed with such authority;

(iii) Access to such securities and similar investments shall be limited to employees of or agents authorized by the Commission, representatives of insurance regulatory authorities, independent public accountants for the separate account, accountants for the life insurer and to no more than 20 persons authorized pursuant to a resolution of the board of directors of the separate account, which persons shall be directors of the separate account, officers and responsible employees of the life insurer or officers and responsible employees of the affiliated insurance company in whose vault such investments are maintained (if applicable), and access to such securities and similar investments shall be had only by two or more such persons jointly, at least one of whom shall be a director of the separate account or officer of the life insurer;

(iv) The requirement in paragraph (b)(8)(i) of this section that the securities and similar investments of the separate account be maintained in the vault of a qualified insurance company shall not apply to securities deposited with insurance regulatory authorities or deposited in a system for the central handling of securities established by a national securities exchange or national securities association registered with the Commission under the Securities Exchange Act of 1934, as amended, or such person as may be permitted by the Commission, or to securities on loan which are collateralized to the extent of their full market value, or to securities hypothecated, pledged, or placed in escrow for the account of such separate account in connection with a loan or other transaction authorized by specific resolution of the board of directors of the separate account, or to securities in transit in connection with the sale, exchange, redemption, maturity or conversion, the exercise of warrants or rights, assents to changes in terms of the securities, or to other transactions necessary or appropriate in the ordinary course of business relating to the management of securities;

(v) Each person when depositing such securities or similar investments in or withdrawing them from the depository or when ordering their withdrawal and delivery from the custody of the life insurer or affiliated insurance company, shall sign a notation in respect of such deposit, withdrawal or order which shall show:

(A) The date and time of the deposit, withdrawal or order;

(B) The title and amount of the securities or other investments deposited, withdrawn or ordered to be withdrawn, and an identification thereof by certificate numbers or otherwise;

(C) The manner of acquisition of the securities or similar investments deposited or the purpose for which they have been withdrawn, or ordered to be withdrawn; and

(D) If withdrawn and delivered to another person the name of such person. Such notation shall be transmitted promptly to an officer or director of the separate account or the life insurer designated by the board of directors of the separate account who shall not be a person designated for the purpose of paragraph (b)(8)(iii) of this section. Such notation shall be on serially numbered forms and shall be preserved for at least one year;

(vi) Such securities and similar investments shall be verified by complete examination by an independent public accountant retained by the separate account at least three times during each fiscal year, at least two of which shall be chosen by such accountant without prior notice to such separate account. A certificate of such accountant stating that he has made an examination of such securities and investments and describing the nature and extent of the examination shall be transmitted to the Commission by the accountant promptly after each examination;

(vii) Securities and similar investments of a separate account maintained with a bank or other company whose functions and physical facilities are supervised by Federal or state authorities pursuant to any arrangement whereby the directors, officers, employees or agents of the separate account or the life insurer are authorized or permitted to withdraw such investments upon their mere receipt are deemed to be in the custody of the life insurer and shall be exempt from the requirements of Section 17(f) so long as the arrangement complies with all provisions of paragraph (b)(8) of this section, except that such securities will be maintained in the vault of a bank or other company rather than the vault of an insurance company.

(9) Section 18(i) (15 U.S.C. 80a–18(i)) to the extent that:

(i) For the purposes of any section of the Act which provides for the vote of securityholders on matters relating to the investment company:

(A) Variable life insurance contractholders shall have one vote for each $100 of cash value funded by the separate account, with fractional votes allocated for amounts less than $100;

(B) The life insurer shall have one vote for each $100 of assets of the separate account not otherwise attributable to contractholders pursuant to paragraph (b)(9)(i)(A) of this section, with fractional votes allocated for amounts less than $100; provided that after the commencement of sales of variable life insurance contracts funded by the separate account, the life insurer shall cast its votes for and against each matter which may be voted upon by contractholders in the same proportion as the votes cast by contractholders; and

(C) The number of votes to be allocated shall be determined as of a record date not more than 90 days prior to any meeting at which such vote is held; provided that if a quorum is not present at the meeting, the meeting may be adjourned for up to 60 days without fixing a new record date;

(ii) The requirement of this section that every share of stock issued by a registered management investment company (except a common-law trust of the character described in Section 16(c)) shall be a voting stock and have equal voting rights with every other outstanding voting stock shall not be deemed to be violated by actions specifically permitted by any provision of this section.

(10) Section 19 (15 U.S.C. 80a–19) to the extent that the provisions of this section shall not be applicable to any dividend or similar distribution paid or payable pursuant to provisions of participating variable life insurance contracts.

(11) Sections 22(d), 22(e), and 27(i)(2)(A) (15 U.S.C. 80a–22(d), 80a–22(e), and 80a–27(i)(2)(A), respectively) and § 270.22c–1 (Rule 22c–1) promulgated under Section 22(c) to the extent:

(i) That the amount payable on death and the cash surrender value of each variable life insurance contract shall be determined on each day during which the New York Stock Exchange is open for trading, not less frequently than once daily as of the time of the close of trading on such exchange; provided that the amount payable on death need not be determined more than once each contract month if such determination does not reduce the participation of the contract in the investment experience of the separate account; provided further, however, that if the net valuation premium for such contract is transferred at least annually, then the amount payable on death need be determined only when such net premium is transferred;

(ii) Necessary for compliance with this section or with insurance laws and regulations and established administrative procedures of the life insurer with respect to issuance, transfer and redemption procedures for variable life insurance contracts funded by the separate account including, but not limited to, premium rate structure and premium processing, insurance underwriting standards, and the particular benefit afforded by the contract; provided, however, that any procedure or action shall be reasonable, fair and not discriminatory to the interests of the affected contractholder and to all other holders of contracts of the same class or series funded by the separate account; and, further provided that any such action shall be disclosed in the form required to be filed by the separate account with the Commission pursuant to paragraph (b)(2)(ii) of this section.

(12) Section 27(i)(2)(A) (15 U.S.C. 80a–27(i)(A)), to the extent that such sections require that the variable life insurance contract be redeemable or provide for a refund in cash; provided that such contract provides for election by the contractholder of a cash surrender value or certain non-forfeiture and settlement options which are required or permitted by the insurance law or regulation of the jurisdiction in which the contract is offered; and further provided that unless required by the insurance law or regulation of the jurisdiction in which the contract is offered or unless elected by the contractholder, such contract shall not provide for the automatic imposition of any option, including, but not limited to, an automatic premium loan, which would involve the accrual or payment of an interest or similar charge;

(13) Section 32(a)(2) (15 U.S.C. 80a–31(a)(2)); provided that:

(i) The independent public accountant is selected before the effective date of the registration statement under the Securities Act of 1933, as amended, for variable life insurance contracts which are funded by the separate account, and the identity of such accountant is disclosed in such registration statement, and

(ii) The selection of such accountant is submitted for ratification or rejection to variable life insurance contractholders at their first meeting after the effective date of the registration statement under the Securities Act of 1933, as amended, on condition that such meeting shall take place within one year after such effective date, unless the time for the holding of such meeting shall be extended by the Commission upon written request for good cause shown.

(14) If the separate account is organized as a unit investment trust, all the assets of which consist of the shares of one or more registered management investment companies which offer their shares exclusively to variable life insurance separate accounts of the life insurer or of any affiliated life insurance company:

(i) The eligibility restrictions of Section 9(a) (15 U.S.C. 80a–9(a)) shall not be applicable to those persons who are officers, directors and employees of the life insurer or its affiliates who do not participate directly in the management or administration of any registered management investment company described above;

(ii) The life insurer shall be ineligible pursuant to paragraph (3) of Section 9(a) to serve as investment adviser of or principal underwriter for any registered management investment company described in paragraph (b)(14) of this section only if an affiliated person of such life insurer, ineligible by reason of paragraph (1) or (2) of Section 9(a), participates in the management or administration of such company;

(iii) The life insurer may vote shares of the registered management investment companies held by the separate account without regard to instructions from contractholders of the separate account if such instructions would require such shares to be voted:

(A) To cause such companies to make (or refrain from making) certain investments which would result in changes in the sub-classification or investment objectives of such companies or to approve or disapprove any contract between such companies and an investment adviser when required to do so by an insurance regulatory authority subject to the provisions of paragraphs (b)(4)(i) and (6)(ii)(A) of this section; or

(B) In favor of changes in investment objectives, investment adviser of or principal underwriter for such companies subject to the provisions of paragraphs (b)(4)(ii) and (6)(ii)(B) and (C) of this section;

(iv) Any action taken in accordance with paragraph (b)(14)(iii)(A) or (B) of this section and the reasons therefor shall be disclosed in the next report to contractholders made pursuant to section 30(e) (15 U.S.C. 80a–29(e)) and § 270.30e–2 (Rule 30e–2);

(v) Any registered management investment company established by the insurer and described in paragraph (b)(14) of this section shall be exempt from Section 14(a); and

(vi) Any registered management investment company established by the insurer and described in paragraph (b)(14) of this section shall be exempt from Sections 15(a), 16(a), and 32(a)(2) (15 U.S.C. 80a–15(a), 80–16(a), and 80–31(a)(2), respectively), to the extent prescribed by paragraphs (b)(6)(i), (b)(7)(i), and (b)(13) of this section, provided that such company complies with the conditions set forth in those paragraphs as if it were a separate account.

(c) When used in this rule, *Variable life insurance contract* means a contract of life insurance, subject to regulation under the insurance laws or code of every jurisdiction in which it is offered, funded by a separate account of a life insurer, which contract, so long as premium payments are duly paid in accordance with its terms, provides for:

(i) A death benefit and cash surrender value which vary to reflect the investment experience of the separate account;

(ii) An initial stated dollar amount of death benefit, and payment of a death benefit guaranteed by the life insurer to be at least equal to such stated amount; and

(iii) Assumption of the mortality and expense risks thereunder by the life insurer for which a charge against the assets of the separate account may be assessed. Such charge shall be disclosed in the prospectus and shall not be less than fifty per centum of the maximum charge for risk assumption as disclosed in the prospectus and as provided for in the contract.

■ 20. Redesignate § 270.6e–3(T) as § 270.6e–3 and revise newly redesignated § 270.6e–3 to read as follows:

§ 270.6e–3 Exemptions for flexible premium variable life insurance separate accounts.

(a) A separate account, and its investment adviser, principal underwriter and depositor, shall, except as provided in paragraph (b) of this section, comply with all provisions of the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) and the rules under it that apply to a registered investment company issuing periodic payment play certificates if:

(1) It is a separate account within the meaning of Section 2(a)(37) of the Act (15 U.S.C. 80a–2(a)(37)) and is established and maintained by a life insurance company pursuant to the insurance laws or code of:

(i) Any state or territory of the United States or the District of Columbia; or

(ii) Canada or any province thereof, if it complies with § 270.7d–1 (Rule 7d–1) under the Act (the ''life insurer'');

(2) The assets of the separate account are derived solely from:

(i) The sale of flexible premium variable life insurance contracts (''flexible contracts'') as defined in paragraph (c)(1) of this section;

(ii) The sale of scheduled premium variable life insurance contracts (''scheduled contracts'') as defined in paragraph (c) of § 270.6e–2 (Rule 6e–2) under the Act;

(iii) Funds corresponding to dividend accumulations with respect to such contracts; and

(iv) Advances made by the life insurer in connection with the operation of such separate account;

(3) The separate account is not used for variable annuity contracts or other contract liabilities not involving life contingencies;

(4) The separate account is legally segregated, and that part of its assets with a value approximately equal to the reserves and other contract liabilities for such separate account are not chargeable with liabilities arising from any other business of the life insurer;

(5) The value of the assets of the separate account, each time adjustments in the reserves are made, is at least equal to the reserves and other contract liabilities of the separate account, and at all other times approximately equals or exceeds the reserves and liabilities; and

(6) The investment adviser of the separate account is registered under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*).

(b) A separate account that meets the requirements of paragraph (a) of this section, and its investment adviser, principal underwriter and depositor shall be exempt with respect to flexible contracts funded by the separate account from the following provisions of the Act:

(1) Subject to section 26(f) of the Act, in connection with any sales charge deducted under the flexible contract, the separate account and other persons shall be exempt from Sections 12(b), 22(c), and 27(i)(2)(A) (15 U.S.C. 80a–12(b), 80–22(c), and 80a–27(i)(2)(A), respectively) of the Act, and § 270.12b–1 (Rule 12b–1) and § 270.22c–1 (Rule 22c–1) under the Act;

(2) Section 7 (15 U.S.C. 80a–7);

(3) Section 8 (15 U.S.C. 80a–8), to the extent that:

(i) For purposes of paragraph (a) of Section 8, the separate account filed with the Commission a notification on § 274.301 (Form N–6EI–1) which identifies the separate account; and

(ii) For purposes of paragraph (b) of Section 8, the separate account shall file with the Commission the form designated by the Commission within ninety days after filing the notification on Form N–6EI–1; provided, however, that if the fiscal year of the separate account end within this ninety day period, the form may be filed within ninety days after the end of such fiscal year.

(4) Section 9 (15 U.S.C. 80a–9), to the extent that:

(i) The eligibility restrictions of Section 9(a) shall not apply to persons who are officers, directors or employees of the life insurer or its affiliates and who do not participate directly in the management or administration of the separate account or in the sale of flexible contracts; and

(ii) A life insurer shall be ineligible under paragraph (3) of Section 9(a) to serve as investment adviser, depositor of or principal underwriter for the separate account only if an affiliated person of such life insurer, ineligible by reason of paragraphs (1) or (2) of Section 9(a), participates directly in the management or administration of the separate account or in the sale of flexible contracts.

(5) Section 13(a) (15 U.S.C. 80a–13(a)), to the extent that:

(i) An insurance regulatory authority may require pursuant to insurance law or regulation that the separate account make (or refrain from making) certain investments which would result in changes in the subclassification or investment policies of the separate account;

(ii) Changes in the investment policy of the separate account initiated by its contractholders or board of directors may be disapproved by the life insurer, if the disapproval is reasonable and is based on a good faith determination by the life insurer that:

(A) The change would violate state law; or

(B) The change would not be consistent with the investment objectives of the separate account or would result in the purchase of securities for the separate account which vary from the general quality and nature of investments and investment techniques used by other separate accounts of the life insurer or of an affiliated life insurance company with similar investment objectives;

(iii) Any action described in paragraph (b)(5)(i) or (ii) of this section and the reasons for it shall be disclosed in the next communication to contractholders, but in no case, later than twelve months from the date of such action.

(6) Section 14(a) (15 U.S.C. 80a–14(a));

(7)(i) Section 15(a) (15 U.S.C. 80a–15(a)), to the extent it requires that the initial written contract with the investment adviser shall have been approved by the vote of a majority of the outstanding voting securities of the registered investment company; provided that:

(A) The investment adviser is selected and a written contract is entered into before the effective date of the 1933 Act registration statement for flexible contracts, and that the terms of the contract are fully disclosed in the registration statement, and

(B) A written contract is submitted to a vote of contractholders at their first meeting and within one year after the effective date of the 1933 Act registration statement, unless the Commission upon written request and for good cause shown extends the time for the holding of such meeting;

(ii) Sections 15 (a), (b), and (c), to the extent that:

(A) An insurance regulatory authority may disapprove pursuant to insurance law or regulation any contract between the separate account and an investment adviser or principal underwriter;

(B) Changes in the principal underwriter for the separate account initiated by contractholders or the board of directors of the separate account may be disapproved by the life insurer; provided that such disapproval is reasonable;

(C) Changes in the investment adviser of the separate account initiated by contractholders or the board of directors of the separate account may be disapproved by the life insurer; provided that such disapproval is reasonable and is based on a good faith determination by the life insurer that:

(*1*) The proposed investment advisory fee will exceed the maximum rate

specified in any flexible contract that may be charged against the assets of the separate account for such services; or

(*2*) The proposed investment adviser may be expected to employ investment techniques which vary from the general techniques used by the current investment adviser to the separate account, or advise the purchase or sale of securities which would not be consistent with the investment objectives of the separate account, or which would vary from the quality and nature of investments made by other separate accounts with similar investment objectives of the life insurer or an affiliated life insurance company;

(D) Any action described in paragraph (b)(7)(ii) (A), (B), or (C) of this section and the reasons for it shall be disclosed in the next communication to contractholders, but in no case, later than twelve months from the date of such action.

(8) Section 16(a) (15 U.S.C. 80a–16(a)), to the extent that:

(i) Directors of the separate account serving before the first meeting of the account's contractholders are exempt from the requirement of Section 16(a) that they be elected by the holders of outstanding voting securities of the account at an annual or special meeting called for that purpose; provided that:

(A) Such persons were appointed directors of the account by the life insurer before the effective date of the 1933 Act registration statement for flexible contracts and are identified in the registration statement (or are replacements appointed by the life insurer for any such persons who have become unable to serve as directors); and

(B) An election of directors for the account is held at the first meeting of contractholders and within one year after the effective date of the 1933 Act registration statement for flexible contracts, unless the time for holding the meeting is extended by the Commission upon written request and for good cause shown;

(ii) A member of the board of directors of the separate account may be disapproved or removed by an insurance regulatory authority if the person is not eligible to be a director of the separate account under the law of the life insurer's domicile.

(9) Section 17(f) (15 U.S.C. 80a–17(f)), to the extent that the securities and similar investments of a separate account organized as a management investment company may be maintained in the custody of the life insurer or of an affiliated life insurance company; provided that:

(i) The securities and similar investments allocated to the separate account are clearly identified as owned by the account, and the securities and similar investments are kept in the vault of an insurance company which meets the qualifications in paragraph (b)(9)(ii) of this section, and whose safekeeping function is supervised by the insurance regulatory authorities of the jurisdiction in which the securities and similar investments will be held;

(ii) The insurance company maintaining such investments must file with an insurance regulatory authority of a state or territory of the United States or the District of Columbia an annual statement of its financial condition in the form prescribed by the National Association of Insurance Commissioners, must be subject to supervision and inspection by such authority and must be examined periodically as to its financial condition and other affairs by such authority, must hold the securities and similar investments of the separate account in its vault, which vault must be equivalent to that of a bank which is a member of the Federal Reserve System, and must have a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of not less than $1,000,000 as set forth in its most recent annual statement filed with such authority;

(iii) Access to such securities and similar investments shall be limited to employees of the Commission, representatives of insurance regulatory authorities, independent public accountants retained by the separate account (or on its behalf by the life insurer), accountants for the life insurer, and to no more than 20 persons authorized by a resolution of the board of directors of the separate account, which persons shall be directors of the separate account, officers and responsible employees of the life insurer or officers and responsible employees of the affiliated life insurance company in whose vault the investments are kept (if applicable), and access to such securities and similar investments shall be had only by two or more such persons jointly, at least one of whom shall be a director of the separate account or officer of the life insurer;

(iv) The requirement in paragraph (b)(9)(i) of this section that the securities and similar investments of the separate account be maintained in the vault of a qualified insurance company shall not apply to securities deposited with insurance regulatory authorities or deposited in accordance with any rule under Section 17(f), or to securities on loan which are collateralized to the extent of their full market value, or to securities hypothecated, pledged, or placed in escrow for the account of such separate account in connection with a loan or other transaction authorized by specific resolution of the board of directors of the separate account, or to securities in transit in connection with the sale, exchange, redemption, maturity or conversion, the exercise of warrants or rights, assents to changes in terms of the securities, or to other transactions necessary or appropriate in the ordinary course of business relating to the management of securities;

(v) Each person when depositing such securities or similar investments in or withdrawing them from the depository or when ordering their withdrawal and delivery from the custody of the life insurer or affiliated life insurance company, shall sign a notation showing:

(A) The date and time of the deposit, withdrawal or order;

(B) The title and amount of the securities or other investments deposited, withdrawn or ordered to be withdrawn, and an identification thereof by certificate numbers or otherwise;

(C) The manner of acquisition of the securities or similar investments deposited or the purpose for which they have been withdrawn, or ordered to be withdrawn; and

(D) If withdrawn and delivered to another person, the name of such person. The notation shall be sent promptly to an officer or director of the separate account or the life insurer designated by the board of directors of the separate account who is not himself permitted to have access to the securities or investments under paragraph (b)(9)(iii) of this section. The notation shall be on serially numbered forms and shall be kept for at least one year;

(vi) The securities and similar investments shall be verified by complete examination by an independent public accountant retained by the separate account (or on its behalf by the life insurer) at least three times each fiscal year, at least two of which shall be chosen by the accountant without prior notice to the separate account. A certificate of the accountant stating that he has made an examination of such securities and investments and describing the nature and extent of the examination shall be sent to the Commission by the accountant promptly after each examination;

(vii) Securities and similar investments of a separate account maintained with a bank or other company whose functions and physical facilities are supervised by federal or

state authorities under any arrangement whereby the directors, officers, employees or agents of the separate account or the life insurer are authorized or permitted to withdraw such investments upon their mere receipt are deemed to be in the custody of the life insurer and shall be exempt from the requirements of Section 17(f) so long as the arrangement complies with all provisions of paragraph (b)(9) of this section, except that such securities will be maintained in the vault of a bank or other company rather than the vault of an insurance company.

(10) Section 18(i) (15 U.S.C. 80a–18(i)), to the extent that:

(i) For the purposes of any section of the Act which provides for the vote of securityholders on matters relating to the investment company:

(A) Flexible contractholders shall have one vote for each $100 of cash value funded by the separate account, with fractional votes allocated for amounts less than $100;

(B) The life insurer shall have one vote for each $100 of assets of the separate account not otherwise attributable to contractholders under paragraph (b)(10)(i)(A) of this section, with fractional votes allocated for amounts less than $100; provided that after the commencement of sales of flexible contracts, the life insurer shall cast its votes for and against each matter which may be voted upon by contractholders in the same proportion as the votes cast by contractholders; and

(C) The number of votes to be allocated shall be determined as of a record date not more than 90 days before any meeting at which such vote is held; provided that if a quorum is not present at the meeting, the meeting may be adjourned for up to 60 days without fixing a new record date;

(ii) The requirement of Section 18(i) that every share of stock issued by a registered management investment company (except a common-law trust of the character described in Section 16(c) (15 U.S.C. 80a–16(c))) shall be a voting stock and have equal voting rights with every other outstanding voting stock shall not be deemed to be violated by actions specifically permitted by any provisions of this section.

(11) Section 19 (15 U.S.C. 80a–19), to the extent that the provisions of this Section shall not apply to any dividend or similar distribution paid or payable under provisions of participating flexible contracts.

(12) Sections 22(c), 22(d), 22(e) and 27(i)(2)(A) (15 U.S.C. 80a–22(c)), 80a–22(d), 80a–22(e), and 80a–27(i)(2)(A), respectively) and § 270.22c–1 (Rule 22c–1) to the extent:

(i) The cash value of each flexible contract shall be computed in accordance with Rule 22c–1(b); provided, however, that where actual computation is not necessary for the operation of a particular contract, then the cash value of that contract must only be capable of computation; and provided further that to the extent the calculation of the cash value reflects deductions for the cost of insurance and other insurance benefits or administrative expenses and fees or sales charges, such deductions need only be made at such times as specified in the contract or as necessary for compliance with insurance laws and regulations; and

(ii) The death benefit, unless required by insurance laws and regulations, shall be computed on any day that the investment experience of the separate account would affect the death benefit under the terms of the contract provided that such terms are reasonable, fair, and nondiscriminatory;

(iii) Necessary to comply with this Rule or with insurance laws and regulations and established administrative procedures of the life insurer for issuance, increases in or additions of insurance benefits, transfer and redemption of flexible contracts, including, but not limited to, premium rate structure and premium processing, insurance underwriting standards, and the particular benefit afforded by the contract; provided, however, that any procedure or action shall be reasonable, fair and not discriminatory to the interests of the affected contractholders and to all other holders of contracts of the same class or series funded by the separate account; and provided further that any such action shall be disclosed in the form filed by the separate account with the Commission under paragraph (b)(3)(ii) of this section.

(13) Sections 27(i)(2)(A) and 22(c) (15 U.S.C. 80a–27(i)(2)(A) and 80a–22(c)) and § 270.22c–1 (Rule 22c–1), to the extent that:

(i) Such sections require that the flexible contract be redeemable or provide for a refund in cash; provided that the contract provides for election by the contractholder of a cash surrender value or certain non-forfeiture and settlement options which are required or permitted by the insurance law or regulation of the jurisdiction in which the contract is offered; and provided further that unless required by the insurance law or regulation of the jurisdiction in which the contract is offered or unless elected by the contractholder, the contract shall not provide for the automatic imposition of any option, including, but not limited to, an automatic premium loan, which would involve the accrual or payment of an interest or similar charge.

(ii) Notwithstanding the provisions of paragraph (b)(13)(A) of this section, if the amounts available under the contract to pay the charges due under the contract on any contract processing day are less than such charges due, the contract may provide that the cash surrender value shall be applied to purchase a non-forfeiture option specified by the life insurer in such contract; provided that the contract also provides that Contract processing days occur not less frequently than monthly.

(iii) Subject to Section 26(f) (15 U.S.C. 80a–26(f)), sales charges and administrative expenses or fees may be deducted upon redemption.

(14) Section 32(a)(2) (15 U.S.C. 80a–31(a)(2)); provided that:

(i) The independent public accountant is selected before the effective date of the 1933 Act registration statement for flexible contracts, and the identity of the accountant is disclosed in the registration statement; and

(ii) The selection of the accountant is submitted for ratification or rejection to flexible contractholders at their first meeting and within one year after the effective date of the 1933 Act registration statement for flexible contracts, unless the time for holding the meeting is extended by order of the Commission.

(15) If the separate account is organized as a unit investment trust, all the assets of which consist of the shares of one or more registered management investment companies which offer their shares exclusively to separate accounts of the life insurer, or of any affiliated life insurance company, offering either scheduled contracts or flexible contracts, or both; or which also offer their shares to variable annuity separate accounts of the life insurer or of an affiliated life insurance company, or which offer their shares to any such life insurance company in consideration solely for advances made by the life insurer in connection with the operation of the separate account; provided that the board of directors of each investment company, constituted with a majority of disinterested directors, will monitor such company for the existence of any material irreconcilable conflict between the interests of variable annuity contractholders and scheduled or flexible contractholders investing in such company; the life insurer agrees that it will be responsible for reporting any potential or existing conflicts to the directors; and if a conflict arises, the life insurer will, at its own cost, remedy

such conflict up to and including establishing a new registered management investment company and segregating the assets underlying the variable annuity contracts and the scheduled or flexible contracts; then:

(i) The eligibility restrictions of Section 9(a) shall not apply to those persons who are officers, directors or employees of the life insurer or its affiliates who do not participate directly in the management or administration of any registered management investment company described in paragraph (b)(15) of this section;

(ii) The life insurer shall be ineligible under paragraph (3) of Section 9(a) to serve as investment adviser of or principal underwriter for any registered management investment company described in paragraph (b)(15) of this section only if an affiliated person of such life insurer, ineligible by reason of paragraphs (1) or (2) of Section 9(a), participates in the management or administration of such company;

(iii) For purposes of any section of the Act which provides for the vote of securityholders on matters relating to the separate account or the underlying registered investment company, the voting provisions of paragraph (b)(10)(i) and (ii) of this section apply; provided that:

(A) The life insurer may vote shares of the registered management investment companies held by the separate account without regard to instructions from contractholders of the separate account if such instructions would require such shares to be voted:

(*1*) To cause such companies to make (or refrain from making) certain investments which would result in changes in the sub-classification or investment objectives of such companies or to approve or disapprove any contract between such companies and an investment adviser when required to do so by an insurance regulatory authority subject to the provisions of paragraphs (b)(5)(i) and (b)(7)(ii)(A) of this section; or

(*2*) In favor of changes in investment objectives, investment adviser of or principal underwriter for such companies subject to the provisions of paragraphs (b)(5)(ii) and (b)(7)(ii) (B) and (C) of this section;

(B) Any action taken in accordance with paragraph (b)(15)(iii)(A)(1) or (2) of this section and the reasons therefor shall be disclosed in the next report contractholders made under Section 30(e) (15 U.S.C. 80a–29(e)) and § 270.30e–2 (Rule 30e–2);

(iv) Any registered management investment company established by the life insurer and described in paragraph (b)(15) of this section shall be exempt from Section 14(a); and

(v) Any registered management investment company established by the life insurer and described in paragraph (b)(14) of this section shall be exempt from Sections 15(a), 16(a), and 32(a)(2) (15 U.S.C. 80a–15(a), 80–16(a), and 80–31(a)(2), respectively), to the extent prescribed by paragraphs (b)(7)(i), (b)(8)(i), and (b)(14) of this section; provided that the company complies with the conditions set forth in those paragraphs as if it were a separate account.

(c) When used in this Rule:

(1) *Flexible premium variable life insurance contract* means a contract of life insurance, subject to regulation under the insurance laws or code of every jurisdiction in which it is offered, funded by a separate account of a life insurer, which contract provides for:

(i) Premium payments which are not fixed by the life insurer as to both timing and amount; provided, however, that the life insurer may fix the timing and minimum amount of premium payments for the first two contract periods following issuance of the contract or of an increase in or addition of insurance benefits, and may prescribe a reasonable minimum amount for any additional premium payment;

(ii) A death benefit the amount or duration of which may vary to reflect the investment experience of the separate account;

(iii) A cash value which varies to reflect the investment experience of the separate account; and

(iv) There is a reasonable expectation that subsequent premium payments will be made.

(2) *Contract period* means the period from a contract issue or anniversary date to the earlier of the next following anniversary date (or, if later, the last day of any grace period commencing before such next following anniversary date) or the termination date of the contract.

(3) *Cash value* means the amount that would be available in cash upon voluntary termination of a contract by its owner before it becomes payable by death or maturity, without regard to any charges that may be assessed upon such termination and before deduction of any outstanding contract loan.

(4) *Cash surrender value* means the amount available in cash upon voluntary termination of a contract by its owner before it becomes payable by death or maturity, after any charges assessed in connection with the termination have been deducted and before deduction of any outstanding contract loan.

(5) *Contract processing day* means any day on which charges under the contract are deducted from the separate account.

■ 21. Amend § 270.11a–2 by revising paragraph (c) to read as follows:

§ 270.11a–2 Offers of exchange by certain registered separate accounts or others the terms of which do not require prior Commission approval.

* * * * *

(c) If the offering account imposes a front-end sales load on the acquired security, then such sales load shall be a percentage that is no greater than the excess of the rate of the front-end sales load otherwise applicable to that security over the rate of any front-end sales load previously paid on the exchanged security.

* * * * *

■ 22. Revise § 270.14a–2 to read as follows:

§ 270.14a–2 Exemption from section 14(a) of the Act for certain registered separate accounts and their principal underwriters.

(a) A registered separate account, and any principal underwriter for such account, shall be exempt from section 14(a) of the Act (15 U.S.C. 80a–14(a)) with respect to a public offering of variable annuity contracts participating in such account.

(b) Any registered management investment company which has as a promoter an insurance company and which offers its securities to separate accounts of such insurance company *that offer variable annuity contracts and are* registered under the Act as unit investment trusts (''trust accounts''), and any principal underwriter for such investment company, shall be exempt from section 14(a) with respect to such offering and to the offering of such securities to trust accounts of other insurance companies.

(c) Any registered management investment company exempt from section 14(a) of the Act pursuant to paragraph (b) of this section shall be exempt from sections 15(a), 16(a), and 32(a)(2) of the Act (15 U.S.C. 80a–15(a), 80a–16(a), and 80a–31(a)(2)), to the extent prescribed in rules 15a–3, 16a–1, and 32a–2 under the Act (17 CFR 270.15a–3, 270.16a–1, and 270.32a–2), provided that such investment company complies with the conditions set forth in those rules as if it were a separate account.

■ 23. Revise § 270.26a–1 to read as follows:

§ 270.26a–1 Payment of administrative fees to the depositor or principal underwriter of a unit investment trust; exemptive relief for separate accounts.

For purposes of Section 26(a)(2)(C) of the Act, payment of a fee to the depositor of or a principal underwriter for a registered unit investment trust, or to any affiliated person or agent of such depositor or underwriter (collectively, ''depositor''), for bookkeeping or other administrative services provided to the trust shall be allowed the custodian or trustee (''trustee'') as an expense, provided that such fee is an amount not greater than the expenses, without profit:

(a) Actually paid by such depositor directly attributable to the services provided and

(b) Increased by the services provided directly by such depositor, as determined in accordance with generally accepted accounting principles consistently applied.

§ 270.26a–2 [Removed]

■ 24. Remove § 270.26a–2.

§ 270.27a–1 [Removed]

■ 25. Remove § 270.27a–1.

§ 270.27a–2 [Removed]

■ 26. Remove § 270.27a–2.

§ 270.27a–3 [Removed]

■ 27. Remove § 270.27a–3.

■ 28. Redesignate § 270.27c–1 as § 270.27i–1 and revise newly redesignated § 270.27i–1 to read as follows:

§ 270.27i–1 Exemption from Section 27(i)(2)(A) of the Act during annuity payment period of variable annuity contracts participating in certain registered separate accounts.

A registered separate account, and any depositor of or underwriter for such account, shall, during the annuity payment period of variable annuity contracts participating in such account, be exempt from the requirement of paragraph (1) of Section 27(i)(2)(A) of the Act that a periodic payment plan certificate be a redeemable security.

§ 270.27c–1 [Removed and reserved]

■ 29. Remove and reserve § 270.27c–1.

§ 270.27d–2 [Removed and reserved]

■ 30. Remove and reserve § 270.27d–2.

§ 270.27e–1 [Removed and reserved]

■ 31. Remove and reserve § 270.27e–1.

§ 270.27f–1 [Removed and reserved]

■ 32. Remove and reserve § 270.27f–1.

§ 270.27g–1 [Removed and reserved]

■ 33. Remove and reserve § 270.27g–1.

§ 270.27h–1 [Removed and reserved]

■ 34. Remove and reserve § 270.27h–1.

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

■ 35. The general authority citation for part 274 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, 80a–29, and Pub. L. 111–203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

§§ 239.15 and 274.11 [Removed and reserved]

■ 36. Remove and reserve § 239.15 and 274.11.

■ 37. Revise Form N–3 (referenced in §§ 239.17a and 274.11b) to read as follows.

Note: The text of Form N–3 will not appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM N-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933
Pre-Effective Amendment No. _____[ ]
Post-Effective Amendment No. _____[ ]
and/or
REGISTRATION STATEMENT UNDER THE INVESTMENT COMPANY ACT OF 1940
Amendment No. _____[ ]

(Check appropriate box or boxes.)

_____
(Exact Name of Registrant)

_____
(Name of Insurance Company)

_____
(Address of Insurance Company's Principal Executive Offices) (Zip Code)

_____
Insurance Company's Telephone Number, including Area Code

_____
(Name and Address of Agent for Service)

_____
Approximate Date of Proposed Public Offering

It is proposed that this filing will become effective (check appropriate box)

[ ] immediately upon filing pursuant to paragraph (b)
[ ] on (date) pursuant to paragraph (b)
[ ] 60 days after filing pursuant to paragraph (a)
[ ] on (date) pursuant to paragraph (a)
[ ] 75 days after filing pursuant to paragraph (a)(2) on (date)
[ ] pursuant to paragraph (a)(2) of rule 485

If appropriate, check the following box:

[ ] this post-effective amendment designates a new effective date for a previously filed post-effective amendment.

Omit from the facing sheet reference to the other Act if the Registration Statement or amendment is filed under only one of the Acts. Include the "Approximate Date of Proposed Public Offering" and "Title of Securities Being Registered" only where securities are being registered under the Securities Act of 1933.

Form N-3 is to be used by separate accounts that are management investment companies that offer variable annuity contracts to register under the Investment Company Act of 1940 and to offer their securities under the Securities Act of 1933. The Commission has designed Form N-3 to provide investors with information that will assist them in making a decision about investing in a variable annuity contract. The Commission also may use the information provided in Form N-3 in its regulatory, disclosure review, inspection, and policy making roles.

A Registrant is required to disclose the information specified by Form N-3, and the Commission will make this information public. A Registrant is not required to respond to the collection of information contained in Form N-3 unless the Form displays a currently valid Office of Management and Budget ("OMB") control number. Please direct comments concerning the accuracy of the information collection burden estimate and any suggestions for reducing the burden to Secretary, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549. The OMB has reviewed this collection of information under the clearance requirements of 44 U.S.C. § 3507.

Persons who respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.

Contents of Form N–3

General Instructions

A. Definitions

References to sections and rules in this Form N–3 are to the Investment Company Act of 1940 [15 U.S.C. 80a–1 *et seq.*] (the ''Investment Company Act''), unless otherwise indicated. Terms used in this Form N–3 have the same meaning as in the Investment Company Act or the related rules, unless otherwise indicated. As used in this Form N–3, the terms set out below have the following meanings:

''Class'' means a class of a Variable Annuity Contract that varies principally with respect to distribution-related fees and expenses.

''Contractowner Account'' means any account of a contractowner, participant, annuitant, or beneficiary to which (net) purchase payments under a variable annuity contract are added and from which administrative or transaction charges may be subtracted.

''Insurance Company'' means the person primarily responsible for the organization of the Registrant and the person, other than the trustee or the custodian, who has continuing functions or responsibilities with respect to the administration of the affairs of the Registrant. If there is more than one Insurance Company, the information called for in this Form about the Insurance Company shall be provided for each Insurance Company.

''Investment Option'' means any portfolio of investments in which the Registrant invests and which may be selected as an option by the contractowner.

''Money Market Account'' means an Investment Option that hold itself out to

investors as a Money Market Fund or the equivalent of a Money Market Fund.

''Money Market Fund'' means a registered open-end management investment company, or series thereof, that is regulated as a money market fund pursuant to rule 2a–7 [17 CFR 270.2a–7].

''Multiple Class Fund'' means an Investment Option that has more than one Class.

''Registrant'' means the separate account (as defined in Section 2(a)(37) of the 1940 Act [15 U.S.C. 80a–2(a)(37)] that offers the Variable Annuity Contracts.

''SAI'' means the Statement of Additional Information required by Part B of this Form.

''Securities Act'' means the Securities Act of 1933 [15 U.S.C. 77a *et seq.*].

''Securities Exchange Act'' means the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq.*].

''Statutory Prospectus'' means a prospectus that satisfies the requirements of section 10(a) of the Securities Act [15 U.S.C. 77j(a)].

''Summary Prospectus'' has the meaning provided by paragraph (a)(12) of rule 498A under the Securities Act [17 CFR 230.498A(a)(12)].

''Variable Annuity Contract'' or ''Contract'' means any accumulation contract or annuity contract, any portion thereof, or any unit of interest or participation therein pursuant to which the value of the contract, either during an accumulation period or after annuitization, or both, varies according to the investment experience of the separate account in which the contract participates. Unless the context otherwise requires, ''Variable Annuity Contract'' or ''Contract'' refers to the Variable Annuity Contracts being offered pursuant to the registration statement prepared on this Form.

B. Filing and Use of Form N–3

1. What is Form N–3 used for?

Form N–3 is used by all separate accounts organized as management investment companies and offering Variable Annuity Contracts to file:

(a) An initial registration statement under the Investment Company Act and any amendments to the registration statement;

(b) An initial registration statement required under the Securities Act and any amendments to the registration statement, including amendments required by section 10(a)(3) of the Securities Act [15 U.S.C. 77j(a)(3)]; or

(c) Any combination of the filings in paragraph (a) or (b).

2. What is included in the registration statement?

(a) For registration statements or amendments filed under both the Investment Company Act and the Securities Act or only under the Securities Act, include the facing sheet of the Form, Parts A, B, and C, and the required signatures.

(b) For registration statements or amendments filed only under the Investment Company Act, include the facing sheet of the Form, responses to all Items of Parts A (except Items 1, 4, 5, 10, 11, and 18), B, and C (except Items 34(e), (m), (n), and (o)), and the required signatures.

3. What are the fees for Form N–3?

No registration fees are required with the filing of Form N–3 to register as an investment company under the Investment Company Act or to register securities under the Securities Act. If Form N–3 is filed to register securities under the Securities Act and securities are sold to the public, registration fees must be paid on an ongoing basis after the end of the Registrant's fiscal year. *See* section 24(f) [15 U.S.C. 80a–24(f)] and related rule 24f–2 [17 CFR 270.24f–2].

4. What rules apply to the filing of a registration statement on Form N–3?

(a) For registration statements and amendments filed under both the Investment Company Act and the Securities Act or under only the Securities Act, the general rules regarding the filing of registration statements in Regulation C [17 CFR 230.400–230.498A] apply to the filing of registration statements on Form N–3. Specific requirements concerning investment companies appear in rules 480–485 and 495–498A of Regulation C.

(b) For registration statements and amendments filed only under the Investment Company Act, the general provisions in rules 8b–1–8b–32 [17 CFR 270.8b–l to 8b–32] apply to the filing of registration statements on Form N–3.

(c) The plain English requirements of rule 421 under the Securities Act [17 CFR 230.421] apply to prospectus disclosure in Part A of Form N–3.

(d) Regulation S–T [17 CFR 232.10–232.903] applies to all filings on the Commission's Electronic Data Gathering, Analysis, and Retrieval system (''EDGAR'').

C. Preparation of the Registration Statement

1. Administration of the Form N–3 Requirements

(a) The requirements of Form N–3 are intended to promote effective communication between the Registrant and prospective investors. A Registrant's prospectus should clearly disclose the fundamental features and risks of the Variable Annuity Contracts, using concise, straightforward, and easy to understand language. A Registrant should use document design techniques that promote effective communication.

(b) The prospectus disclosure requirements in Form N–3 are intended to elicit information for an average or typical investor who may not be sophisticated in legal or financial matters. The prospectus should help investors to evaluate the risks of an investment and to decide whether to invest in a Variable Annuity Contract by providing a balanced disclosure of positive and negative factors. Disclosure in the prospectus should be designed to assist an investor in comparing and contrasting a Variable Annuity Contract with other Contracts.

(c) Responses to the Items in Form N–3 should be as simple and direct as reasonably possible and should include only as much information as is necessary to enable an average or typical investor to understand the particular characteristics of the Variable Annuity Contracts. The prospectus should avoid including lengthy legal and technical discussions and simply restating legal or regulatory requirements to which Contracts generally are subject. Brevity is especially important in describing the practices or aspects of the Registrant's operations that do not differ materially from those of other separate accounts. Avoid excessive detail, technical or legal terminology, and complex language. Also avoid lengthy sentences and paragraphs that may make the prospectus difficult for many investors to understand and detract from its usefulness.

(d) The requirements for prospectuses included in Form N–3 will be administered by the Commission in a way that will allow variances in disclosure or presentation if appropriate for the circumstances involved while remaining consistent with the objectives of Form N–3.

2. Form N–3 Is Divided Into Three Parts

(a) *Part A.* Part A includes the information required in a Registrant's prospectus under section 10(a) of the Securities Act. The purpose of the prospectus is to provide essential

information about the Registrant and the Contracts in a way that will help investors to make informed decisions about whether to purchase the securities described in the prospectus. In responding to the Items in Part A, avoid cross-references to the SAI. Cross-references within the prospectus are most useful when their use assists investors in understanding the information presented and does not add complexity to the prospectus.

(b) *Part B.* Part B includes the information required in a Registrant's SAI. The purpose of the SAI is to provide additional information about the Registrant and the Contracts that the Commission has concluded is not necessary or appropriate in the public interest or for the protection of investors to be in the prospectus, but that some investors may find useful. Part B affords the Registrant an opportunity to expand discussions of the matters described in the prospectus by including additional information that the Registrant believes may be of interest to some investors. The Registrant should not duplicate in the SAI information that is provided in the prospectus, unless necessary to make the SAI comprehensible as a document independent of the prospectus.

(c) *Part C.* Part C includes other information required in a Registrant's registration statement.

3. Additional Matters

(a) *Organization of Information.* Organize the information in the prospectus and SAI to make it easy for investors to understand. Notwithstanding rule 421(a) under the Securities Act [17 CFR 230.421(a)] regarding the order of information required in a prospectus, disclose the information required by Item 2 (Overview of the Contract), Item 3 (Key Information), and Item 4 (Fee Table) in numerical order at the front of the prospectus. Do not precede Items 2, 3, and 4 with any other Item except the Cover Page (Item 1), a glossary, if any (General Instruction C.3.(d)), or a table of contents meeting the requirements of rule 481(c) under the Securities Act [17 CFR 230.481(c)]. If the discussion of the information required by Items 2 or 3 also responds to disclosure requirements in other items of the prospectus, a Registrant need not include additional disclosure in the prospectus that repeats the information disclosed in response to those items.

(b) *Other Information.* A Registrant may include, except in response to Items 2 and 3, information in the prospectus or the SAI that is not otherwise required so long as the information is not incomplete, inaccurate, or misleading and does not, because of its nature, quantity, or manner of presentation, obscure or impede understanding of the information that is required to be included. For example, Registrants are free to include in the prospectus financial statements required to be in the SAI, and may include in the SAI financial statements that may be placed in Part C.

(c) *Presentation of Information.* To aid investor comprehension, Registrants are encouraged to use, as appropriate, question-and-answer formats, tables, side-by-side comparisons, captions, bullet points, numeric examples, illustrations or similar presentation methods. For example, such presentation methods would be appropriate when presenting disclosure for similar Contract features, prospectuses describing multiple Variable Annuity Contracts, or the operation of optional benefits or annuitization.

(d) *Definitions.* Define the special terms used in the prospectus (*e.g.,* accumulation unit, contractowner, participant, sub-account, etc.) in any presentation that clearly conveys meaning to investors. If the Registrant elects to include a glossary or list of definitions, only special terms used throughout the prospectus must be defined or listed. If a special term is used in only one section of the prospectus, it may be defined there (and need not be included in any glossary or list of definitions that the Registrant includes).

(e) *Use of Form N–3 to Register Multiple Contracts.*

(i) A single prospectus may describe multiple Contracts that are essentially identical. Whether the prospectus describes Contracts that are ''essentially identical'' will depend on the facts and circumstances. For example, a Contract that does not offer optional benefits would not be essentially identical to one that does. Similarly, group and individual Contracts would not be essentially identical. However, Contracts that vary only due to state regulatory requirements would be essentially identical.

(ii) Similarly, multiple prospectuses may be combined in a single registration statement on Form N–3 when the prospectuses describe Contracts that are essentially identical. For example, a Registrant could determine it is appropriate to include multiple prospectuses in a registration statement in the following situations: (i) The prospectuses describe the same Contract that is sold through different distribution channels; (ii) the prospectuses describe Contracts that differ only with respect to underlying Investment Options offered; or (iii) the prospectuses describe both the original and an ''enhanced'' version of the same Contract (where the ''enhanced'' version modifies the features or options that the Registrant offers under that Contract).

(iii) Paragraph (a) of General Instruction C.3 requires Registrants to disclose the information required by Items 2, 3, and 4 in numerical order at the front of the prospectus and generally not to precede the Items with other information. As a general matter, Registrants providing disclosure in a single prospectus for more than one Variable Annuity Contract, or for Contracts sold in both the group and individual markets, may depart from the requirement of paragraph (a) as necessary to present the required information clearly and effectively (although the order of information required by each Item must remain the same). For example, the prospectus may present all of the Item 2 information for several Variable Annuity Contracts, followed by all of the Item 3 information for the Contracts, and followed by all of the Item 4 information for the Contracts. Alternatively, the prospectus may present Items 2, 3, and 4 for each of several Contracts sequentially. Other presentations also would be acceptable if they are consistent with the Form's intent to disclose the information required by Items 2, 3, and 4 in a standard order at the beginning of the prospectus.

(f) *Dates.* Rule 423 under the Securities Act [17 CFR 230.423] applies to the dates of the prospectuses and the SAI. The SAI should be made available at the same time that the prospectus becomes available for purposes of rules 430 and 460 under the Securities Act [17 CFR 230.430 and 230.460].

(g) *Sales Literature.* A Registrant may include sales literature in the prospectus so long as the amount of this information does not add substantial length to the prospectus and the placement of the sales literature does not obscure essential disclosure.

(h) *Interactive Data File*

(i) An Interactive Data File (§ 232.11 of this chapter) is required to be submitted to the Commission in the manner provided by Rule 405 of Regulation S–T (§ 232.405 of this chapter) for any registration statement or post-effective amendment thereto on Form N–3 that includes or amends information provided in response to Items 3, 4, 5, 12, 19, or 20.

(A) Except as required by paragraph (h)(i)(B), the Interactive Data File must

be submitted as an amendment to the registration statement to which the Interactive Data File relates. The amendment must be submitted on or before the date the registration statement or post-effective amendment that contains the related information becomes effective.

(B) In the case of a post-effective amendment to a registration statement filed pursuant to paragraphs (b)(1)(i), (ii), (v), or (vii) of rule 485 under the Securities Act [17 CFR 230.485(b)], the Interactive Data File must be submitted either with the filing, or as an amendment to the registration statement to which the Interactive Data Filing relates that is submitted on or before the date the post-effective amendment that contains the related information becomes effective.

(ii) An Interactive Data File is required to be submitted to the Commission in the manner provided by rule 405 of Regulation S–T for any form of prospectus filed pursuant to paragraphs (c) or (e) of rule 497 under the Securities Act [17 CFR 230.497(c) or (e)] that includes information provided in response to Items 3, 4, 5, 12, 19 or 20 that varies from the registration statement. The Interactive Data File must be submitted with the filing made pursuant to rule 497.

(iii) The Interactive Data File must be submitted in accordance with the specifications in the EDGAR Filer Manual, and in such a manner that will permit the information for each Contract, and, for any information that does not relate to all of the Classes in a filing, each Class of the Contract to be separately identified.

(i) *Website Addresses and Cross-References.* Any website address or cross-reference that is included in an electronic version of the Statutory Prospectus must be an active hyperlink. This requirement does not apply to electronic Statutory Prospectuses that are filed on the EDGAR system. Rule 105 of Regulation S–T [17 CFR 232.405] prohibits hyperlinking to websites, locations, or other documents that are outside of the EDGAR system.

D. Incorporation by Reference

1. Specific Rules for Incorporation by Reference in Form N–3

(a) A Registrant may not incorporate by reference into a prospectus information that Part A of this Form requires to be included in a prospectus, except as specifically permitted by Part A, of the Form.

(b) A Registrant may incorporate by reference any or all of the SAI into the prospectus (but not to provide any information required by Part A to be included in the prospectus) without delivering the SAI with the prospectus.

(c) A Registrant may incorporate by reference into the SAI or its response to Part C information that Parts B and C require to be included in the Registrant's registration statement.

2. General Requirements

All incorporation by reference must comply with the requirements of this Form and the following rules on incorporation by reference: Rule 10(d) of Regulation S–K under the Securities Act [17 CFR 229.10(d)] (general rules on incorporation by reference, which, among other things, prohibit, unless specifically required by this Form, incorporating by reference a document that includes incorporation by reference to another document, and limits incorporation to documents filed within the last 5 years, with certain exceptions); rule 411 under the Securities Act [17 CFR 230.411] (general rules on incorporation by reference in a prospectus); rule 303 of Regulation S–T [17 CFR 232.303] (specific requirements for electronically filed documents); and rules 0–4, 8b–23, and 8b–32 [17 CFR 270.0–4, 270.8b–23, and 270.8b–32] (additional rules on incorporation by reference for investment companies).

Part A—Information Required in a Prospectus

Item 1. Front and Back Cover Pages

(a) *Front Cover Page.* Include the following information on the outside front cover page of the prospectus:

(1) The Registrant's name.

(2) The Insurance Company's name.

(3) The types of Variable Annuity Contracts offered by the prospectus (*e.g.,* group, individual, single premium immediate, flexible premium deferred).

(4) The Investment Options available under the contract.

(5) The name of the Contract and the Class or Classes, if any, to which the Contract relates.

(6) The date of the prospectus.

(7) The statement required by rule 481(b)(1) under the Securities Act.

(8) The statement that additional information about certain investment products, including variable annuities, has been prepared by the Securities and Exchange Commission's staff and is available at *Investor.gov*.

(9) In the case of a Registrant holding itself out as a Money Market Fund or an Investment Option holding itself out as a Money Market Account, a prominent statement that an investment in the Registrant or the Investment Option is neither insured nor guaranteed by the U.S. Government.

(10) The legend: ''If you are a new investor in the [Contract], you may cancel your [Contract] within 10 days of receiving it without paying fees or penalties. In some states, this cancellation period may be longer. Upon cancellation, you will receive either a full refund of the amount you paid with your application or your total contract value. You should review this prospectus, or consult with your investment professional, for additional information about the specific cancellation terms that apply.''

Instruction. A Registrant may include on the front cover page any additional information, subject to the requirement of General Instruction C.3.(b) and (c).

(b) *Back Cover Page.* Include the following information, in plain English under rule 421(d) under the Securities Act [17 CFR 230.421(d)], on the outside back cover page of the prospectus:

(1) A statement that the SAI includes additional information about the Registrant. Explain that the SAI is available, without charge, upon request, and explain how contractowners may make inquiries about their Contracts. Provide a toll-free (or collect) telephone number for investors to call: To request the SAI; to request other information about the Contracts; and to make contractowner inquiries.

Instructions.

1. A Registrant may indicate, if applicable, that the SAI and other information are available on its internet site and/or by email request.

2. A Registrant may indicate, if applicable, that the SAI and other information are available from an insurance agent or financial intermediary (such as a broker-dealer or bank) through which the Contracts may be purchased or sold.

3. When a Registrant (or an insurance agent or financial intermediary through which Contracts may be purchased or sold) receives a request for the SAI, the Registrant (or insurance agent or financial intermediary) must send the SAI within 3 business days of receipt of the request, by first-class mail or other means designed to ensure equally prompt delivery.

(2) A statement whether and from where information is incorporated by reference into the prospectus as permitted by General Instruction D. Unless the information is delivered with the prospectus, explain that the Registrant will provide the information without charge, upon request (referring to the telephone number provided in response to paragraph (b)(1)).

Instruction. The Registrant may combine the information about incorporation by reference with the

statements required under paragraph (b)(1).

(3) A statement that reports and other information about the Registrant are available on the Commission's internet site at *http://www.sec.gov,* and that copies of this information may be obtained, upon payment of a duplicating fee, by electronic request at the following email address: *publicinfo@sec.gov*.

(4) The EDGAR contract identifier for the Contract on the bottom of the back cover page in type size smaller than that generally used in the prospectus (*e.g.,* 8-point modern type).

Item 2. Overview of the Contract

Provide a concise description of the Contract, including the following information:

(a) *Purpose.* Briefly describe the purpose(s) of the Contract (*e.g.,* to help the contractowner accumulate assets through an investment portfolio, to provide or supplement the contractowner's retirement income, to provide death and/or other benefits). State for whom the Contract may be appropriate (*e.g.,* by discussing a representative investor's time horizon, liquidity needs, and financial goals).

(b) *Phases of Contract.* Briefly describe the accumulation (savings) phase and annuity (income) phase of the Contract.

(1) This discussion should include a brief overview of the Investment Options available under the Contract, as well as any general (fixed) account options.

Instructions.

1. Prominently disclose that additional information about each Investment Option is provided elsewhere in the prospectus (see Items 19 and 20), and provide cross-references as appropriate.

2. A detailed explanation of the separate account and Investment Options is not necessary and should be avoided.

(2) State, if applicable, that if a contractowner annuitizes, he or she will receive a stream of income payments, however (i) he or she will be unable to make withdrawals and (ii) death benefits and living benefits will terminate.

(c) *Contract Features.* Summarize the Contract's primary features, including death benefits, withdrawal options, loan provisions, and any available optional benefits. If applicable, state that the contractowner will incur an additional fee for selecting a particular benefit.

Item 3. Key Information

Include the following information:

Important Information You Should Consider About the Contract

An investment in the Contract is subject to fees, risks, and other important considerations, some of which are briefly summarized in the following table. You should review the prospectus for additional information about these topics.

Fees and Expenses	
Surrender Charge (charges for early withdrawal).	
Transaction Charges (charges for certain transactions).	
Ongoing Fees and Expenses (annual charges).	
Risks	
Risk of Loss	
Not a Short-Term Investment.	
Risks Associated with Investment.	
Insurance Company Risks.	
Restrictions	
Investments	
Optional Benefits	
Taxes	
Tax Implications	
Conflicts of Interest	
Investment Professional Compensation.	
Exchanges	

Instructions.

1. General.

(a) A Registrant should disclose the required information in the tabular presentation(s) reflected herein, in the order specified. A Registrant may exclude any disclosures that are not applicable, or modify any of the statements required to be included, so long as the modified statement contains comparable information.

(b) A Registrant should provide cross-references to the location in the Statutory Prospectus where the subject matter is described in greater detail. Cross-references in electronic versions of the Summary Prospectus and/or Statutory Prospectus should link directly to the location in the Statutory Prospectus where the subject matter is discussed in greater detail. The cross-reference should be adjacent to the relevant disclosure, either within the table row, or presented in an additional table column.

(c) All disclosures provided in response to this Item 3 should be short and succinct, consistent with the limitations of a tabular presentation.

2. *Fees and Expenses*

(a) *Surrender Charges (charges for early withdrawal).* Include a statement that if the contractowner withdraws money from the Contract within [x] years following his or her last premium payment, he or she will be assessed a surrender charge. Include in this statement the maximum surrender charge (as a percentage of [contribution/premium or amount surrendered]), and the maximum number of years that a surrender charge may be assessed since the last premium payment under the contract. Provide an example of the maximum surrender charge a contractowner could pay (in dollars) under the Contract assuming a $100,000 investment (*e.g.,* ''[i]f you make an early withdrawal, you could pay a surrender charge of up to $9,000 on a $100,000 investment.'').

(b) *Transaction Charges (charges for certain transactions).* State that in addition to surrender charges (if applicable), the contractowner may also be charged for other transactions, and provide a brief narrative description of the types of such charges (*e.g.,* front-end loads, charges for transferring cash value between Investment Options, charges for wire transfers, etc.).

(c) *Ongoing Fees and Expenses (annual charges).*

Include the following information, in the order specified:

(i) *Minimum and Maximum Annual Fee Table*

(A) The legend: ''The table below describes the fees and expenses that you may pay *each year,* depending on the options you choose. Please refer to your contract specifications page for information about the specific fees you will pay each year based on the options you have elected.''

(B) Provide Minimum and Maximum Annual Fees in substantially the following tabular format, in the order specified.

Annual fee	Minimum	Maximum
Annual contract expenses (excluding optional benefit expenses)	[ ]%	[ ]%
Optional benefits (if elected)	[ ]%	[ ]%

(C) Explain, in a parenthetical or footnote to the table or each caption, the basis for each percentage (*e.g.,* % of separate account value or benefit base).

(D) Annual contract expenses should be calculated in accordance with the instructions for Total Annual Contract Expenses in Item 4.

(E) The Minimum Annual Fee means the lowest available current fee for each annual fee category (*i.e.,* the least expensive annual contract expenses, and the least expensive optional benefit available for an additional charge). The Maximum Annual Fee means the highest available current fee for each annual fee category (*i.e.,* the most expensive annual contract expenses, and the most expensive optional benefit available for an additional charge).

(ii) *Lowest and Highest Annual Cost Table*

(A) The legend: ''Because your contract is customizable, the choices you make affect how much you will pay. To help you understand the cost of owning your contract, the following table shows the lowest and highest cost you could pay *each year.* This estimate assumes that you do not take withdrawals from the contract, which could add surrender charges that substantially increase costs.''

(B) Provide Lowest and Highest Annual Costs in substantially the following tabular format, in the order specified.

Lowest annual cost: $[ ]	Highest annual cost: $[ ]
Assumes: • Investment of $100,000 • 5% annual appreciation • Least expensive combination of annual contract expenses • No optional benefits • No sales charges • No additional contributions, transfers or withdrawals	Assumes: • Investment of $100,000. • 5% annual appreciation. • Most expensive combination of annual contract expenses and optional benefits. • No sales charges. • No additional contributions, transfers or withdrawals.

(C) Calculate the Lowest and Highest Annual Cost estimates in the following manner:

a. Calculate the dollar amount of fees that would be assessed based on the assumptions described in the table above for each of the first 10 Contract years.

b. Total each year's fees (discounted to the present value using a 5% annual discount rate) and divide by 10 to calculate the estimated dollar amounts that are required to be set forth in the table above.

c. Sales loads, other than ongoing sales charges, may be excluded from the Lowest and Highest Annual Cost estimates.

d. Amounts of any premium bonus may be excluded from the Lowest and Highest Annual Cost estimates.

e. Unless otherwise stated, the least and most expensive combination of annual contract expenses and optional benefits available for an additional charge should be based on the disclosures provided in the Example in Item 4. If a different combination of annual contract expenses and optional benefits available for an additional charge would result in different Minimum or Maximum fees in different years, use the least expensive or most expensive combination of annual contract expenses and optional benefits each year.

3. *Risks*

(a) *Risk of Loss.* State that a contractowner can lose money by investing in the Contract

(b) *Not a Short-Term Investment.* State that a Contract is not a short-term investment vehicle and is not appropriate for an investor who needs ready access to cash, accompanied by a brief explanation.

(c) *Risks Associated with Investment.* State that an investment in the Contract is subject to the risk of poor investment performance and can vary depending on the performance of the Investment Options available under the Contract (as well as any fixed account Investment Option), that each Investment Option will have its own unique risks, and that the contractowner should review prospectus disclosures regarding the Investment Options before making an investment decision.

(d) *Insurance Company Risks.* State that an investment in the Contract is subject to the risks related to the Insurance Company, including that any obligations, guarantees, or benefits are subject to the claims-paying ability of the Insurance Company. If applicable, further state that more information about the Insurance Company, including its financial strength ratings, is available upon request from the Registrant.

Instruction. A Registrant may include the Insurance Company's financial strength rating(s) and omit the disclosures contemplated by the last sentence of Instruction 3.(d).

4. *Restrictions.*

(a) *Investments.* Briefly state whether there are any restrictions that may limit the investments that a contractowner may choose, as well as any limitations on the transfer of Contract value among Investment Options. If applicable, state that the insurer reserves the right to remove or substitute Investment Options.

(b) *Optional Benefits.* State whether there are any restrictions or limitations relating to optional benefits, and/or whether an optional benefit may be modified or terminated by the Registrant. If applicable, state that withdrawals may affect the availability of optional benefits by reducing the benefit by an amount greater than the value withdrawn, and/or could terminate a benefit.

5. *Taxes—Tax Implications.* State that a contractowner should consult with a tax professional to determine the tax implications of an investment in and payments received under the Contract, and that there is no additional tax benefit to the contractowner if the Contract is purchased through a tax-qualified plan or individual retirement account (IRA). Explain that withdrawals will be subject to ordinary income tax, and may be subject to tax penalties.

6. *Conflicts of Interest.*

(a) *Investment Professional Compensation.* State that some investment professionals receive compensation for selling the Contract to investors, and briefly describe the basis upon which such compensation is typically paid (*e.g.,* commissions, revenue sharing, compensation from affiliates and third parties). State that these investment professionals may have a financial incentive to offer or recommend the Contract over another investment for which the investment professional is not compensated (or compensated less).

(b) *Exchanges.* State that some investment professionals may have a financial incentive to offer a contractowner a new contract in place of the one he or she already owns, and that a contractowner should only exchange his or her contract if he or she

determines, after comparing the features, fees, and risks of both contracts, that it is preferable for him or her to purchase the new contract rather than continue to own the existing contract.

Instruction. A Registrant may omit these line-items if neither the Registrant nor any of its related companies pay financial intermediaries for the sale of the Contract or related services.

Item 4. Fee Table

Include the following information:

The following tables describe the fees and expenses that you will pay when buying, owning, and surrendering the contract. Please refer to your contract specifications page for information about the specific fees you will pay each year based on the options you have elected.

The first table describes the fees and expenses that you will pay *at the time* that you buy the contract, surrender the contract, or transfer cash value between [Investment Options]. State premium taxes may also be deducted.

ANNUAL TRANSACTION EXPENSES	
Sales Load Imposed on Purchases (as a percentage of purchase payments)	____%
Deferred Sales Load (or Surrender Charge) (as a percentage of purchase payments or amount surrendered, as applicable)	____%
Redemption Fee (as a percentage of amount redeemed, if applicable)	____%
Exchange Fee	____%

The next table describes the fees and expenses that you will pay *each year* during the time you own the contract. If you choose to purchase an optional benefit, you will pay additional charges, as shown below.

ANNUAL CONTRACT EXPENSES	
Administrative [Expenses]	$____
Base Contract [Expenses] (as a percentage of average account value)	____%
Management Fees	____%
Other Expenses	____%
_____	____%
_____	____%
_____	____%

ANNUAL CONTRACT EXPENSES—Continued	
Optional Benefit [Expenses] (as a percentage of benefit base or other (*e.g.,* average account value))	____%
Total Annual Contract Expenses	____%

Example

This Example is intended to help you compare the cost of investing in the contract with the cost of investing in other variable annuity contracts. These costs include transaction expenses, annual contract expenses, and [Investment Option] operating expenses.

The Example assumes that you invest $100,000 in the contract for the time periods indicated. The Example also assumes that your investment has a 5% return each year and assumes the most expensive combination of [Investment Option] operating expenses and optional benefits available for an additional charge. Although your actual costs may be higher or lower, based on these assumptions, your costs would be:

If you surrender your contract at the end of the applicable time period:	1 year $____	3 years $____	5 years $____	10 years $____
If you annuitize at the end of the applicable time period:	1 year $____	3 years $____	5 years $____	10 years $____
If you do *not* surrender your contract:	1 year $____	3 years $____	5 years $____	10 years $____

Portfolio Turnover

The Investment Option pays transaction costs, such as commissions, when it buys and sells securities (or ''turns over'' its portfolio). A higher portfolio turnover rate may indicate higher transaction costs and may result in higher taxes when Registrant shares are held in a taxable account. These costs, which are not reflected in annual contract expenses or in the example, affect the Investment Option's performance. During the most recent fiscal year, the Investment Option's portfolio turnover rate was ____% of the average value of its portfolio.

Instructions.

1. Include the narrative explanations in the order indicated. A Registrant may modify a narrative explanation if the explanation contains comparable information to that shown.

2. Assume that the annuity contract is owned during the accumulation period for purposes of the table (including the Example). If an annuitant would pay different fees or be subject to different expenses, disclose this in a brief narrative and provide a cross-reference to those portions of the prospectus describing these fees.

3. A Registrant may omit captions if the Registrant does not charge the fees or expenses covered by the captions. A Registrant may modify or add captions if the captions shown do not provide an accurate description of the Registrant's fees and expenses.

4. Round all dollar figures to the nearest dollar and all percentages to the nearest hundredth of one percent.

5. In the Annual Transaction Expenses and Annual Contract Expenses tables, the Registrant must disclose the maximum guaranteed charge, unless a specific instruction directs otherwise. If a fee is calculated based on a benchmark (*e.g.,* a fee that varies according to volatility levels or Treasury yields), the Registrant must also disclose the maximum guaranteed charge as a single number. The Registrant may disclose the current charge, in addition to the maximum charge, if the disclosure of the current charge is no more prominent than, and does not obscure or impede understanding of, the disclosure of the maximum charge. In addition, the Registrant may include in a footnote to the table a tabular, narrative, or other presentation providing further detail regarding variations in the charge. For example, if deferred sales charges decline over time, the Registrant may include in a footnote a presentation regarding the scheduled reductions in the deferred sales charges.

6. Provide a separate fee table (or separate column within the table) for each Contract form offered by the prospectus that has different fees.

7. If the Registrant offers more than one Investment Option, provide a separate response for each Investment Option. In addition, in a Contract with more than one Class, provide a separate response for each Class.

Administrative [Expenses]

8. Administrative expenses include any contract, account, or similar fee imposed on all Contractowner Accounts on any recurring basis.

Annual Transaction [Expenses]

9. ''Sales Load Imposed on Purchases'' includes the maximum sales load imposed upon purchase payments and may include a tabular presentation, within the larger table, of the range of such sales loads.

10. ''Deferred Sales Load'' includes the maximum contingent deferred sales load (or surrender charge), expressed as

a percentage of the original purchase price or amount surrendered, and may include a tabular presentation, within the larger table, of the range of contingent deferred sales loads over time.

11. ''Exchange Fee'' includes the maximum fee charged for any exchange or transfer of Contract value from the Registrant to another investment company or from one Investment Option of the Registrant to another Investment Option or the insurance company's general account. The Registrant may include a tabular presentation of the range of exchange fees unless such a presentation would be so lengthy as to encumber the larger table, in which case the Registrant should only provide a cross-reference to the narrative portion of the prospectus discussing the exchange fee.

12. If the Registrant (or any other party pursuant to an agreement with the Registrant) charges any other transaction fee, add another caption describing it and list the (maximum) amount or basis on which the fee is deducted.

Base Contract [Expenses]

13. Base Contract expenses includes mortality and expense risk fees, and account fees and expenses. Account fees and expenses include all fees and expenses (except sales loads, mortality and expense risk fees, and optional benefits) that are deducted from separate account assets or charged to all Contractowner Accounts.

14. Other Annual Expenses.

(a) ''Management Fees'' include investment advisory fees (including any component thereof based on the performance of the Registrant), any other management fees payable to the investment adviser or its affiliates and administrative fees payable to the investment adviser or its affiliates not included as ''Other Expenses.''

(b)(i) ''Other Expenses'' includes all expenses (except fees and expenses reported in other items in the table) that are deducted from separate account assets and are reflected as expenses in the Registrant's statement of operations (including increases resulting from complying with paragraph 2(g) of Rule 6–07 [17 CFR 210.6–07] of Regulation S–X).

(ii) ''Other Expenses'' do not include extraordinary expenses. ''Extraordinary expenses'' refers to expenses that are distinguished by their unusual nature and by the infrequency of occurrence. Unusual nature means the expense has a high degree of abnormality and is clearly unrelated to, or only incidentally related to, the ordinary and typical activities of the fund, taking into account the environment in which the fund operates. Infrequency of occurrence means the expense is not reasonably expected to recur in the foreseeable future, taking into consideration the environment in which the fund operates. The environment of a fund includes such factors as the characteristics of the industry or industries in which it operates, the geographical location of its operations, and the nature and extent of governmental regulation. If extraordinary expenses were incurred that materially affected the Registrant's ''Other Expenses,'' the Registrant should disclose in the narrative following the table what the ''Other Expenses'' would have been had extraordinary expenses been included.

(iii) The Registrant may subdivide this caption into no more than three subcategories of the Registrant's choosing, but must also include a total of all ''Other Expenses.''

(c) The percentages expressing annual expenses should be based on amounts incurred during the most recent fiscal year. However, if the Registrant has changed its fiscal year, and as a result the most recent fiscal year is less than three months, the Registrant should use the fiscal year prior to the most recent fiscal year as the basis for determining annual expenses.

(d) If there have been any changes in the annual expenses that would materially affect the information disclosed in the table:

(i) Restate the expense information using the current fees that would have been applicable had they been in effect during the previous fiscal year; and

(ii) In the narrative following the table, disclose that the expense information in the table has been restated to reflect current fees.

Instruction. A change in annual expenses means either an increase or a decrease in expenses that occurred during the most recent fiscal year or that is expected to occur during the current fiscal year. It includes the elimination of any expense reimbursement or fee waiver arrangement, in which case the expenses that would have been incurred had there been no reimbursement or waiver should be listed, but does not include circumstances where separate account expenses decrease in relation to the size of the separate account so as to make any waiver or reimbursement arrangement inoperative. An expected decrease in expenses as a percentage of assets due to economies of scale or breakpoints in a fee arrangement for a separate account whose assets have increased is an example of a change that should not be treated as a change requiring restatement.

(e) If there were expense reimbursement or fee waiver arrangements that reduced any operating expenses and will continue to reduce them in the current fiscal year: (a) Revise the appropriate caption by adding ''After Expense Reimbursements'' or some similar phrase; (b) state the amount of the actual expenses incurred, (*i.e.,* net of the amount reimbursed or waived); and (c) disclose in the narrative following the table the amount the expenses would have been absent the reimbursement or waiver.

(f)(i) If the Registrant invests in shares of one or more Acquired Funds, add a subcaption to the ''Annual Expenses'' portion of the table directly above the subcaption titled ''Total Annual Expenses.'' Title the additional subcaption: ''Acquired Fund Fees and Expenses.'' Disclose in the subcaption fees and expenses incurred indirectly by the Registrant as a result of investment in shares of one or more Acquired Funds. For purposes of this Item, an ''Acquired Fund'' means any company in which the Registrant invests that (i) is an investment company or (ii) would be an investment company under section 3(a) of the 1940 Act (15 U.S.C. 80a3(a)) but for the exceptions to that definition provided for in sections 3(c)(1) and 3(c)(7) of the 1940 Act (15 U.S.C. 80a–3(c)(1) and 80a–3(c)(7)). If a Registrant uses another term in response to other requirements of this Form to refer to Acquired Funds, it may include that term in parentheses following the subcaption title. In the event the fees and expenses incurred indirectly by the Registrant as a result of investment in shares of one or more Acquired Funds do not exceed 0.01 percent (one basis point) of average net assets of the Registrant, the Registrant may include these fees and expenses under the subcaption ''Other Expenses'' in lieu of this disclosure requirement.

(ii) Determine the ''Acquired Fund Fees and Expenses'' according to the following formula:

$$AFFE = [(F_1/FY) * AI_1 * D_1] + [(F_2/FY) * AI_2 * D_2] + [(F_3/FY) * AI_3 * D_3] + \text{Transaction Fees} + \text{Incentive Allocations Average Net Assets of the Registrant}$$

Where:

AFFE = Acquired Fund fees and expenses;

$F_1, F_2, F_3, \ldots$ = Total annual operating expense ratio for each Acquired Fund;

FY = Number of days in the relevant fiscal year;

$AI_1, AI_2, AI_3, \ldots$ = Average invested balance in each Acquired Fund;

D_1, D_2, D_3, . . . = Number of days invested in each Acquired Fund;

''Transaction Fees'' = The total amount of sales loads, redemption fees, or other transaction fees paid by the Registrant in connection with acquiring or disposing of shares in any Acquired Funds during the most recent fiscal year.

(iii) Calculate the average net assets of the Registrant for the most recent fiscal year based on the value of the net assets determined no less frequently than the end of each month.

(iv) The total annual operating expense ratio used for purposes of this calculation (F1) is the annualized ratio of operating expenses to average net assets for the Acquired Fund's most recent fiscal period as disclosed in the Acquired Fund's most recent shareholder report. If the ratio of expenses to average net assets is not included in the most recent shareholder report or the Acquired Fund is a newly formed fund that has not provided a shareholder report, then the ratio of expenses to average net assets of the Acquired Fund is the ratio of total annual operating expenses to average annual net assets of the Acquired Fund for its most recent fiscal period as disclosed in the most recent communication from the Acquired Fund to the Registrant. For purposes of this instruction, Acquired Fund expenses include increases resulting from brokerage service and expense offset arrangements and reductions resulting from fee waivers or reimbursements by the Acquired Funds' investment advisers or sponsors.

(v) To determine the average invested balance (AI1), the numerator is the sum of the amount initially invested in an Acquired Fund during the most recent fiscal year (if the investment was held at the end of the previous fiscal year, use the amount invested as of the end of the previous fiscal year) and the amounts invested in the Acquired Fund no less frequently than monthly during the period the investment is held by the Registrant (if the investment was held through the end of the fiscal year, use each month-end through and including the fiscal year-end). Divide the numerator by the number of measurement points included in the calculation of the numerator (*i.e.,* if an investment is made during the fiscal year and held for 3 succeeding months, the denominator would be 4).

Optional Benefits [Expenses]

15. Optional Benefits expenses include any optional features (*e.g.,* enhanced death benefits and living benefits) offered under the Contract for an additional charge.

Total Annual Contract Expenses

16. If optional benefit expenses are calculated on a basis other than account value, Registrants should prominently indicate that those optional benefit expenses are not included in total annual expenses (which are calculated as a percentage of account value).

Example

17. For purposes of the Example(s) in the table, provide the following for each contract class of each Investment Option:

(a) Assume that the percentage amounts listed under ''Base Contract [Expenses]'' remain the same in each year of the 1-, 3-, 5-, and 10-year periods, except that an appropriate adjust to reflect reduced annual expenses from completion of organization expense amortization may be made;

(b) The most expensive combination of contract features must be shown first. Additional expense presentations are permitted, but not required;

(c) Assume the maximum sales load that may be deducted from purchase payments is deducted;

(d) For any breakpoint in any fee, assume that the amount of the Registrant's (and the Investment Option's) assets remains constant as of the level at the end of the most recently completed fiscal year;

(e) Assume no exchanges or other transactions;

(f) Reflect any [annual] contract expenses by dividing the total amount of [annual] contract expenses collected during the year that are attributable to the contract offered by the prospectus by the total average net assets that are attributable to the contract offered by the prospectus. Add the resulting percentage to Base Contract expenses and assume that it remains the same in each year of the 1-, 3-, 5-, and 10-year periods;

(g) Reflect any contingent deferred sales load by assuming a complete surrender on the last day of the year;

(h) Provide the information required in the third section of the Example only if a sales load or other fee is charged upon a complete surrender; and

(i) Include in the Example the information provided by the caption ''If you annuitize at the end of the applicable time period'' only if the Registrant charges fees upon annuitization that are different from those charged upon surrender.

Item 5. Principal Risks of Investing in the Contract

Summarize the principal risks of purchasing a Contract, including the risks of poor investment performance, that Contracts are unsuitable as short-term savings vehicles, limitations on access to cash value through withdrawals, and the possibility of adverse tax consequences.

Item 6. General Description of Registrant, Insurance Company, and Investment Options

Concisely discuss the organization and operation or proposed operation of the Registrant. Include the information specified below.

(a) *Insurance Company.* Provide the name and address of the Insurance Company.

(b) *Registrant.* Briefly describe the Registrant. Include a statement indicating that:

(1) Income, gains, and losses credited to, or charged against, the Registrant reflect the Registrant's own investment experience and not the investment experience of the Insurance Company's other assets;

(2) the assets of the Registrant may not be used to pay any liabilities of the Insurance Company other than those arising from the Contracts; and

(3) the Insurance Company is obligated to pay all amounts promised to contractowners under the Contracts.

(c) *Investment Options.* State that information regarding each Investment Option, including (i) its name, (ii) its type (*e.g.,* Money Market Account, bond fund, balanced fund, *etc.*) or a brief statement concerning its investment objectives, (iii) its investment adviser and any sub-investment adviser, (iv) expense ratio, and (v) performance is available elsewhere in the prospectus (*see* Items 19 and 20), and provide cross-references as appropriate.

(d) *Portfolio Holdings.* State that a description of the Registrant's policies and procedures with respect to the disclosure of the Registrant's portfolio securities is available (i) in the Registrant's SAI; and (ii) on the Registrant's website, if applicable.

(e) *Voting.* Concisely discuss the rights of contractowners to instruct the Insurance Company on the voting of shares of the Registrant, including the manner in which votes will be allocated.

Item 7. Management

(a) *Investment Adviser.* Provide the name and address of each investment adviser of the Registrant, including sub advisers. Describe the investment adviser's experience as an investment adviser and the advisory services that it provides to the Registrant.

(1) Describe the compensation of each investment adviser of the Registrant as follows:

(i) If the Registrant has operated for a full fiscal year, state the aggregate fee paid to the adviser for the most recent fiscal year as a percentage of average net assets. If the Registrant has not operated for a full fiscal year, state what the adviser's fee is as a percentage of average net assets, including any breakpoints.

(ii) If the adviser's fee is not based on a percentage of average net assets (*e.g.,* the adviser receives a performance-based fee), describe the basis of the adviser's compensation.

(2) Include a statement, adjacent to the disclosure required by paragraph (a)(1) of this Item, that a discussion regarding the basis for the board of directors approving any investment advisory contract of the Registrant is available in the Registrant's annual or semi-annual report to contractowners, as applicable, and providing the period covered by the relevant annual or semi-annual report.

Instructions.

1. If the Registrant changed advisers during the fiscal year, describe the compensation and the dates of service for each adviser.

2. Explain any changes in the basis of computing the adviser's compensation during the fiscal year.

3. If a Registrant has more than one investment adviser, disclose the aggregate fee paid to all of the advisers, rather than the fees paid to each adviser, in response to this Item.

(b) *Portfolio Manager.* State the name, title, and length of service of the person or persons employed by or associated with the Registrant or an investment adviser of the Registrant who are primarily responsible for the day-to-day management of the Registrant's portfolio (''Portfolio Manager''). For each Portfolio Manager identified, state the Portfolio Manager's business experience during the past 5 years. Include a statement, adjacent to the foregoing disclosure, that the SAI provides additional information about the Portfolio Manager's(s') compensation, other accounts managed by the Portfolio Manager(s), and the Portfolio Manager's(s') ownership of securities in the Registrant. If a Portfolio Manager is a member of a committee, team, or other group of persons associated with the Registrant or an investment adviser of the Registrant that is jointly and primarily responsible for the day-to-day management of the Registrant's portfolio, provide a brief description of the person's role on the committee, team, or other group (*e.g.,* lead member), including a description of any limitations on the person's role and the relationship between the person's role and the roles of other persons who have responsibility for the day-to-day management of the Registrant's portfolio.

Item 8. Charges

(a) *Description.* Briefly describe all charges deducted from purchase payments, Contractowner Accounts, or assets of the Registrant, or any other source (*e.g.,* sales loads, premium taxes and other taxes, administrative and transaction charges, risk charges, contract loan charges, and optional benefit charges). Indicate whether each charge will be deducted from purchase payments, Contractowner Accounts, or the Registrant's assets, the proceeds of withdrawals or surrenders, or some other source. When possible, specify the amount of any current charge as a percentage or dollar figure (*e.g.,* 0.95% of average daily net assets or $5 per exchange). For recurring charges, specify the frequency of the deduction (*e.g.,* daily, monthly, annually). Identify the person who receives the amount deducted, briefly explain what is provided in consideration for the charges, and explain the extent to which any charge can be modified. Where it is possible to identify what is provided in consideration for a particular charge (*e.g.,* use of sales load to pay distribution costs, please explain what is provided in consideration for that charge separately.

Instructions.

1. Describe the sales loads applicable to the Contract and how sales loads are charged and calculated, including the factors affecting the computation of the amount of the sales load. If the Contract has a front-end sales load, describe the sales load as a percentage of the applicable measure of purchase payments and as a percentage of the net amount invested for each breakpoint. For Contracts with a deferred sales load, describe the sales load as a percentage of the applicable measure of purchase payments (or other basis) that the deferred sales load may represent. Percentages should be shown in a table. Identify any events on which a deferred sales load is deducted (*e.g.,* surrender or partial surrender). The description of any deferred sales load should include how the deduction will be allocated among Investment Options of the Registrant and when, if ever, the sales load will be waived (*e.g.,* if the Contract provides a free withdrawal amount).

2. Unless set forth in response to Instruction 1, list any special purchase plans or methods established pursuant to a rule or an exemptive order that reflect scheduled variations in, or elimination of, the sales load (*e.g.,* group discounts, waiver of sales load upon annuitization or attainment of a certain age, waiver of deferred sales load for a certain percentage of contract value (''free corridor''), investment of proceeds from another policy, exchange privileges, employee benefit plans, or the terms of a merger, acquisition or exchange offer made pursuant to a plan of reorganization); identify each class of individuals or transactions to which such plans apply; state each different sales charge available as a percentage of the public offering price and as a percentage of the net amount invested; and state from whom additional information may be obtained. Describe any other special purchase plans or methods established pursuant to a rule that reflect other variations in, or elimination of, the sales load or in any administrative charge or other deductions from purchase payments, and generally describe the basis for the variation or elimination in the sales load or other deduction (*i.e.,* the size of the purchaser, a prior or existing relationship with the purchaser, the purchaser's assumption of certain administrative functions, or other characteristics that result in differences in costs or services).

3. If proceeds from explicit sales loads will not cover the expected costs of distributing the contracts, identify from what source the shortfall, if any, will be paid. If any shortfall is to be made from assets from the Insurance Company's general account, disclose, if applicable, that any amounts paid by the Insurance Company may consist, among other things, of proceeds derived from Base Contract expenses deducted from the account.

4. If the Contract's charge for premium or other taxes varies according to jurisdiction, identification of the range of current premium or other taxes is sufficient.

(b) *Commissions Paid to Dealers.* State the commissions paid to dealers as a percentage of purchase payments.

(c) *Investment Option Charges.* State that charges are deducted from and expenses paid out of the assets of the Investment Options.

(d) *Operating Expenses.* Describe the type of operating expenses for which the Registrant is responsible. If organizational expenses of the Registrant are to be paid out of its assets, explain how the expenses will be amortized and the period over which the amortization will occur.

Item 9. General Description of Contracts

(a) *Contract Rights.* Identify the person or persons (*e.g.,* the contractowner, participant, annuitant, or beneficiary) who have material rights under the Contracts, and the nature of those rights, (1) during the accumulation period, (2) during the annuity period, or (3) after the death of the annuitant or contractowner.

Instruction. Disclose all material state variations and intermediary specific variations (*e.g.,* variations resulting from different brokerage channels) to the offering.

(b) *Contract Provisions and Limitations.* Briefly describe any provisions and limitations for:

(1) Minimum contract value, and the consequences of falling below that amount;

(2) allocation of purchase payments among Investment Options of the Registrant;

(3) transfer of Contract values between Investment Options of the Registrant, including transfer programs (*e.g.,* dollar cost averaging, portfolio rebalancing, asset allocation programs, and automatic transfer programs);

(4) conversion or exchange of Contracts for another contract, including a fixed or variable annuity or life insurance contract; and

Instruction. In discussing conversion or exchange of Contracts, the Registrant should include any time limits on conversion or exchange, the name of the company issuing the other contract and whether that company is affiliated with the issuer of the Contract, and how the cash value of the Contract will be affected by the conversion or exchange.

(5) buyout offers of variable annuity contracts, including interests or participations therein.

(c) *General Account.* Describe the obligations under the contract that are funded by the insurer's general account (*e.g.,* death benefits, living benefits, or other benefits available under the contract), and state that these amounts are subject to the insurer's claims paying ability and financial strength.

(d) *Contract or Registrant Changes.* Briefly describe the changes that can be made in the Contracts or the operations of the Registrant by the Registrant or the Insurance Company, including:

(1) Why a change may be made (*e.g.,* changes in applicable law or interpretations of law);

(2) who, if anyone, must approve any change (*e.g.,* the contractowner or the Commission); and

(3) who, if anyone, must be notified of any change.

Instruction. Describe only those changes that would be material to a purchaser of the Contracts, such as a reservation of the right to deregister the Registrant under the Investment Company Act or to substitute one Investment Option for another. Do not describe possible non-material changes, such as changing the time of day at which accumulation unit values are determined.

(e) *Class of Purchasers.* Disclose any limitations on the class or classes of purchasers to whom the Contract is being offered.

(f) *Frequent Transfers among Investment Options of the Registrant*

(1) Describe the risks, if any, that frequent transfers of Contract value among Investment Options of the Registrant may present for other contractowners and other persons (*e.g.,* participants, annuitants, or beneficiaries) who have material rights under the Contract.

(2) State whether or not the Registrant or Insurance Company has policies and procedures with respect to frequent transfers of Contract value among Investment Options of the Registrant.

(3) If neither the Registrant nor Insurance Company has any such policies and procedures, provide a statement of the specific basis for the view of the board that it is appropriate for the Registrant not to have such policies and procedures.

(4) If the Registrant or Insurance Company has adopted any such policies and procedures, describe those policies and procedures, including:

(i) Whether or not the Registrant or Insurance Company discourages frequent transfers of Contract value among Investment Options of the Registrant;

(ii) whether or not the Registrant or Insurance Company accommodates frequent transfers of Contract value among Investment Options of the Registrant; and

(iii) any policies and procedures of the Registrant or Insurance Company for deterring frequent transfers of Contract value among Investment Options of the Registrant, including any restrictions imposed by the Registrant or Insurance Company to prevent or minimize frequent transfers. Describe each of these policies, procedures, and restrictions with specificity. Indicate whether each of these restrictions applies uniformly in all cases or whether the restriction will not be imposed under certain circumstances, including whether each of these restrictions applies to trades that occur through omnibus accounts at intermediaries, such as investment advisers, broker-dealers, transfer agents, and third party administrators. Describe with specificity the circumstances under which any restriction will not be imposed. Include a description of the following restrictions, if applicable:

(A) Any restrictions on the volume or number of transfers that may be made within a given time period;

(B) any transfer fee;

(C) any costs or administrative or other fees or charges that are imposed on persons deemed to be engaged in frequent transfers of Contract value among Investment Options of the Registrant, together with a description of the circumstances under which such costs, fees, or charges will be imposed;

(D) any minimum holding period that is imposed before a transfer may be made from an Investment Option into another Investment Option of the Registrant;

(E) any restrictions imposed on transfer requests submitted by overnight delivery, electronically, or via facsimile or telephone; and

(F) any right of the Registrant or Insurance Company to reject, limit, delay, or impose other conditions on transfers or to terminate or otherwise limit Contracts based on a history of frequent transfers among Investment Options, including the circumstances under which such right will be exercised.

(5) If applicable, include a statement, adjacent to the disclosure required by paragraphs (f)(1) through (f)(4) of this Item, that the Statement of Additional Information includes a description of all arrangements with any person to permit frequent transfers of contract value among Investment Options of the Registrant.

Item 10. Annuity Period

Briefly describe the annuity options available. The discussion should include:

(a) Material factors that determine the level of annuity benefits;

(b) The annuity commencement date (give the earliest and latest possible dates);

(c) Frequency and duration of annuity payments, and the effect of these on the level of payment;

(d) The effect of assumed investment return;

(e) Any minimum amount necessary for an annuity option and the consequences of an insufficient amount; and

(f) Rights, if any, to change annuity options or to effect a transfer of investment base after the annuity commencement date.

Instructions.

1. Describe the choices, if any, available to a prospective annuitant, and

the effect of not specifying a choice. Where an annuitant is given a choice in assumed investment return, explain the effect of choosing a higher, as opposed to a lower, assumed investment return.

2. Detailed disclosure on the method of calculating annuity payments should be placed in the Statement of Additional Information in response to Item 31.

(g) If applicable, state that the contractowner will not be able to withdraw any contract value amounts after the annuity commencement date.

Item 11. Standard Death Benefit

Briefly describe the standard death benefit provided under the Contract during the accumulation and the annuity periods.

Include:

(a) The operation of the standard death benefit, including the amount of the death benefit and how the death benefit amount may vary, the circumstances under which the value of the benefit may increase or be reduced (including the impact of withdrawals), and how the benefit may be terminated.

(b) When the death benefit is calculated and payable and the effect of choosing a specific method of payment on calculation of the death benefit.

(c) The forms the benefit may take, including the effect of not choosing a payment option and the period, if any, during which payments must begin under any annuity option.

Item 12. Other Benefits Available Under the Contract

(a) Include the following information:

In addition to the standard death benefit associated with your contract, other [standard and/or optional] benefits may also be available to you. The purposes, fees, and restrictions/limitations of these additional benefits are briefly summarized in the following table[s].

Name of benefit	Purpose	Statement of whether benefit is standard or optional	Fee	Brief description of restrictions/limitations
			[ ]% [ ]%	

Instructions.

1. *General.*

(a) The table required by this Item 12(a) is meant to provide a tabular summary overview of the benefits described in Item 12(b) (*e.g.,* optional death benefits, optional or standard living benefits, etc.)

(b) If the Contract offers multiple benefits of the same type (*e.g.,* death benefit, accumulation benefit, withdrawal benefit, long-term care benefit), the Registrant may include multiple tables in response to this Item 12(a), if doing so might better permit comparisons of different benefits of the same type.

(c) The Registrant should include appropriate titles, headings, or other information to promote clarity and facilitate understanding of the table(s) presented in response to this Item 12(a). For example, if certain optional benefits are only available to certain contractowners (*e.g.,* contractowners who invested during specific time periods), the table could include footnotes or headings to identify which optional benefits are affected and to whom those optional benefits are available. In addition, if the Registrant includes titles or headings for the table(s) specifying whether the benefit is standard or optional, the Registrant does not need to include the ''Statement of Whether Benefit is Standard or Optional'' column in the table(s).

2. *Name of Benefit.* State the name of each benefit included in the table(s).

3. *Purpose.* Briefly describe the purpose of each benefit included in the table(s).

4. *Statement of Whether Benefit is Standard or Optional.* State whether the benefit is standard or optional.

5. *Fee.* State the fee associated with each benefit included in the table(s). Include parentheticals providing information about what the stated percentage refers to (*e.g.,* percentage of contract value, percentage of benefit base, etc.).

6. *Brief Description of Restrictions/Limitations.* For each benefit for which the Registrant has stated that there are restrictions or limitations, briefly describe the restriction(s) or limitation(s) associated with each benefit. Registrants are encouraged to use short phrases (*e.g.,* ''benefit limits [Investment Options] available,'' ''withdrawals could terminate benefit'') to describe the restriction(s) or limitation(s).

(b) Briefly describe any other benefits (other than standard death benefit, *e.g.,* optional death benefits, optional or standard living benefits, etc.) offered under a Contract, including:

(1) Whether the benefit is standard or elected;

(2) The operation of the benefit, including the amount of the benefit and how the benefit amount may vary, the circumstances under which the value of the benefit may increase or be reduced (including the impact of withdrawals), and how the benefit may be terminated;

(3) Fees and costs, if any, associated with the benefit; and

(4) How the benefit amount is calculated and payable and the effect of choosing a specific method of payment on calculation of the benefit.

(c) Briefly describe any limitations, restrictions and risks associated with any benefit (other than the standard death benefit) offered under the contract (*e.g.,* restrictions on which Investment Options may be selected; risk of reduction or termination of benefit resulting from excess withdrawals).

Instruction. In responding to paragraphs (b) and (c) of this Item, provide one or more examples illustrating the operation of each benefit in a clear, concise, and understandable manner.

Item 13. Purchases and Contract Value

(a) Briefly describe the procedures for purchasing a Contract. Include a concise explanation of:

(1) The minimum initial and subsequent purchase payments required and any limitations on the amount of purchase payments that will be accepted (if there are separate limits for each Investment Option, state these limits); and

(2) a statement of when initial and subsequent purchase payments are credited.

(b) Describe the manner in which purchase payments are credited, including: (A) An explanation that purchase payments are credited on the basis of accumulation unit value; (B) how accumulation unit value is determined; and (C) how the number of accumulation units credited to a contract is determined.

(c) Explain that investment performance of the Investment Options, expenses, and deduction of certain charges affect accumulation unit value and/or the number of accumulation units.

(d) Identify the method used to value the Registrant's assets (*e.g.,* market

value, good faith determination, amortized cost).

Instruction. A Registrant (other than a Money Market Fund) must provide a brief explanation of the circumstances under which it will use fair value pricing and the effects of using fair value pricing. With respect to any portion of a Registrant's assets that are invested in one or more open-end management investment companies that are registered under the Investment Company Act, the Registrant may briefly explain that the Registrant's net asset value is calculated based upon the net asset values of the registered open-end management investment companies in which the Registrant invests, and that the prospectuses for these companies explain the circumstances under which those companies will use fair value pricing and the effects of using fair value pricing.

(e) Describe when calculations of accumulation unit value are made and that purchase payments are credited to a contract on the basis of accumulation unit value next determined after receipt of a purchase payment.

(f) Identify each principal underwriter (other than the Insurance Company) of the variable annuity contracts and state its principal business address. If the principal underwriter is affiliated with the Registrant, the Insurance Company, or any affiliated person of the Registrant or the Insurance Company, identify how they are affiliated (*e.g.,* the principal underwriter is controlled by the Insurance Company).

Item 14. Surrenders and Withdrawals

(a) *Surrender.* Briefly describe how a contractowner or annuitant (if the annuity option chosen by the annuitant is not based on a life contingency) can surrender (or partially surrender or make withdrawals from) a Contract, including any limits on the ability to surrender, how the proceeds are calculated, and when they are payable.

(b) *Partial Surrender and Withdrawal.* Indicate generally whether and under what circumstances partial surrenders and partial withdrawals are available under a Contract, including the minimum and maximum amounts that may be surrendered or withdrawn, any limits on their availability, how the proceeds are calculated, and when the proceeds are payable.

(c) *Effect of Partial Surrender and Withdrawal.* Indicate generally whether and under what circumstances partial surrenders or partial withdrawals will affect a Contract's cash value, death benefit(s), and/or any living benefits, and whether any charge(s) will apply.

(d) *Investment Option Allocation.* Describe how partial surrenders and partial withdrawals will be allocated to the Investment Options.

Instruction. The Registrant should generally describe the terms and conditions that apply to these transactions. Technical information regarding the determination of amounts available to be surrendered or withdrawn should be included in the SAI.

(e) *Involuntary Redemption.* Briefly describe any provision for involuntary redemptions under the Contract and the reasons for it, such as the size of the account or infrequency of purchase payments.

(f) *Revocation Rights.* Briefly describe any revocation rights (*e.g.,* ''free-look'' provisions), including a description of how the amount refunded is determined, the method for crediting earnings to purchase payments during the free-look period, and whether Investment Options are limited during the free-look period.

Item 15. Loans

Briefly describe the loan provisions of the Contract, including any of the following that are applicable.

(a) *Availability of Loans.* State that a portion of the Contract's cash surrender value may be borrowed. State how the amount available for a loan is calculated.

(b) *Limitations.* Describe any limits on availability of loans (*e.g.,* a prohibition on loans during the first Contract year).

(c) *Interest.* Describe how interest accrues on the loan, when it is payable, and how interest is treated if not paid. Explain how interest earned on the loaned amount is credited to the Contract and allocated to the Investment Options.

(d) *Effect on Contract Value and Death Benefit.* Describe how loans and loan repayments affect cash value and how they are allocated among the Investment Options. Include (i) a brief explanation that amounts borrowed under a Contract do not participate in a Registrant's investment experience and that loans, therefore, can affect the Contract's value and death benefit whether or not the loan is repaid, and (ii) a brief explanation that the cash surrender value and the death proceeds payable will be reduced by the amount of any outstanding Contract loan plus accrued interest.

(e) *Other Effects.* Describe any other effect that a loan could have on the Contract (*e.g.,* the effect of a Contract loan in excess of Contract value).

(f) *Procedures.* Describe the loan procedures, including how and when amounts borrowed are transferred out of the Registrant and how and when amounts repaid are credited to the Registrant.

Item 16. Taxes

(a) *Tax Consequences.* Describe the material tax consequences to the contractowner and beneficiary of buying, holding, exchanging, or exercising rights under the Contract.

Instruction. Discuss the taxation of annuity payments, death benefit proceeds, periodic and non-periodic withdrawals, loans, and any other distribution that may be received under the Contract, as well as the tax benefits accorded the Contract, and other material tax consequences. Describe, if applicable, whether the tax consequences vary with different uses of the Contract.

(b) *Qualified Plans.* Identify the types of qualified plans for which the Contracts are intended to be used.

Instructions.

1. Identify the types of persons who may use the plans (*e.g.,* corporations, self-employed individuals) and disclose, if applicable, that the terms of the plan may limit the rights otherwise available under the contracts.

2. Do not describe the Internal Revenue Code requirements for qualifications of plans or the non-annuity tax consequences of qualification (*e.g.,* the effect on employer taxation).

(c) *Effect.* Describe the effect, if any, of taxation on the determination of cash values or sub-account values.

Item 17. Legal Proceedings

Describe any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the Registrant, or the Registrant's investment adviser, principal underwriter, or Insurance Company is a party. Include the name of the court where the case is pending, the date instituted, the principal parties involved, a description of the factual basis alleged to underlie the proceeding, and the relief sought. Include similar information as to any proceedings instituted, or known to be contemplated, by a governmental authority.

Instruction. For purposes of this requirement, legal proceedings are material only to the extent that they are likely to have a material adverse effect on the Registrant, the ability of the investment adviser or principal underwriter to perform its contract with the Registrant, or the ability of the Insurance Company to meet its obligations under the Contracts.

Item 18. Financial Statements

If all of the required financial statements of the Registrant and the Insurance Company (*see* Item 32) are not in the prospectus (*see* General Instruction C.3.(b)), state, under a separate caption, where the financial statements may be found. Briefly explain how investors may obtain any financial statements not in the Statement of Additional Information.

Item 19. Investment Options Available Under the Contract

Include as an Appendix under the heading ''Appendix: [Investment Options] Available Under [the Contract]'' the following information, in the format specified below:

The following is a list of [Investment Options] currently available under [the Contract], which is subject to change as discussed in [the Statutory Prospectus for the Contract]. More information about the [Investment Options] is available in [the Statutory Prospectus for the Contract], which can be requested at no cost by following the instructions on [the front cover page or beginning of the Summary Prospectus].

The performance information below reflects contract fees and expenses that are paid by each investor. Each [Investment Option's] past performance is not necessarily an indication of future performance.

[Type/investment objective]	[Investment option and *adviser/subadviser*]	Annual contract expenses (expenses/average assets, excluding optional benefit expenses)	Average annual total returns (excluding optional benefit expenses *(as of 12/31/____)*		
			1 year	5 year	10 year
[Insert]	[Names of Investment Option and *adviser/subadviser*]	[____]%	[____]%	[____]%	[____]%

Instructions.

1. *General.*

(a) A Statutory Prospectus may omit the appendix described in this Item if the appendix is not included in a Summary Prospectus. The second sentence of the first paragraph of the legend preceding the table is only required in the case of a Summary Prospectus.

(b) Only include those Investment Options that are currently offered under the Contract.

(c) If the availability of one or more Investment Options varies by benefit offered under the Contract, include as another Appendix a separate table that indicates which Investment Options are available under each of the benefits offered under the Contract. This Appendix could incorporate a table that is structured pursuant to the following example, or could use any other presentation that might promote clarity and facilitate understanding:

[Investment Option]	**[Benefit #1]**	**[Benefit #2]**	**[Benefit #3]**	**[Benefit #4]**
Investment Option A	☑	☑	☑	☑
Investment Option B	☑	☑		
Investment Option C	☑	☑		
Investment Option D	☑			

2. *Type/Investment Objective.* Briefly describe each Investment Option's type (*e.g.,* Money Market Account, bond fund, balanced fund, etc.), or include a brief statement concerning the Investment Option's investment objectives.

3. *Investment Option and Adviser/Subadviser.* State the name of each Investment Option and its adviser/subadviser, as applicable. The adviser's/sub-adviser's name may be omitted if it is incorporated into the name of the Investment Option.

4. *Expense ratio.* For purposes of this Item, ''expense ratio'' means the ''Total Annual Fund Operating Expenses'' as calculated pursuant to Item 3 of Form N–1A for open-end funds, before waivers and reimbursements that reduce the Investment Option's rate of return.

5. *Average Annual Total Returns.* For purposes of this Item, ''average annual total returns'' means the ''average annual total return'' (before taxes) as calculated pursuant to Item 30(b)(1).

Item 20. Additional Information About Investment Options Available Under the Contract

(a) *Investment Objectives.* Provide the following information for each Investment Option.

(1) *Investment Objectives.* State the Investment Option's investment objectives and, if applicable, state that those objectives may be changed without shareholder approval.

(2) *Implementation of Investment Objectives.* Describe how the Investment

Option intends to achieve its investment objectives. In the discussion:

(i) Describe the Investment Option's principal investment strategies, including the particular type or types of securities in which the Investment Option principally invests or will invest.

Instructions.

1. A strategy includes any policy, practice, or technique used by the Investment Option to achieve its investment objectives.

2. Whether a particular strategy, including a strategy to invest in a particular type of security, is a principal investment strategy depends on the strategy's anticipated importance in achieving the Registrant's investment objectives, and how the strategy affects the Investment Option's potential risks and returns. In determining what is a principal investment strategy, consider, among other things, the amount of the Investment Option's assets expected to be committed to the strategy, the amount of the Investment Option's assets expected to be placed at risk by the strategy, and the likelihood of the Investment Option losing some or all of those assets from implementing the strategy.

3. A negative strategy (*e.g.,* a strategy not to invest in a particular type of security or not to borrow money) is not a principal investment strategy.

4. Disclose any policy to concentrate in securities of issuers in a particular industry or group of industries (*i.e.,* investing more than 25% of an Investment Option's net assets in a particular industry or group of industries).

5. Disclose any other policy specified in Item 23(b)(1) that is a principal investment strategy of the Investment Option.

6. Disclose, if applicable, that the Investment Option may, from time to time, take temporary defensive positions that are inconsistent with the Investment Option's principal investment strategies in attempting to respond to adverse market, economic, political, or other conditions. Also disclose the effect of taking such a temporary defensive position (*e.g.,* that the Registrant may not achieve its investment objective).

7. Disclose whether the Investment Option (if not a Money Market Account) may engage in active and frequent trading of portfolio securities to achieve its principal investment strategies. If so, explain the tax consequences to contractowners of increased portfolio turnover, and how the tax consequences of, or trading costs associated with, an Investment Option's portfolio turnover may affect the Investment Option's performance.

(ii) Explain in general terms how the Investment Option decides which securities to buy and sell (*e.g.,* for an equity fund, discuss, if applicable, whether the Investment Option emphasizes value or growth or blends the two approaches).

(b) *Risks.* Disclose the principal risks of investing in the Investment Option(s), including the risks to which the Investment Option's particular portfolio as a whole is expected to be subject and the circumstances reasonably likely to affect adversely the Investment Option's accumulation unit values, yield, or total return.

(c) *Performance.* Provide the following for each Investment Option.

(1) Include the bar chart and table required by paragraphs (c)(2) and (3) of this Item. Provide a brief explanation of how the information illustrates the variability of the Investment Option's returns (*e.g.,* by stating that the information provides some indication of the risks of investing in the Registrant by showing changes in the Investment Option's performance from year to year and by showing how the Investment Option's average annual returns for 1, 5, and 10 years compare with those of a broad measure of market performance). Provide a statement to the effect that the Registrant's past performance is not necessarily an indication of how the Investment Option will perform in the future. If applicable, include a statement explaining that updated performance information is available and providing a website address and/or toll-free (or collect) telephone number where the updated information may be obtained.

(2) If the Investment Option has annual returns for at least one calendar year, provide a bar chart showing the Investment Option's annual total returns for each of the last 10 calendar years (or for the life of the Investment Option if less than 10 years), but only for periods subsequent to the effective date of the Registrant's registration statement. Present the corresponding numerical return adjacent to each bar. If the Registrant's fiscal year is other than a calendar year, include the year-to-date return information as of the end of the most recent quarter in a footnote to the bar chart. Following the bar chart, disclose the Investment Option's highest and lowest return for a quarter during the 10 years or other period of the bar chart.

(3) If the Investment Option has annual returns for at least one calendar year, provide a table showing the Investment Option's average annual total return. All returns should be shown for 1-, 5-, and 10- calendar year periods ending on the date of the most recently completed calendar year (or for the life of the Investment Option, if shorter), but only for periods subsequent to the effective date of the Registrant's registration statement. The table also should show the returns of an appropriate broad-based securities market index for the same periods. An Investment Option that has been in existence for more than 10 years also may include returns for the life of the Investment Option. A Money Market Account may provide the Investment Option's 7-day yield ending on the date of the most recent calendar year or disclose a toll-free (or collect) telephone number that investors can use to obtain the Investment Option's current 7-day yield. For each Investment Option, provide the information in the following table with the specified captions:

Performance reflects contract fees and expenses that are paid by each investor. This performance does not reflect optional benefit expenses.

AVERAGE ANNUAL TOTAL RETURNS

[For the period ended December 31, ____]

	1 year	5 years (or life of fund)	10 years (or life of fund)
Average Annual Total Returns	%	%	%
Index (reflects no deduction for [fees, expenses, or taxes])	%	%	%

Instructions.

1. *Bar Chart.*

(a) Provide annual total returns beginning with the earliest calendar year.

(i) Assume an initial investment made at the net asset value calculated on the last business day before the first day of each period shown.

(ii) Do not reflect sales loads or account fees in the initial investment, but, if sales loads or account fees are imposed, note that they are not reflected in total return.

(iii) Reflect any sales load assessed upon reinvestment of dividends or distributions.

(iv) Assume a redemption at the price calculated on the last business day of each period shown.

(v) For a period less than a full calendar year, state the total return for the period and disclose that total return is not annualized in a note to the chart.

(vi) If a Registrant's shares are sold subject to a sales load or account fees, state that sales loads or account fees are not reflected in the bar chart and that, if these amounts were reflected, returns would be less than those shown.

(b) For an Investment Option that provides annual total returns for only one calendar year or for an Investment Option that does not include the bar chart because it does not have annual returns for a full calendar year, modify, as appropriate, the narrative explanation required by paragraph (c)(1) of this Item (*e.g.,* by stating that the information gives some indication of the risks of an investment in the Investment Option by comparing the Investment Option's performance with a broad measure of market performance).

2. *Table.*

(a) For purposes of this table, an ''appropriate broad-based securities market index'' is one that is administered by an organization that is not an affiliated person of the Registrant, its investment adviser, or principal underwriter, unless the index is widely recognized and used. Adjust the index to reflect the reinvestment of dividends on securities in the index, but do not reflect the expenses of the Registrant.

(b) Calculate a Money Market Account's 7-day yield under Item 30(a) and the Investment Option's average annual total return under Item 30(b)(1).

(c) An Investment Option's is encouraged to compare its performance not only to the required broad-based index, but also to other more narrowly based indexes that reflect the market sectors in which the Investment Option invests. An Investment Option also may compare its performance to an additional broad-based index, or to a non-securities index (*e.g.,* the Consumer Price Index), so long as the comparison is not misleading. If an additional index is included, disclose information about the additional index in the narrative explanation accompanying the bar chart and table (*e.g.,* by stating that the information shows how the Investment Option's performance compares with the returns of an index of funds with similar investment objectives).

(d) If the Investment Option selects an index that is different from the index used in a table for the immediately preceding period, explain the reason(s) for the selection of a different index and provide information for both the newly selected and the former index.

(e) An Investment Option (other than a Money Market Account) may include the Investment Option's yield calculated under Item 30(b)(2). Any Investment Option may include its tax-equivalent yield calculated under Item 30. If a Investment Option's yield is included, provide a toll-free (or collect) telephone number that investors can use to obtain current yield information.

3. *Multiple Class Funds.*

(a) When a Multiple Class Fund presents information for more than one Class together in response to this Item, provide annual total returns in the bar chart for only one of those Classes. The Multiple Class Fund can select which Class to include (*e.g.,* the oldest Class, the Class with the greatest net assets) if the Multiple Class Fund:

(i) Selects the Class with 10 or more years of annual returns if other Classes have fewer than 10 years of annual returns;

(ii) Selects the Class with the longest period of annual returns when the Classes all have fewer than 10 years of returns; and

(iii) If the Multiple Class Fund provides annual total returns in the bar chart for a Class that is different from the Class selected for the most immediately preceding period, explain in a footnote to the bar chart the reasons for the selection of a different Class.

(b) When a Multiple Class Fund offers a new Class in a prospectus and separately presents information for the new Class in response to this Item, include the bar chart with annual total returns for any other existing Class for the first year that the Class is offered. Explain in a footnote that the returns are for a Class that is not presented that would have substantially similar annual returns because the shares are invested in the same portfolio of securities and the annual returns would differ only to the extent that the Classes do not have the same expenses. Include return information for the other Class reflected in the bar chart in the performance table.

(c) When a Multiple Class Fund presents information for more than one Class together in response to this Item:

(i) Provide the average annual total returns required this Item for each of the Classes.

(ii) All returns shown should be identified by Class.

(d) If a Multiple Class Fund offers a Class in the prospectus that converts into another Class after a stated period, compute average annual total returns in the table by using the returns of the other Class for the period after conversion.

4. *Change in Investment Adviser.* If the Investment Option has not had the same investment adviser during the last 10 calendar years, the Investment Option may begin the bar chart and the performance information in the table on the date that the current adviser began to provide advisory services to the Investment Option so long as:

(a) Neither the current adviser nor any affiliate is or has been in ''control'' of the previous adviser under section 2(a)(9) of the Investment Company Act [15 U.S.C. 80a–2(a)(9)];

(b) The current adviser employs no officer(s) of the previous adviser or employees of the previous adviser who were responsible for providing investment advisory or portfolio management services to the Registrant; and

(c) The graph is accompanied by a statement explaining that previous periods during which the Investment Option was advised by another investment adviser are not shown.

Part B—Information Required in a Statement of Additional Information

Item 21. Cover Page and Table of Contents

(a) *Front Cover Page.* Include the following information on the outside front cover page of the SAI:

(1) The Registrant's name,

(2) The Insurance Company's name.

(3) The name of the Contract and the Class or Classes, if any, to which the Contract relates.

(4) A statement or statements:

(i) That the SAI is not a prospectus;

(ii) How the prospectus may be obtained; and

(iii) Whether and from where information is incorporated by reference into the SAI; as permitted by General Instruction D.

Instruction. Any information incorporated by reference into the SAI must be delivered with the SAI.

(5) The date of the SAI and the prospectus to which the SAI relates.

(b) *Table of Contents.* Include under appropriate captions (and subcaptions) a list of the contents of the SAI and, when useful, provide cross references to related disclosure in the prospectus.

Item 22. General Information and History

(a) *Insurance Company.* Provide the date and form of organization of the Insurance Company, the name of the state or other jurisdiction in which the Insurance Company is organized, and a description of the general nature of the Insurance Company's business.

Instruction. The description of the Insurance Company's business should be short and need no list all of the businesses in which the Insurance Company engages or identify the jurisdictions in which it does business if a general description (*e.g.,* ''variable annuity'' or ''reinsurance'') is provided.

(b) *Registrant.* Provide the date and form of organization of the Registrant and the Registrant's classification pursuant to Section 4 [15 U.S.C. 80a–4] (*i.e.,* separate account and an open-end investment company).

(c) *History of Insurance Company and Registrant.* If the Insurance Company's name was changed during the past five years, state its former name and the approximate date on which it was changed. If, at the request of any state, sales of contracts offered by the Registrant have been suspended at any time, or if sales of contracts offered by the Insurance Company have been suspended during the past five years, briefly describe the reasons for and results of the suspension. Briefly describe the nature and results of any bankruptcy, receivership, or similar proceeding, or any other material reorganization, readjustment, or succession of the Insurance Company during the past five years.

(d) *Ownership of Investment Option Assets.* If 10 percent or more of the assets of any Investment Option are not attributable to Contracts or to accumulated deductions or reserves (*e.g.,* initial capital contributed by the Insurance Company), state what percentage those assets are of the total assets of the Registrant. If the Insurance Company, or any other person controlling the assets, has any present intention of removing the assets from the Investment Option, so state.

(e) *Control of Insurance Company.* State the name of each person who controls the Insurance Company and the nature of its business.

Instruction. If the Insurance Company is controlled by another person that, in turn, is controlled by another person, give the name of each control person and the nature of its business.

Item 23. Investment Objectives and Risks

Instruction. If the Registrant offers more than one Investment Option under the Contract, provide the requested information for each Investment Option. Otherwise, the requested information may be provided at the Registrant level.

(a) *Investment Strategies and Risks.* Describe any investment strategies, including a strategy to invest in a particular type of security, used by an investment adviser of the Registrant in managing the Registrant that are not principal strategies and the risks of those strategies.

(b) *Registrant Policies.*

(1) Describe the Registrant's policy with respect to each of the following:

(i) Issuing senior securities;

(ii) Borrowing money, including the purpose for which the proceeds will be used;

(iii) Underwriting securities of other issuers;

(iv) Concentrating investments in a particular industry or group of industries;

(v) Purchasing or selling real estate or commodities;

(vi) Making loans; and

(vii) Any other policy that the Registrant deems fundamental or that may not be changed without shareholder approval, including, if applicable, Registrant's investment objectives.

Instruction. If the Registrant reserves freedom of action with respect to any practice specified in paragraph (b)(1) of this Item, state the maximum percentage of assets to be devoted to the practice and disclose the risks of the practice.

(2) State whether shareholder approval is necessary to change any policy specified in paragraph (b)(1) of this Item. If so, describe the vote required to obtain this approval.

(c) *Temporary Defensive Position.* Disclose, if applicable, the types of investments that a Registrant may make while assuming a temporary defensive position described in response to Item 20(a).

(d) *Portfolio Turnover.* Explain any significant variation in the Registrant's portfolio turnover rates over the two most recently completed fiscal years or any anticipated variation in the portfolio turnover rate from that reported for the last fiscal year in response to Item 33.

Instruction. This paragraph does not apply to a Money Market Fund or a Money Market Account.

(e) *Disclosure of Portfolio Holdings*

(1) Describe the Registrant's policies and procedures with respect to the disclosure of the Registrant's portfolio securities to any person, including:

(i) How the policies and procedures apply to disclosure to different categories of persons, including individual investors, institutional investors, intermediaries that distribute the Registrant's shares, third-party service providers, rating and ranking organizations, and affiliated persons of the Registrant;

(ii) Any conditions or restrictions placed on the use of information about portfolio securities that is disclosed, including any requirement that the information be kept confidential or prohibitions on trading based on the information, and any procedures to monitor the use of this information;

(iii) The frequency with which information about portfolio securities is disclosed, and the length of the lag, if any, between the date of the information and the date on which the information is disclosed;

(iv) Any policies and procedures with respect to the receipt of compensation or other consideration by the Registrant, its investment adviser, or any other party in connection with the disclosure of information about portfolio securities;

(v) The individuals or categories of individuals who may authorize disclosure of the Registrant's portfolio securities (*e.g.,* executive officers of the Registrant);

(vi) The procedures that the Registrant uses to ensure that disclosure of information about portfolio securities is in the best interests of Registrant contractowners, including procedures to address conflicts between the interests of Registrant contractowners, on the one hand, and those of the Registrant's investment adviser; principal underwriter; or any affiliated person of the Registrant, its investment adviser, or its principal underwriter, on the other; and

(vii) The manner in which the board of directors exercises oversight of disclosure of the Registrant's portfolio securities.

Instruction. Include any policies and procedures of the Registrant's investment adviser, or any other third party, that the Registrant uses, or that are used on the Registrant's behalf, with respect to the disclosure of the Registrant's portfolio securities to any person.

(2) Describe any ongoing arrangements to make available information about the Registrant's portfolio securities to any person, including the identity of the persons

who receive information pursuant to such arrangements. Describe any compensation or other consideration received by the Registrant, its investment adviser, or any other party in connection with each such arrangement, and provide the information described by paragraphs (e)(1)(ii), (iii), and (v) of this Item with respect to such arrangements.

Instructions.

1. The consideration required to be disclosed by paragraph (e)(2) of this Item includes any agreement to maintain assets in the Registrant or in other investment companies or accounts managed by the investment adviser or by any affiliated person of the investment adviser.

2. The Registrant is not required to describe an ongoing arrangement to make available information about the Registrant's portfolio securities pursuant to this Item, if, not later than the time that the Registrant makes the portfolio securities information available to any person pursuant to the arrangement, the Registrant discloses the information in a publicly available filing with the Commission that is required to include the information.

3. The Registrant is not required to describe an ongoing arrangement to make available information about the Registrant's portfolio securities pursuant to this Item if:

(a) The Registrant makes the portfolio securities information available to any person pursuant to the arrangement no earlier than the day next following the day on which the Registrant makes the information available on its website in the manner specified in its prospectus pursuant to paragraph (b) of this Instruction 3; and

(b) the Registrant has disclosed in its current prospectus that the portfolio securities information will be available on its website, including (1) the nature of the information that will be available, including both the date as of which the information will be current (*e.g.,* month-end) and the scope of the information (*e.g.,* complete portfolio holdings, Registrant's largest 20 holdings); (2) the date when the information will first become available and the period for which the information will remain available, which shall end no earlier than the date on which the Registrant files its Form N–CSR or Form N–Q with the Commission for the period that includes the date as of which the website information is current; and (3) the location on the Registrant's website where either the information or a prominent hyper link (or series of prominent hyperlinks) to the information will be available.

(f) *Money Market Fund Material Events.* In the case of a Registrant holding itself out as a Money Market Fund or an Investment Option holding itself out as a Money Market Account (except any Money Market Fund or Money Market Account that is not subject to the requirements of §§ 270.2a–7(c)(2)(i) and/or (ii) of this chapter pursuant to § 270.2a–7(c)(2)(iii) of this chapter, and has not chosen to rely on the ability to impose liquidity fees and suspend redemptions consistent with the requirements of §§ 270.2a–7(c)(2)(i) and/or (ii)) disclose, as applicable, the following events:

(1) *Imposition of Liquidity Fees and Temporary Suspensions of Registrant Redemptions.*

(i) During the last 10 years, any occasion on which the Registrant has invested less than ten percent of its total assets in weekly liquid assets (as provided in § 270.2a–7(c)(2)(ii)), and with respect to each such occasion, whether the Registrant's board of directors determined to impose a liquidity fee pursuant to § 270.2a–7(c)(2)(ii) and/or temporarily suspend the Registrant's redemptions pursuant to § 270.2a–7(c)(2)(i).

(ii) During the last 10 years, any occasion on which the Registrant has invested less than thirty percent, but more than ten percent, of its total assets in weekly liquid assets (as provided in § 270.2a–7(c)(2)(i)) and the Registrant's board of directors has determined to impose a liquidity fee pursuant to § 270.2a–7(c)(2)(i) and/or temporarily suspend the Registrant's redemptions pursuant to § 270.2a–7(c)(2)(i).

Instructions.

1. With respect to each such occasion, disclose: The dates and length of time for which the Registrant invested less than ten percent (or thirty percent, as applicable) of its total assets in weekly liquid assets; the dates and length of time for which the Registrant's board of directors determined to impose a liquidity fee pursuant to § 270.2a–7(c)(2)(i) or § 270.2a–7(c)(2)(ii), and/or temporarily suspend the Registrant's redemptions pursuant to § 270.2a–7(c)(2)(i); and the size of any liquidity fee imposed pursuant to § 270.2a–7(c)(2)(i) or § 270.2a–7(c)(2)(ii).

2. The disclosure required by paragraph (e)(1) of this Item should incorporate, as appropriate, any information that the Registrant is required to report to the Commission on Items E.1, E.2, E.3, E.4, F.1, F.2, and G.1 of Form N–CR [17 CFR 274.222].

3. The disclosure required by paragraph (e)(1) of this Item should conclude with the following statement: ''The Registrant was required to disclose additional information about this event [or ''these events,'' as appropriate] on Form N–CR and to file this form with the Securities and Exchange Commission. Any Form N–CR filing submitted by the Registrant is available on the EDGAR Database on the Securities and Exchange Commission's internet site at *http://www.sec.gov.*''

(2) *Financial Support Provided to Money Market Funds or Money Market Accounts.* During the last 10 years, any occasion on which an affiliated person, promoter, or principal underwriter of the Registrant, or an affiliated person of such a person, provided any form of financial support to the Registrant, including a description of the nature of support, person providing support, brief description of the relationship between the person providing support and the Registrant, date support provided, amount of support, security supported (if applicable), and the value of security supported on date support was initiated (if applicable).

Instructions.

1. The term ''financial support'' includes any capital contribution, purchase of a security from the Registrant in reliance on § 270.17a–9, purchase of any defaulted or devalued security at par, execution of letter of credit or letter of indemnity, capital support agreement (whether or not the Registrant ultimately received support), performance guarantee, or any other similar action reasonably intended to increase or stabilize the value or liquidity of the Registrant's portfolio; excluding, however, any routine waiver of fees or reimbursement of Registrant expenses, routine inter-fund lending, routine inter-fund purchases of Registrant shares, or any action that would qualify as financial support as defined above, that the board of directors has otherwise determined not to be reasonably intended to increase or stabilize the value or liquidity of the Registrant's portfolio.

2. If during the last 10 years, the Registrant has participated in one or more mergers with another investment company (a ''merging investment company''), provide the information required by paragraph (f)(2) of this Item with respect to any merging investment company as well as with respect to the Registrant; for purposes of this Instruction, the term ''merger'' means a merger, consolidation, or purchase or sale of substantially all of the assets between the Registrant and a merging investment company. If the person or entity that previously provided financial support to a merging investment company is not currently an affiliated person, promoter, or principal

underwriter of the Registrant, the Registrant need not provide the information required by paragraph (f)(2) of this Item with respect to that merging investment company.

3. The disclosure required by paragraph (f)(2) of this Item should incorporate, as appropriate, any information that the Registrant is required to report to the Commission on Items C.1, C.2, C.3, C.4, C.5, C.6, and C.7 of Form N–CR [17 CFR 274.222].

4. The disclosure required by paragraph (f)(2) of this Item should conclude with the following statement: ''The Registrant was required to disclose additional information about this event [or ''these events,'' as appropriate] on Form N–CR and to file this form with the Securities and Exchange Commission. Any Form N–CR filing submitted by the Registrant is available on the EDGAR Database on the Securities and Exchange Commission's internet site at *http://www.sec.gov.*''

Item 24. Management of the Registrant

Instructions.

1. For purposes of this Item, the terms below have the following meanings:

(a) The term ''family of investment companies'' means any two or more registered investment companies that:

(i) Share the same investment adviser or principal underwriter; and

(ii) Hold themselves out to investors as related companies for purposes of investment and investor services.

(b) The term ''fund complex'' means two or more registered investment companies that:

(i) Hold themselves out to investors as related companies for purposes of investment and investor services; or

(ii) Have a common investment adviser or have an investment adviser that is an affiliated person of the investment adviser of any of the other registered investment companies.

(c) The term ''immediate family member'' means a person's spouse; child residing in the person's household (including step and adoptive children); and any dependent of the person, as defined in section 152 of the Internal Revenue Code (26 U.S.C. 152).

(d) The term ''officer'' means the president, vice-president, secretary, treasurer, controller, or any other officer who performs policy-making functions.

2. When providing information about directors, furnish information for directors who are interested persons of the Registrant separately from the information for directors who are not interested persons of the Registrant. For example, when furnishing information in a table, you should provide separate tables (or separate sections of a single table) for directors who are interested persons and for directors who are not interested persons. When furnishing information in narrative form, indicate by heading or otherwise the directors who are interested persons and the directors who are not interested persons.

(a) *Management Information.*

(1) Provide the information required by the following table for each member of the board of managers (''director'') and officer of the Registrant, and, if the Registrant has an advisory board, member of the board. Explain in a footnote to the table any family relationship between the persons listed.

(1)	(2)	(3)	(4)	(5)	(6)
Name, address, and age	Position(s) held with registrant	Term of office and length of time served	Principal occupation(s) during past 5 years	Number of portfolios in fund complex overseen by director	Other directorships held by director

Instructions.

1. For purposes of this paragraph, the term ''family relationship'' means any relationship by blood, marriage, or adoption, not more remote than first cousin.

2. For each director who is an interested person of the Registrant, describe, in a footnote or otherwise, the relationship, events, or transactions by reason of which the director is an interested person.

3. State the principal business of any company listed under column (4) unless the principal business is implicit in its name.

4. Indicate in column (6) directorships not included in column (5) that are held by a director in any company with a class of securities registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78l) or subject to the requirements of section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) or any company registered as an investment company under the 1940 Act (15 U.S.C. 80a–2(a)(19)), and name the companies in which the directorships are held. Where the other directorships include directorships overseeing two or more portfolios in the same fund complex, identify the fund complex and provide the number of portfolios overseen as a director in the fund complex rather than listing each portfolio separately.

(2) For each individual listed in column (1) of the table required by paragraph (a)(1) of this Item, except for any director who is not an interested person of the Registrant, describe any positions, including as an officer, employee, director, or general partner, held with affiliated persons or principal underwriters of the Registrant.

Instruction. When an individual holds the same position(s) with two or more registered investment companies that are part of the same fund complex, identify the fund complex and provide the number of registered investment companies for which the position(s) are held rather than listing each registered investment company separately.

(3) Describe briefly any arrangement or understanding between any director or officer and any other person(s) (naming the person(s)) pursuant to which he was selected as a director or officer.

Instruction. Do not include arrangements or understandings with directors or officers acting solely in their capacities as such.

(b) *Leadership Structure and Board of Directors.*

(1) Briefly describe the leadership structure of the Registrant's board, including the responsibilities of the board of directors with respect to the Registrant's management and whether the chairman of the board is an interested person of the Registrant. If the chairman of the board is an interested person of the Registrant, disclose whether the Registrant has a lead independent director and what specific role the lead independent director plays in the leadership of the Registrant. This disclosure should indicate why the Registrant has determined that its leadership structure is appropriate given the specific characteristics or circumstances of the Registrant. In addition, disclose the extent of the board's role in the risk oversight of the Registrant, such as how the board administers its oversight function and

the effect that this has on the board's leadership structure.

(2) Identify the standing committees of the Registrant's board of directors, and provide the following information about each committee:

(i) A concise statement of the functions of the committee;

(ii) The members of the committee;

(iii) The number of committee meetings held during the last fiscal year; and

(iv) If the committee is a nominating or similar committee, state whether the committee will consider nominees recommended by security holders and, if so, describe the procedures to be followed by security holders in submitting recommendations.

(3)(i) Unless disclosed in the table required by paragraph (a)(1) of this Item, describe any positions, including as an officer, employee, director, or general partner, held by any director who is not an interested person of the Registrant, or immediate family member of the director, during the two most recently completed calendar years with:

(A) The Registrant;

(B) An investment company, or a person that would be an investment company but for the exclusions provided by sections 3(c)(1) and 3(c)(7) (15 U.S.C. 80a–3(c)(1) and (c)(7)), having the same Insurance Company, investment adviser or principal underwriter as the Registrant or having an Insurance Company, investment adviser or principal underwriter that directly or indirectly controls, is controlled by, or is under common control with the Insurance Company or an investment adviser or principal underwriter of the Registrant;

(C) The Insurance Company or an investment adviser, principal underwriter, or affiliated person of the Registrant; or

(D) Any person directly or indirectly controlling, controlled by, or under common control with the Insurance Company or an investment adviser or principal underwriter of the Registrant.

(ii) Unless disclosed in the table required by paragraph (a)(1) of this Item or in response to paragraph (b)(3)(i) of this Item, indicate any directorships held during the past five years by each director in any company with a class of securities registered pursuant to section 12 of the Securities Exchange Act (15 U.S.C. 78l) or subject to the requirements of section 15(d) of the Securities Exchange Act (15 U.S.C. 78o (d)) or any company registered as an investment company under the Investment Company Act, and name the companies in which the directorships were held.

Instruction. When an individual holds the same position(s) with two or more portfolios that are part of the same fund complex, identify the fund complex and provide the number of portfolios for which the position(s) are held rather than listing each portfolio separately.

(3) For each director, state the dollar range of equity securities beneficially owned by the director as required by the following table:

(i) In the Registrant; and

(ii) On an aggregate basis, in any registered investment companies overseen by the director within the same family of investment companies as the Registrant.

(1)	(2)	(3)
Name of director	Dollar range of equity securities in the Registrant	Aggregate dollar range of equity securities in all registered investment companies overseen by director in family of investment companies

Instructions.

1. Information should be provided as of the end of the most recently completed calendar year. Specify the valuation date by footnote or otherwise.

2. Determine ''beneficial ownership'' in accordance with rule 16a–1(a)(2) under the Exchange Act (17 CFR 240.16a–1(a)(2)).

3. If the SAI covers more than one Investment Option, disclose in column (2) the dollar range of equity securities beneficially owned by a director in each Investment Option overseen by the director.

4. In disclosing the dollar range of equity securities beneficially owned by a director in columns (2) and (3), use the following ranges: None, $1–$10,000, $10,001–$50,000, $50,001–$100,000, or over $100,000.

(4) For each director who is not an interested person of the Registrant, and his immediate family members, furnish the information required by the following table as to each class of securities owned beneficially or of record in.

(i) The Insurance Company or an investment adviser or principal underwriter of the Registrant; or

(ii) A person (other than a registered investment company) directly or indirectly controlling, controlled by, or under common control with the Insurance Company or an investment adviser or principal underwriter of the Registrant:

(1)	(2)	(3)	(4)	(5)	(6)
Name of director	Name of owners and relationships to director	Company	Title of class	Value of securities	Percent of class

Instructions.

1. Information should be provided as of the end of the most recently completed calendar year. Specify the valuation date by footnote or otherwise.

2. An individual is a ''beneficial owner'' of a security if he is a ''beneficial owner'' under either rule 13d–3 or rule 16a–1(a)(2) under the Exchange Act (17 CFR 240.13d–3 or 240.16a–1(a)(2)).

3. Identify the company in which the director or immediate family member of the director owns securities in column (3). When the company is a person directly or indirectly controlling, controlled by, or under common control

with the Insurance Company or an investment adviser or principal underwriter, describe the company's relationship with the Insurance Company, investment adviser, or principal underwriter.

4. Provide the information required by columns (5) and (6) on an aggregate basis for each director and his immediate family members.

(5) Unless disclosed in response to paragraph (b)(5) of this Item, describe any direct or indirect interest, the value of which exceeds $120,000, of each director who is not an interested person of the Registrant, or immediate family member of the director, during the two most recently completed calendar years, in:

(i) The Insurance Company or an investment adviser or principal underwriter of the Registrant; or

(ii) A person (other than a registered investment company) directly or indirectly controlling, controlled by, or under common control with the Insurance Company or an investment adviser or principal underwriter of the Registrant.

Instructions.

1. A director or immediate family member has an interest in a company if he is a party to a contract, arrangement, or understanding with respect to any securities of, or interest in, the company

2. The interest of the director and the interests of his immediate family members should be aggregated in determining whether the value exceeds $120,000.

(6) Describe briefly any material interest, direct or indirect, of any director who is not an interested person of the Registrant, or immediate family member of the director, in any transaction, or series of similar transactions, during the two most recently completed calendar years, in which the amount involved exceeds $120,000 and to which any of the following persons was a party:

(i) The Registrant;

(ii) An officer of the Registrant;

(iii) An investment company, or a person that would be an investment company but for the exclusions provided by sections 3(c)(1) and 3(c)(7) (15 U.S.C. 80a–3(c)(1) and (c)(7)), having the same Insurance Company, investment adviser or principal underwriter as the Registrant or having an Insurance Company, investment adviser or principal underwriter that directly or indirectly controls, is controlled by, or is under common control with an Insurance Company, investment adviser or principal underwriter of the Registrant;

(iv) An officer of an investment company, or a person that would be an investment company but for the exclusions provided by sections 3(c)(1) and 3(c)(7) (15 U.S.C. 80a–3(c)(1) and (c)(7)), having the same Insurance Company, investment adviser or principal underwriter as the Registrant or having an Insurance Company, investment adviser or principal underwriter that directly or indirectly controls, is controlled by, or is under common control with the Insurance Company or an investment adviser or principal underwriter of the Registrant;

(v) The Insurance Company or an investment adviser or principal underwriter of the Registrant;

(vi) An officer of the Insurance Company or an investment adviser or principal underwriter of the Registrant;

(vii) A person directly or indirectly controlling, controlled by, or under common control with the Insurance Company or an investment adviser or principal underwriter of the Registrant; or

(viii) An officer of a person directly or indirectly controlling, controlled by, or under common control with the Insurance Company or an investment adviser or principal underwriter of the Registrant.

Instructions.

1. Include the name of each director or immediate family member whose interest in any transaction or series of similar transactions is described and the nature of the circumstances by reason of which the interest is required to be described.

2. State the nature of the interest, the approximate dollar amount involved in the transaction, and, where practicable, the approximate dollar amount of the interest.

3. In computing the amount involved in the transaction or series of similar transactions, include all periodic payments in the case of any lease or other agreement providing for periodic payments.

4. Compute the amount of the interest of any director or immediate family member of the director without regard to the amount of profit or loss involved in the transaction(s).

5. As to any transaction involving the purchase or sale of assets, state the cost of the assets to the purchaser and, if acquired by the seller within two years prior to the transaction, the cost to the seller. Describe the method used in determining the purchase or sale price and the name of the person making the determination.

6. Disclose indirect, as well as direct, material interests in transactions. A person who has a position or relationship with, or interest in, a company that engages in a transaction with one of the persons listed in paragraphs (b)(7)(i) through (b)(7)(viii) of this Item may have an indirect interest in the transaction by reason of the position, relationship, or interest. The interest in the transaction, however, will not be deemed ''material'' within the meaning of paragraph (b)(7) of this Item where the interest of the director or immediate family member arises solely from the holding of an equity interest (including a limited partnership interest, but excluding a general partnership interest) or a creditor interest in a company that is a party to the transaction with one of the persons specified in paragraphs (b)(7)(i) through (b)(7)(viii) of this Item, and the transaction is not material to the company.

7. The materiality of any interest is to be determined on the basis of the significance of the information to investors in light of all the circumstances of the particular case. The importance of the interest to the person having the interest, the relationship of the parties to the transaction with each other, and the amount involved in the transaction are among the factors to be considered in determining the significance of the information to investors.

8. No information need be given as to any transaction where the interest of the director or immediate family member arises solely from the ownership of securities of a person specified in paragraphs (b)(7)(i) through (b)(7)(viii) of this Item and the director or immediate family member receives no extra or special benefit not shared on a pro rata basis by all holders of the Class of securities.

9. Transactions include loans, lines of credit, and other indebtedness. For indebtedness, indicate the largest aggregate amount of indebtedness outstanding at any time during the period, the nature of the indebtedness and the transaction in which it was incurred, the amount outstanding as of the end of the most recently completed calendar year, and the rate of interest paid or charged.

10. No information need be given as to any routine, retail transaction. For example, the Registrant need not disclose that a director has a credit card, bank or brokerage account, residential mortgage, or insurance policy with a person specified in paragraphs (b)(7)(i) through (b)(7)(viii) of this Item unless the director is accorded special treatment.

(7) Describe briefly any direct or indirect relationship, in which the

amount involved exceeds $120,000, of any director who is not an interested person of the Registrant, or immediate family member of the director, that existed at any time during the two most recently completed calendar years with any of the persons specified in paragraphs (b)(7)(i) through (b)(7)(viii) of this Item. Relationships include.

(i) Payments for property or services to or from any person specified in paragraphs (b)(7)(i) through (b)(7)(viii) of this Item;

(ii) Provision of legal services to any person specified in paragraphs (b)(7)(i) through (b)(7)(viii) of this Item;

(iii) Provision of investment banking services to any person specified in paragraphs (b)(7)(i) through (b)(7)(viii) of this Item, other than as a participating underwriter in a syndicate; and

(iv) Any consulting or other relationship that is substantially similar in nature and scope to the relationships listed in paragraphs (b)(8)(i) through (b)(8)(iii) of this Item.

Instructions.

1. Include the name of each director or immediate family member whose relationship is described and the nature of the circumstances by reason of which the relationship is required to be described.

2. State the nature of the relationship and the amount of business conducted between the director or immediate family member and the person specified in paragraphs (b)(7)(i) through (b)(7)(viii) of this Item as a result of the relationship during the two most recently completed calendar years.

3. In computing the amount involved in a relationship, include all periodic payments in the case of any agreement providing for periodic payments.

4. Disclose indirect, as well as direct, relationships. A person who has a position or relationship with, or interest in, a company that has a relationship with one of the persons listed in paragraphs (b)(7)(i) through (b)(7)(viii) of this Item may have an indirect relationship by reason of the position, relationship, or interest.

5. In determining whether the amount involved in a relationship exceeds $120,000, amounts involved in a relationship of the director should be aggregated with those of his immediate family members.

6. In the case of an indirect interest, identify the company with which a person specified in paragraphs (b)(7)(i) through (b)(7)(viii) of this Item has a relationship; the name of the director or immediate family member affiliated with the company and the nature of the affiliation; and the amount of business conducted between the company and the person specified in paragraphs (b)(7)(i) through (b)(7)(viii) of this Item during the two most recently completed calendar years.

7. In calculating payments for property and services for purposes of paragraph (b)(8)(i) of this Item, the following may be excluded:

(a) Payments where the transaction involves the rendering of services as a common contract carrier, or public utility, at rates or charges fixed in conformity with law or governmental authority; or

(b) Payments that arise solely from the ownership of securities of a person specified in paragraphs (b)(7)(i) through (b)(7)(viii) of this Item and no extra or special benefit not shared on a pro rata basis by all holders of the class of securities is received.

8. No information need be given as to any routine, retail relationship. For example, the Registrant need not disclose that a director has a credit card, bank or brokerage account, residential mortgage, or insurance policy with a person specified in paragraphs (b)(7)(i) through (b)(7)(viii) of this Item unless the director is accorded special treatment.

(8) If an officer of the Insurance Company or an investment adviser or principal underwriter of the Registrant, or an officer of a person directly or indirectly controlling, controlled by, or under common control with the Insurance Company or an investment adviser or principal underwriter of the Registrant, served during the two most recently completed calendar years, on the board of directors of a company where a director of the Registrant who is not an interested person of the Registrant, or immediate family member of the director, was during the two most recently completed calendar years, an officer, identify:

(i) The company;

(ii) The individual who serves or has served as a director of the company and the period of service as director;

(iii) The Insurance Company, investment adviser or principal underwriter or person controlling, controlled by, or under common control with the Insurance Company, investment adviser or principal underwriter where the individual named in paragraph (b)(9)(ii) of this Item holds or held office and the office held; and

(iv) The director of the Registrant or immediate family member who is or was an officer of the company; the office held; and the period of holding the office.

(9) For each director, briefly discuss the specific experience, qualifications, attributes, or skills that led to the conclusion that the person should serve as a director for the Registrant at the time that the disclosure is made, in light of the Registrant's business and structure. If material, this disclosure should cover more than the past five years, including information about the person's particular areas of expertise or other relevant qualifications.

(c) *Compensation.* For all directors of the Registrant and for all members of any advisory board who receive compensation from the Registrant, and for each of the three highest paid officers or any affiliated person of the Registrant who received aggregate compensation from the Registrant for the most recently completed fiscal year exceeding $60,000 (''Compensated Persons''):

(1) Provide the information required by the following table:

COMPENSATION TABLE

(1)	(2)	(3)	(4)	(5)
Name of person, position	Aggregate compensation from Registrant	Pension or retirement benefits accrued as part of Registrant's expenses	Estimated annual benefits upon retirement	Total compensation from Registrant and fund complex paid to directors

Instructions.

1. For column (1), indicate, as necessary, the capacity in which the remuneration is received. For Compensated Persons who are directors of the Registrant, compensation is amounts received for service as a director.

2. If the Registrant has not completed its first full year since its organization, furnish the information for the current fiscal year, estimating future payments that would be made pursuant to an existing agreement or understanding. Disclose in a footnote to the Compensation Table the period for which the information is furnished.

3. Include in column (2) amounts deferred at the election of the Compensated Person, whether pursuant to a plan established under Section 401(k) of the Internal Revenue Code [26 U.S.C. 401(k)] or otherwise for the fiscal year in which earned. Disclose in a footnote to the Compensation Table the total amount of deferred compensation (including interest) payable to or accrued for any Compensated Person.

4. Include in columns (3) and (4) all pension or retirement benefits proposed to be paid under any existing plan in the event of retirement at normal retirement date, directly or indirectly, by the Registrant, any of its subsidiaries, or other companies in the Fund Complex. Omit column (4) where retirement benefits are not determinable.

5. For any defined benefit or actuarial plan under which benefits are determined primarily by final compensation (or average final compensation) and years of service, provide the information required in column (4) in a separate table showing estimated annual benefits payable upon retirement (including amounts attributable to any defined benefit supplementary or excess pension award plans) in specified compensation and years of service classifications. Also provide the estimated credited years of service for each Compensated Person.

6. Include in column (5) only aggregate compensation paid to a director for service on the board and all other boards of investment companies in a Fund Complex specifying the number of such other investment companies.

7. No information is required to be provided concerning the officers of the sponsoring insurance company who are not directly or indirectly engaged in activities related to the separate account.

(2) Describe briefly the material provisions of any pension, retirement, or other plan or any arrangement, other than fee arrangements disclosed in paragraph (c)(1), under which the Compensated Persons are or may be compensated for services provided, including amounts paid, if any, to the compensated Person under these arrangements during the most recently completed fiscal year. Specifically include the criteria used to determine amounts payable under the plan, the length of service or vesting period required by the plan, the retirement age or other event that gives rise to payment under the plan, and whether the payment of benefits is secured or funded by the Registrant.

(d) *Sales Loads.* Disclose any arrangements that result in breakpoints in, or elimination of, sales loads for directors and other affiliated persons of the Registrant. Identify each class of individuals and transactions to which the arrangements apply and state each different breakpoint as a percentage of both the offering price and the net amount invested of the Registrant's shares. Explain, as applicable, the reasons for the difference in the price at which securities are offered generally to the public, and the prices at which securities are offered to directors and other affiliated persons of the Registrant.

(e) *Codes of Ethics.* Provide a brief statement disclosing whether the Registrant and its investment adviser and principal underwriter have adopted codes of ethics under rule 17j–1 of the Investment Company Act [17 CFR 270.17j–1] and whether these codes of ethics permit personnel subject to the codes to invest in securities, including securities that may be purchased or held by the Registrant.

Instruction. A Registrant that is not required to adopt a code of ethics under rule 17j–1 of the Investment Company Act is not required to respond to this Item.

(f) *Proxy Voting Policies.* Unless the Registrant invests exclusively in non-voting securities, describe the policies and procedures that the Registrant uses to determine how to vote proxies relating to portfolio securities, including the procedures that the Registrant uses when a vote presents a conflict between the interests of contractowners, on the one hand, and those of the Registrant's investment adviser; principal underwriter; or any affiliated person of the Registrant, its investment adviser, or its principal underwriter, on the other. Include any policies and procedures of the Registrant's investment adviser, or any other third party, that the Registrant uses, or that are used on the Registrant's behalf, to determine how to vote proxies relating to portfolio securities. Also, state that information regarding how the Registrant voted proxies relating to portfolio securities during the most recent 12-month period ended June 30 is available (1) without charge, upon request, by calling a specified toll-free (or collect) telephone number; or on or through the Registrant's website at a specified internet address; or both; and (2) on the Commission's website at *http://www.sec.gov*.

Instructions.

1. A Registrant may satisfy the requirement to provide a description of the policies and procedures that it uses to determine how to vote proxies relating to portfolio securities by including a copy of the policies and procedures themselves.

2. If a Registrant discloses that the Registrant's proxy voting record is available by calling a toll-free (or collect) telephone number, and the Registrant (or financial intermediary through which shares of the Registrant may be purchased or sold) receives a request for this information, the Registrant (or financial intermediary) must send the information disclosed in the Registrant's most recently filed report on Form N–PX, within three business days of receipt of the request, by first-class mail or other means designed to ensure equally prompt delivery.

3. If a Registrant discloses that the Registrant's proxy voting record is available on or through its website, the Registrant must make available free of charge the information disclosed in the Registrant's most recently filed report on Form N–PX on or through its website as soon as reasonably practicable after filing the report with the Commission. The information disclosed in the Registrant's most recently filed report on Form N–PX must remain available on or through the Registrant's website for as long as the Registrant remains subject to the requirements of rule 30b1–4 (17 CFR 270.30b1–4) and discloses that the Registrant's proxy voting record is available on or through its website.

Item 25. Investment Advisory and Other Services

(a) *Investment Advisers.* Disclose the following information about each investment adviser:

(1) The name of any person who controls the adviser, the basis of the person's control, and the general nature of the person's business. Also disclose, if material, the business history of any organization that controls the adviser.

(2) The name of any affiliated person of the Registrant or the Insurance Company who also is an affiliated person of the adviser, and a list of all capacities in which the person is

affiliated with the Registrant or the Insurance Company and with the adviser.

Instruction. If an affiliated person of the Registrant or the Insurance Company alone or together with others controls the investment adviser, state that fact. It is not necessary to provide the amount or percentage of the outstanding voting securities owned by the controlling person.

(3) The method of calculating the advisory fee payable by the Registrant including:

(i) The total dollar amounts that the Registrant or the Insurance Company paid to the adviser (aggregated with amounts paid to affiliated advisers, if any), and any advisers who are not affiliated persons of the adviser, under the investment advisory contract for the last three fiscal years;

(ii) If applicable, any credits that reduced the advisory fee for any of the last three fiscal years; and

(iii) Any expense limitation provision.

Instructions.

1. If the advisory fee payable by the Registrant or the Insurance Company varies depending on the Registrant's investment performance in relation to a standard, describe the standard along with a fee schedule in tabular form. The Registrant may include examples showing the fees that the adviser would earn at various levels of performance as long as the examples include calculations showing the maximum and minimum fee percentages that could be earned under the contract.

2. State each type of credit or offset separately.

3. When a Registrant is subject to more than one expense limitation provision, describe only the most restrictive provision.

4. For a Registrant with more than one Investment Option, or a Multiple Class Fund, describe the methods of allocation and payment of advisory fees for each Investment Option or Class.

(b) *Services Provided by Each Investment Adviser and Registrant Expenses Paid by Third Parties*

(1) Describe all services performed for or on behalf of the Registrant supplied or paid for wholly or in substantial part by each investment adviser.

(2) Describe all fees, expenses, and costs of the Registrant that are to be paid by persons other than an investment adviser, the Insurance Company, or the Registrant, and identify those persons.

(c) *Service Agreements.* Summarize the substantive provisions of any management-related service contract that may be of interest to a purchaser of the Registrant's securities, under which services are provided to the Registrant, unless the contract is described in response to some other item of the form. Indicate the parties to the contract, and the total dollars paid and by whom for the past three years.

Instructions.

1. The term ''management-related service contract'' includes any contract with the Registrant to keep, prepare, or file accounts, books, records, or other documents required under federal or state law, or to provide any similar services with respect to the daily administration of the Registrant, but does not include the following:

(a) Any contract with the Registrant to provide investment advice;

(b) Any agreement with the Registrant to act as custodian or agent to administer purchases and redemptions under the Contracts; and

(c) Any contract with the Registrant for outside legal or auditing services, or contract for personal employment entered into with the Registrant in the ordinary course of business.

2. No information need be given in response to this paragraph with respect to the service of mailing proxies or periodic reports to the Registrant's contractowners.

3. In summarizing the substantive provisions of any management-related service contract, include the following:

(a) The name of the person providing the service;

(b) The direct or indirect relationships, if any, of the person with the Registrant, an investment adviser of the Registrant, its Insurance Company, or the Registrant's principal underwriter; and

(c) The nature of the services provided, and the basis of the compensation paid for the services for the Registrant's last three fiscal years.

(d) *Other Investment Advice.* If any person (other than a director, officer, member of an advisory board, employee, or investment adviser of the Registrant), through any understanding, whether formal or informal, regularly advises the Registrant or the Registrant's investment adviser with respect to the Registrant's investing in, purchasing, or selling securities or other property, or has the authority to determine what securities or other property should be purchased or sold by the Registrant, and receives direct or indirect remuneration, provide the following information:

(1) The person's name;

(2) a description of the nature of the arrangement, and the advice or information given; and

(3) any remuneration (including, for example, participation, directly or indirectly, in commissions or other compensation paid in connection with transactions in Registrant's portfolio securities) paid for such advice or information, and a statement of how and by whom such remuneration was paid for the last three fiscal years.

Instruction. Do not include information for the following:

1. Persons who advised the investment adviser or the Registrant solely through uniform publications distributed to subscribers;

2. Persons who provided the investment adviser or the Registrant with only statistical and other factual information, advice about economic factors and trends, or advice as to occasional transactions in specific securities, but without generally advising about the purchase or sale of securities by the Registrant;

3. A company that is excluded from the definition of ''investment adviser'' of an investment company under section 2(a)(20)(iii) [15 U.S.C. 80a–2(a)(20)(iii)];

4. Any person the character and amount of whose compensation for these services must be approved by a court; or

5. Other persons as the Commission has by rule or order determined not to be an ''investment adviser'' of an investment company.

(e) *Dealer Reallowances.* Disclose any front-end sales load reallowed to dealers as a percentage of the offering price of the Registrant's shares.

(f) *Rule 12b–1 Plans.* If the Registrant has adopted a plan under rule 12b–1, describe the material aspects of the plan, and any agreements relating to the implementation of the plan, including:

(1) A list of the principal types of activities for which payments are or will be made, including the dollar amount and the manner in which amounts paid by the Registrant under the plan during the last fiscal year were spent on:

(i) Advertising;

(ii) Printing and mailing of prospectuses to other than current contractowners;

(iii) Compensation to underwriters;

(iv) Compensation to broker-dealers;

(v) Compensation to sales personnel;

(vi) Interest, carrying, or other financing charges; and

(vii) Other (specify).

(2) The relationship between amounts paid to the distributor and the expenses that it incurs (*e.g.,* whether the plan reimburses the distributor only for expenses incurred or compensates the distributor regardless of its expenses).

(3) The amount of any unreimbursed expenses incurred under the plan in a previous year and carried over to future years, in dollars and as a percentage of the Registrant's net assets on the last day of the previous year.

(4) Whether the Registrant participates in any joint distribution activities with another investment company. If so, disclose, if applicable, that fees paid under the Registrant's rule 12b–1 plan may be used to finance the distribution of the shares of another investment company, and state the method of allocating distribution costs (*e.g.,* relative net asset size, number of shareholder accounts).

(5) Whether any of the following persons had a direct or indirect financial interest in the operation of the plan or related agreements:

(i) Any interested person of the Registrant; or

(ii) Any director of the Registrant who is not an interested person of the Registrant.

(6) The anticipated benefits to the Registrant that may result from the plan.

(g) *Other Service Providers.*

(1) Unless disclosed in response to paragraph (c) or another Item of this form, identify and state the principal business address of any person who provides significant administrative or business affairs management services for the Registrant (*e.g.,* an ''Administrator''), describe the services provided, and the compensation paid for the services.

(2) State the name and principal business address of the Registrant's custodian and independent public accountant and describe generally the services performed by each.

(3) If the Registrant's assets are held by a person other than the Insurance Company, a commercial bank, trust company, or depository registered with the Commission as custodian, state the nature of the business of each such person.

(4) If an affiliated person of the Registrant, or an affiliated person of such an affiliated person, acts as administrative or servicing agent for the Registrant, describe the services the person performs and the basis for remuneration. State, for the past three years, the total dollars paid for the services, and by whom.

Instruction: No disclosure need be given in response to paragraph (g)(4) of this Item for an administrative or servicing agent who is also the Insurance Company.

(5) If the Insurance Company is the principal underwriter of the Contract, so state.

(h) *Securities Lending.*

(1) Provide the following dollar amounts of income and fees/compensation related to the securities lending activities of each Investment Option during its most recent fiscal year:

(i) Gross income from securities lending activities, including income from cash collateral reinvestment;

(ii) All fees and/or compensation for each of the following securities lending activities and related services: Any share of revenue generated by the securities lending program paid to the securities lending agent(s) (''revenue split''); fees paid for cash collateral management services (including fees deducted from a pooled cash collateral reinvestment vehicle) that are not included in the revenue split; administrative fees that are not included in the revenue split; fees for indemnification that are not included in the revenue split; rebates paid to borrowers; and any other fees relating to the securities lending program that are not included in the revenue split, including a description of those other fees;

(iii) The aggregate fees/compensation disclosed pursuant to paragraph (ii); and

(iv) Net income from securities lending activities (*i.e.,* the dollar amount in paragraph (i) minus the dollar amount in paragraph (iii)).

Instruction. If a fee for a service is included in the revenue split, state that the fee is ''included in the revenue split.''

(2) Describe the services provided in relation to the Investment Option by the securities lending agent in the Investment Option's most recent fiscal year.

Item 26. Portfolio Managers

(a) *Other Accounts Managed.* If a Portfolio Manager required to be identified in response to Item 7(b) is primarily responsible for the day-to-day management of the portfolio of any other account, provide the following information:

(1) The Portfolio Manager's name;

(2) The number of other accounts managed within each of the following categories and the total assets in the accounts managed within each category:

(i) Registered investment companies;

(ii) Other pooled investment vehicles; and

(iii) Other accounts.

(3) For each of the categories in paragraph (a)(2) of this Item, the number of accounts and the total assets in the accounts with respect to which the advisory fee is based on the performance of the account; and

(4) A description of any material conflicts of interest that may arise in connection with the Portfolio Manager's management of the Registrant's investments, on the one hand, and the investments of the other accounts included in response to paragraph (a)(2) of this Item, on the other. This description would include, for example, material conflicts between the investment strategy of the Registrant and the investment strategy of other accounts managed by the Portfolio Manager and material conflicts in allocation of investment opportunities between the Registrant and other accounts managed by the Portfolio Manager.

Instructions.

1. Provide the information required by this paragraph as of the end of the Registrant's most recently completed fiscal year, except that, in the case of an initial registration statement or an update to the Registrant's registration statement that discloses a new Portfolio Manager, information with respect to any newly identified Portfolio Manager must be provided as of the most recent practicable date. Disclose the date as of which the information is provided.

2. If a committee, team, or other group of persons that includes the Portfolio Manager is jointly and primarily responsible for the day-to-day management of the portfolio of an account, include the account in responding to paragraph (a) of this Item.

(b) *Compensation.* Describe the structure of, and the method used to determine, the compensation of each Portfolio Manager required to be identified in response to Item 7(b). For each type of compensation (*e.g.,* salary, bonus, deferred compensation, retirement plans and arrangements), describe with specificity the criteria on which that type of compensation is based, for example, whether compensation is fixed, whether (and, if so, how) compensation is based on Registrant pre- or after-tax performance over a certain time period, and whether (and, if so, how) compensation is based on the value of assets held in the Registrant's portfolio. For example, if compensation is based solely or in part on performance, identify any benchmark used to measure performance and state the length of the period over which performance is measured.

Instructions.

1. Provide the information required by this paragraph as of the end of the Registrant's most recently completed fiscal year, except that, in the case of an initial registration statement or an update to the Registrant's registration statement that discloses a new Portfolio Manager, information with respect to any newly identified Portfolio Manager must be provided as of the most recent practicable date. Disclose the date as of which the information is provided.

2. Compensation includes, without limitation, salary, bonus, deferred compensation, and pension and retirement plans and arrangements, whether the compensation is cash or non-cash. Group life, health, hospitalization, medical reimbursement, relocation, and pension and retirement plans and arrangements may be omitted, provided that they do not discriminate in scope, terms, or operation in favor of the Portfolio Manager or a group of employees that includes the Portfolio Manager and are available generally to all salaried employees. The value of compensation is not required to be disclosed under this Item.

3. Include a description of the structure of, and the method used to determine, any compensation received by the Portfolio Manager from the Registrant, the Registrant's investment adviser, or any other source with respect to management of the Registrant and any other accounts included in the response to paragraph (a)(2) of this Item. This description must clearly disclose any differences between the method used to determine the Portfolio Manager's compensation with respect to the Registrant and other accounts, *e.g.,* if the Portfolio Manager receives part of an advisory fee that is based on performance with respect to some accounts but not the Registrant, this must be disclosed.

(c) *Ownership of Securities.* For each Portfolio Manager required to be identified in response to Item 7(b), state the dollar range of equity securities in the Registrant beneficially owned by the Portfolio Manager using the following ranges: none, $1–$10,000, $10,001–$50,000, $50,001–$100,000, $100,001–$500,000, $500,001–$1,000,000, or over $1,000,000.

Instructions.

1. Provide the information required by this paragraph as of the end of the Registrant's most recently completed fiscal year, except that, in the case of an initial registration statement or an update to the Registrant's registration statement that discloses a new Portfolio Manager, information with respect to any newly identified Portfolio Manager must be provided as of the most recent practicable date. Specify the valuation date.

2. Determine ''beneficial ownership'' in accordance with rule 16a–1(a)(2) under the Exchange Act (17 CFR 240.16a–1(a)(2)).

Item 27. Brokerage Allocation and Other Practices

(a) *Brokerage Transactions.* Describe how transactions in portfolio securities are effected, including a general statement about brokerage commissions, markups, and markdowns on principal transactions and the aggregate amount of any brokerage commissions paid by the Registrant during its three most recent fiscal years. If, during either of the two years preceding the Registrant's most recent fiscal year, the aggregate dollar amount of brokerage commissions paid by the Registrant differed materially from the amount paid during the most recent fiscal year, state the reason(s) for the difference(s).

(b) *Commissions.*

(1) Identify, disclose the relationship, and state the aggregate dollar amount of brokerage commissions paid by the Registrant during its three most recent fiscal years to any broker:

(i) That is an affiliated person of the Registrant or an affiliated person of that person; or

(ii) An affiliated person of which is an affiliated person of the Registrant, its Insurance Company, its investment adviser, or principal underwriter.

(2) For each broker identified in response to paragraph (b)(1), state:

(i) The percentage of the Registrant's aggregate brokerage commissions paid to the broker during the most recent fiscal year; and

(ii) The percentage of the Registrant's aggregate dollar amount of transactions involving the payment of commissions effected through the broker during the most recent fiscal year.

(3) State the reasons for any material difference in the percentage of brokerage commissions paid to, and the percentage of transactions effected through, a broker disclosed in response to paragraph (b)(1).

(c) *Brokerage Selection.* Describe how the Registrant will select brokers to effect securities transactions for the Registrant and how the Registrant will evaluate the overall reasonableness of brokerage commissions paid, including the factors that the Registrant will consider in making these determinations.

Instructions.

1. If the Registrant will consider the receipt of products or services other than brokerage or research services in selecting brokers, specify those products and services.

2. If the Registrant will consider the receipt of research services in selecting brokers, identify the nature of those research services.

3. State whether persons acting on the Registrant's behalf are authorized to pay a broker a higher brokerage commission than another broker might have charged for the same transaction in recognition of the value of (a) brokerage or (b) research services provided by the broker.

4. If applicable, explain that research services provided by brokers through which the Registrant effects securities transactions may be used by the Registrant's investment adviser in servicing all of its accounts and that not all of these services may be used by the adviser in connection with the Registrant. If other policies or practices are applicable to the Registrant with respect to the allocation of research services provided by brokers, explain those policies and practices.

(d) *Directed Brokerage.* If, during the last fiscal year, the Registrant, its Insurance Company, or its investment adviser, through an agreement or understanding with a broker, or otherwise through an internal allocation procedure, directed the Registrant's brokerage transactions to a broker because of research services provided, state the amount of the transactions and related commissions.

(e) *Regular Broker-Dealers.* If the Registrant has acquired during its most recent fiscal year or during the period of time since organization, whichever is shorter, securities of its regular brokers or dealers as defined in rule 10b–1 [17 CFR 270.10b–1] or of their parents, identify those brokers or dealers and state the value of the Registrant's aggregate holdings of the securities of each issuer as of the close of the Registrant's most recent fiscal year.

Instruction. The Registrant need only disclose information about an issuer that derived more than 15% of its gross revenues from the business of a broker, a dealer, an underwriter, or an investment adviser during its most recent fiscal year.

Item 28. Purchase of Securities Being Offered

(a) Describe the manner in which Registrant's securities are offered to the public. Include a description of any special purchase plans and any exchange privileges not described in the prospectus.

Instruction. Address exchange privileges between Investment Options, between the Registrant and other separate accounts, and between the Registrant and contracts offered through the Insurance Company's general account.

(b) Describe the method that will be used to determine the sales load on the variable annuity contracts offered by the Registrant.

Instruction. Explain fully any difference in the price at which variable annuity contracts are offered to members of the public, as individuals or

as groups, and the prices at which the contracts are offered for any class of transactions or to any class of individuals, including officers, directors, members of the board of managers, or employees of the Registrant's Insurance Company, underwriter, or investment adviser.

(c) Describe the method used to value the Registrants' assets if not described in the prospectus.

Instructions.

1. Describe the valuation procedure used to determine accumulation unit value.

2. If Registrant uses either penny-rounding pricing or amortized cost valuation, pursuant to either an order of exemption from the Commission or Rule 2a–7 under the 1940 Act [17 CFR 270.2a–7], describe the nature, extent and effect of any conditions under the exemption.

(d) Describe the way in which purchase payments are credited to the contract to the extent not described in the prospectus.

(e) If the Registrant has received an order of exemption from Section 18(f) of the 1940 Act [15 U.S.C. 80a–18(f)] from the Commission or has filed a notice of election pursuant to Rule 18f–1 under the Act [17 CFR 270.18f–1] which has not been withdrawn, fully describe the nature, extent, and effect of the exemptive relief in the Statement of Additional Information if the information is not in the prospectus.

(f) *Frequent Transfer Arrangements.* Describe any arrangements with any person to permit frequent transfers of contract value among Investment Options of the Registrant, including the identity of the persons permitted to engage in frequent transfers pursuant to such arrangements, and any compensation or other consideration received by the Registrant, the Insurance Company, or any other party pursuant to such arrangements.

Instructions.

1. The consideration required to be disclosed by paragraph (f) of this Item includes any agreement to maintain assets in the Registrant or in other investment companies or accounts managed or sponsored by the Insurance Company, its investment adviser, or any affiliated person of the Insurance Company or of any such investment adviser.

2. If the Registrant has an arrangement to permit frequent transfers of Contract value among Investment Options of the Registrant by a group of individuals, such as the participants in a defined contribution plan that meets the requirements for qualification under Section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), the Registrant may identify the group rather than identifying each individual group member.

Item 29. Underwriters

(a) *Identification.* Identify each principal underwriter (other than the Insurance Company) of the Contracts, and state its principal business address. If the principal underwriter is affiliated with the Registrant, the Insurance Company, or any affiliated person of the Registrant or the Insurance Company, identify how they are affiliated (*e.g.,* the principal underwriter is controlled by the Insurance Company).

(b) *Offering and Commissions.* For each principal underwriter distributing Contracts of the Registrant, state:

(1) Whether the offering is continuous; and

(2) the aggregate dollar amount of underwriting commissions paid to, and the amount retained by, the principal underwriter for each of the Registrant's last three fiscal years.

(c) *Other Payments.* With respect to any payments made by the Registrant to an underwriter of or dealer in the Contracts during the Registrant's last fiscal year, disclose the name and address of the underwriter or dealer, the amount paid; and basis for determining the amount, the circumstances surrounding the payments, and the consideration received by the Registrant. Do not include information about:

(1) Payments made through deduction from premiums paid at the time of sale of the Contracts; or

(2) Payments made from cash values upon full or partial surrender of the Contracts or from an increase or decrease in the face amount of the Contracts.

Instructions.

1. Information need not be given about the service of mailing proxies or periodic reports of the Registrant.

2. Exclude information about bona fide contracts with the Registrant or its Insurance Company for outside legal or auditing services, or bona fide contracts for personal employment entered into with the Registrant or its Insurance Company in the ordinary course of business.

3. Information need not be given about any service for which total payments of less than $15,000 were made during each of the Registrant's last three fiscal years.

4. Information need not be given about payments made under any contract to act as administrative or servicing agent.

5. If the payments were made under an arrangement or policy applicable to dealers generally, describe only the arrangement or policy.

Item 30. Calculation of Performance Data

(a) *Money Market Accounts.* Yield quotation(s) included in the prospectus for an Investment Option that holds itself out as a Money Market Account should be calculated according to paragraphs (a)(1)–(2) of this Item.

(1) *Yield Quotation.* Based on the 7 days ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate the yield by determining the net change, exclusive of capital changes and income other than investment income, in the value of a hypothetical pre-existing account having a balance of one accumulation unit of the Investment Option at the beginning of the period, subtracting a hypothetical charge reflecting deductions from Contractowner Accounts, and dividing the difference by the value of the account at the beginning of the base period to obtain the base period return, and then multiplying the base period return by (365/7) with the resulting yield figure carried to at least the nearest hundredth of one percent

(2) *Effective Yield Quotation.* Based on the 7 days ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate the effective yield, carried to at least the nearest hundredth of one percent, by determining the net change, exclusive of capital changes and income other than investment income, in the value of a hypothetical pre-existing account having a balance of one accumulation unit of the Investment Option at the beginning of the period, subtracting a hypothetical charge reflecting deductions from Contractowner Accounts, and dividing the difference by the value of the account at the beginning of the base period to obtain the base period return, and then compounding the base period return by adding 1, raising the sum to a power equal to 365 divided by 7, and subtracting 1 from the result, according to the following formula:

$$\text{EFFECTIVE YIELD} = [(\text{BASE PERIOD RETURN} + 1)^{365/7}] - 1.$$

Instructions.

1. When calculating the yield or effective yield quotations, the calculation of net change in account value must include all deductions that are charged to all Contractowner Accounts in proportion to the length of the base period. For any account fees

that vary with the size of the account, assume an account size equal to the Investment Option's mean (or median) account size.

2. Deductions from purchase payments and sales loads assessed at the time of redemption or annuitization should not be reflected in the computation of yield and effective yield. However, the amount or specific rate of such deductions must be disclosed.

3. Exclude realized gains and losses from the sale of securities and unrealized appreciation and depreciation from the calculation of yield and effective yield. Exclude income other than investment income.

(b) *Other Investment Options.* Performance information included in the prospectus should be calculated according to paragraphs (b)(1)–(3).

(1) *Average Annual Total Return Quotation.* For the 1-, 5-, and 10-year periods ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate the average annual total return by finding the average annual compounded rates of return over the 1-, 5-, and 10-year periods that would equate the initial amount invested to the ending redeemable value, according to the following formula:

$P(1 + T)^n = ERV$

Where:

P = a hypothetical initial payment of $1,000.
T = average annual total return.
n = number of years.
ERV = ending redeemable value of a hypothetical $1,000 payment made at the beginning of the 1-, 5-, or 10-year periods at the end of the 1-, 5-, or 10-year periods (or fractional portion).

Instructions.

1. Assume the maximum sales load (or other charges deducted from payments) is deducted from the initial $1,000 payment.

2. Include all recurring fees that are charged to all Contractowner Accounts. For any account fees that vary with the size of the account, assume an account size equal to the Investment Option's mean (or median) account size. If recurring fees charged to Contractowner Accounts are paid other than by redemption of accumulation units, they should be appropriately reflected.

3. Determine the ending redeemable value by assuming a complete redemption at the end of the 1, 5, or 10 year periods and the deduction of all nonrecurring charges deducted at the end of each period.

4. If the Registrant's registration statement has been in effect less than one, five, or ten years, the time period during which the registration statement has been in effect should be substituted for the period stated.

5. Carry the total return quotation to the nearest hundredth of one percent.

6. Total return information in the prospectus need only be current to the end of the Investment Option's most recent fiscal year.

(2) *Yield Quotation.* Based on a 30-day (or one month) period ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate yield by dividing the net investment income per accumulation unit earned during the period by the maximum offering price per unit on the last day of the period, according to the following formula:

$$YIELD = 2[(\frac{a - b}{cd} + 1)^6 - 1]$$

Where:

a = dividends and interest earned during the period.
b = expenses accrued for the period (net of reimbursements).
c = the average daily number of accumulation units outstanding during the period.
d = the maximum offering price per accumulation units on the last day of the period.

Instructions.

1. To calculate interest earned (for the purpose of ''a'' above) on debt obligations:

(a) Compute the yield to maturity of each obligation held by the Investment Option based on the market value of the obligation (including actual accrued interest) at the close of business on the last business day of each month, or, with respect to obligations purchased during the month, the purchase price (plus actual accrued interest).

(b) Divide the yield to maturity by 360 and multiply the quotient by the market value of the obligation (including actual accrued interest) (as referred to in Instruction 1(a) above) to determine the interest income on the obligation for each day of the subsequent month that the obligation is in the portfolio. Assume that each month has thirty days.

(c) Total the interest earned on all debt obligation and all dividends accrued on all equity securities during the thirty-day or one month period.

Note: Although the period for computing interest earned referred to above is based on calendar months, a thirty-day yield may be calculated by aggregating the daily interest on the portfolio from portions of two months. Nothing in these instructions prohibits a Registrant from recalculating daily interest income on the portfolio more than once a month.

(d) For purpose of Instruction 1(a), the maturity of an obligation with a call provision(s) is the next call date on which the obligation reasonably may be expected to be called or, if none, the maturity date.

2. With respect to the treatment of discount and premium on mortgage or other receivables-backed obligations which are expected to be subject to monthly payments of principal and interest (''paydowns''):

(a) Account for gain or loss attributable to actual monthly paydowns as an increase or decrease to interest income during the period.

(b) The Investment Option may elect (i) to amortize the discount and premium on the remaining security, based on the cost of the security, to the weighted average maturity date, if such information is available, or to the remaining term of the security, if the weighted average maturity date is not available, or (ii) not to amortize discount or premium on the remaining security.

3. Solely for the purpose of computing yield, recognize dividend income by accruing 1/360 of the stated dividend rate of the security each day that the security is in the portfolio.

4. Do not use equalization accounting in the calculation of yield.

5. Include expenses accrued pursuant to a plan adopted under rule 12b–1 under the 1940 Act [17 CFR 270.12b–1] among the expenses accrued for the period. Reimbursement accrued pursuant to a plan may reduce the accrued expenses, but only to the extent the reimbursement does not exceed expenses accrued for the period.

6. Include among the expenses accrued for the period all recurring fees that are charged to all Contractowner Accounts. For any account fees that vary with the size of the account, assume an account size equal to the Investment Option's mean (or median) account size.

7. If a broker-dealer or an affiliate (as defined in paragraph (b) of Rule 1–02 [17 CFR 210.1–02(b) of Regulation S–X) of the broker-dealer has, in connection with directing the Investment Option's brokerage transactions to the broker-dealer, provided, agreed to provide, paid for, or agreed to pay for, in whole or in part, services provided to the Investment Option (other than brokerage and research services as these terms are defined in Section 28(e) of the Securities Exchange Act of 1934 [15 U.S.C. 78bb(e)]), add to expenses accrued for the period an estimate of additional amounts that would have been accrued for the period if the Investment Option had paid for the services directly in an arms-length transaction.

8. Disclose the amount or specific rate of any nonrecurring account or sales charges.

(3) *Non-Standardized Performance Quotation.* An Investment Option may calculate performance using any other historical measure of performance (not subject to any prescribed method of computation) if the measurement reflects all elements of return.

Item 31. Annuity Payments

Describe the method for determining the amount of annuity payments if not described in the prospectus. In addition, describe how any change in the amount of a payment after the first payment is determined.

Item 32. Financial Statements

(a) *Registrant.* Provide financial statements of the Registrant.

Instructions. Include, in a separate section, the financial statements and schedules required by Regulation S–X [17 CFR 210]. Financial statements of the Registrant may be limited to:

1. An audited balance sheet or statement of assets and liabilities as of the end of the most recent fiscal year;

2. An audited statement of operations of the most recent fiscal year conforming to the requirements of Rule 6–07 of Regulation S–X [17 CFR 210.6–07];

3. An audited statement of cash flows for the most recent fiscal year if necessary to comply with generally accepted accounting principles; and

4. Audited statements of changes in net assets conforming to the requirements of Rule 6–09 of Regulation S–X [17 CFR 210.6–09] for the two most recent fiscal years.

(b) *Insurance Company.* Provide financial statements of the Insurance Company.

Instructions.

1. Include, in a separate section, the financial statements and schedules of the Insurance Company required by Regulation S–X. If the Insurance Company would not have to prepare financial statements in accordance with generally accepted accounting principles except for use in this registration statement or other registration statements filed on Forms N–3, N–4, or N–6, its financial statements may be prepared in accordance with statutory requirements. The Insurance Company's financial statements must be prepared in accordance with generally accepted accounting principles if the Insurance Company prepares financial information in accordance with generally accepted accounting principles for use by the Insurance Company's parent, as defined in Rule 1–02(p) of Regulation S–X [17 CFR 210.1–02(p)], in any report under sections 13(a) and 15(d) of the Securities Exchange Act [15 U.S.C. 78m(a) and 78*o*(d)] or any registration statement filed under the Securities Act.

2. All statements and schedules of the Insurance Company required by Regulation S–X, except for the consolidated balance sheets described in Rule 3–01 of Regulation S–X [17 CFR 210.3–01], and any notes to these statements or schedules, may be omitted from Part B and instead included in Part C of the registration statement. If any of this information is omitted from Part B and included in Part C, the consolidated balance sheets included in Part B should be accompanied by a statement that additional financial information about the Insurance Company is available, without charge, upon request. When a request for the additional financial information is received, the Registrant should send the information within 3 business days of receipt of the request, by first-class mail or other means designed to ensure equally prompt delivery.

3. Notwithstanding Rule 3–12 of Regulation S–X [17 CFR 210.3–12], the financial statements of the Insurance Company need not be more current than as of the end of the most recent fiscal year of the Insurance Company. In addition, when the anticipated effective date of a registration statement falls within 90 days subsequent to the end of the fiscal year of the Insurance Company, the registration statement need not including financial statements of the Insurance Company more current than as of the end of the third fiscal quarter of the most recently completed fiscal year of the Insurance Company unless the audited financial statements for such fiscal year are available. The exceptions to Rule 3–12 of Regulation S–X contained in this Instruction 3 do not apply when:

(a) The Insurance Company's financial statements have never been included in an effective registration statement under the Securities Act of 1933 of a separate account that offers variable annuity contracts or variable life insurance contracts; or

(b) The balance sheet of the Insurance Company at the end of either of the two most recent fiscal years included in response to this Item shows a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of less than $2,500,000; or

(c) The balance sheet of the Insurance Company at the end of a fiscal quarter within 135 days of the expected date of effectiveness under the Securities Act (or a fiscal quarter within 90 days of filing if the registration statement is filed solely under the Investment Company Act) would show a combined capital surplus, if a stock company, or an unassigned surplus, if a mutual company, of less than $2,500,000. If two fiscal quarters end within the 135 day period, the Insurance Company may choose either for purposes of this test.

Any interim financial statements required by this Item need not be comparative with financial statements for the same interim period of an earlier year.

Item 33. Condensed Financial Information

Furnish the following information for each class of accumulation units of the Registrant.

ACCUMULATION UNIT VALUES (for an accumulation unit outstanding throughout the period)

1. accumulation unit value at beginning of period;
2. accumulation unit value at end of period;
3. number of accumulation units outstanding at the end of period;
4. portfolio turnover rate.

Instructions.

1. For purpose of this Item, ''class of accumulation units'' means any variation that affects accumulation units, including variations related to contract class, optional benefits, and sub-accounts.

2. The above information must be provided for each class of accumulation units of the Registrant derived from contracts offered by means of this prospectus and each class derived from contracts no longer offered for sale, but for which registrant may continue to accept payments. Information need not be provided for any class of accumulation units of the Registrant derived from contracts that are currently offered for sale by means of a different prospectus. Also, information need not be provided for any class of accumulation units that is no longer offered for sale but for which Registrant may continue to accept payments, if the information is provided in a different, but current prospectus of the Registrant.

3. The information shall be presented in comparative columns for each of the last five fiscal years of the Registrant (or for life of the Registrant and its immediate predecessors, if less) but only from the later of the effective date of Registrant's first 1933 Act Registration Statement. In addition, the information shall be presented for the period between the end of the latest fiscal year and the date of the latest balance sheet or statement of assets and liabilities furnished.

4. Accumulation unit amounts shall be given at least to the nearest cent. If the computation of the offering price is extended to tenths of a cent or more, then the amounts on the table should be given in tenths of a cent.

5. Accumulation unit values should only be given for Investment Options that fund obligations of the Registrant under variable annuity contracts offered by means of this prospectus.

6. The portfolio turnover rate to be shown at caption 4 shall be calculated as follows:

(a) The rate of portfolio turnover shall be calculated by dividing (A) the lesser of purchases or sales of portfolio securities for the particular fiscal year by (B) the monthly average of the value of the portfolio securities owned by the Registrant during the particular fiscal year. Such monthly average shall be calculated by totaling the values of the portfolio securities as of the beginning and end of the first month of the particular fiscal year and as of the end of each of the succeeding eleven months, and dividing the sum by 13.

(b) For the purposes of this Item, exclude from both the numerator and the denominator all securities, including options whose maturities or expiration dates at the time of acquisition were one year or less. All long-term securities, including United States Government securities, should be included. Purchases shall include any cash paid upon the conversion of one portfolio security into another. Purchases shall also include the cost of rights or warrants purchased. Sales shall include the net proceeds of the sale of rights or warrants. Sales shall also include the net proceeds of portfolio securities which have been called, or for which payment has been made through redemption or maturity.

(c) If during the fiscal year the Registrant acquired the assets of another separate account in exchange for its own accumulation units, it shall exclude from purchases the value of securities so acquired, and from sales all sales of such securities made following a purchase-of-assets transaction to realign the Registrant's portfolio. In such event, the Registrant shall also make appropriate adjustment in the denominator of the portfolio turnover computation. The Registrant must disclose such exclusions and adjustments in its answer to this Item.

(d) Short sales which the Registrant intends to maintain for more than one year and put and call options where the expiration date is more than one year from date of acquisition are included in purchases and sales for purposes of this Item. The proceeds from a short sale should be included in the value of the portfolio securities which the Registrant sold during the reporting period and the cost of covering a short sale should be included in the value of the portfolio securities which the Registrant purchased during the period. The premiums paid to purchase options should be included in the value of the portfolio securities which the Registrant purchased during the reporting period and the premiums received from the sale of options should be included in the value of the portfolio securities which the Registrant sold during the period.

(e) A Registrant that holds itself out as a Money Market Fund is not required to provide a portfolio turnover rate in response to this Item.

7. Registrants may, but are not required to, omit the AUV tables, if the registrant provides an annual account statement to each individual contract owner that discloses, with respect to each class of accumulation units held by the contractowner, the actual performance of each Investment Option reflecting all contract charges incurred by the contract owner. For accounts held less than one year, the annual account statement must disclose the actual performance of each sub-account for the length of time the investor has owned the sub-account.

Part C—Other Information

Item 34. Exhibits

Subject to General Instruction D regarding incorporation by reference and rule 483 under the Securities Act [17 CFR 230.483], file the exhibits listed below as part of the registration statement. Letter or number the exhibits in the sequence indicated and file copies rather than originals, unless otherwise required by rule 483. Reflect any exhibit incorporated by reference in the list below and identify the previously filed document containing the incorporated material.

(a) *Board of Directors Resolution.* The resolution of the board of directors of the Insurance Company authorizing the establishment of the Registrant.

(b) *Bylaws.* Copies of the existing bylaws of the Registrant or instruments corresponding thereto.

(c) *Custodian Agreement.* All depository contracts and agreements for custody of securities and similar investments of the Registrant, including the schedule of remuneration.

(d) *Investment Advisory Contracts.* Copies of all investment advisory contracts relating to the management of the assets of the Registrant.

(e) *Underwriting Contracts.* Underwriting or distribution contract between the Registrant or Insurance Company and a principal underwriter and agreements between principal underwriters and dealers or the Insurance Company and dealers.

(f) *Contracts.* The form of each Contract, including any riders or endorsements.

(g) *Applications.* The form of application used with any Contract provided in response to paragraph (f) above;

(h) *Insurance Company's Certificate of Incorporation and By-Laws.* The Insurance Company's current certificate of incorporation or other instrument of organization and by-laws and any related amendment.

(i) *Reinsurance Contracts.* Any contract of reinsurance related to a Contract.

(j) *Profit Sharing Contracts for the Benefit of the Board of Managers or Officers of Registrant.* Copies of all bonus, profit sharing, pension, or other similar contracts or arrangements wholly or partly for the benefit of members of the board of managers or officers of the Registrant in their capacity as such; any such plan that is not set forth in a formal document, furnish a reasonably detailed description thereof;

(k) *Administrative Contracts.* Any contract relating to the performance of administrative services in connection with administering a Contract.

(l) *Other Material Contracts.* Other material contracts not made in the ordinary course of business to be performed in whole or in part on or after the filing date of the registration statement.

(m) *Legal Opinion.* An opinion and consent of counsel regarding the legality of the securities being registered, stating whether the securities will, when sold, be legally issued and represent binding obligations of the Insurance Company.

(n) *Other Opinions.* Copies of any other opinions, appraisals, or rulings, and consents of their use relied on in preparing this Registration Statement and required by Section 7 of the 1933 Act.

(o) *Omitted Financial Statements.* Financial statements omitted from Item 32.

(p) *Initial Capital Agreement.* Any agreements or understandings made in consideration for providing the initial capital between or among the Registrant, Insurance Company, underwriter, or initial contractowners and written assurances from the Insurance Company or initial contractowners that purchases were made for investment purposes and not with the intention of redeeming or reselling.

(q) *Codes of Ethics.* Copies of any codes of ethics adopted under Rule 17j–1 under the Investment Company Act [17 CFR 270.17j–1] and currently applicable to the Registrant (*i.e.,* the codes of the Registrant and its investment advisers and principal underwriters). If there are no codes of ethics applicable to the Registrant, state the reason (*e.g.,* the Registrant is a Money Market Fund).

(r) *Preliminary Summary Prospectuses.* The form of any Initial Summary Prospectus and Updating Summary Prospectus that the Registrant intends to use on or after the effective date of the registration statement, pursuant to rule 498A under the Securities Act.

Instruction. Registrants are required to provide the preliminary Summary Prospectus exhibits only in connection with the filing of an initial registration statement, or in connection with a pre-effective amendment or a post-effective amendment filed in accordance with paragraph (a) of rule 485 under the Securities Act.

Item 35. Directors and Officers of the Insurance Company

Provide the following information about each director or officer of the Insurance Company:

(1) Name and principal business address	(2) Positions and offices with insurance company	(3) Positions and offices with registrant

Instruction. Registrants are required to provide the above information only for officers or directors who are engaged directly or indirectly in activities relating to the Registrant or the Contracts, and for executive officers including the Insurance Company's president, secretary, treasurer, and vice presidents who have authority to act as president in his or her absence.

Item 36. Persons Controlled by or Under Common Control With the Insurance Company or Registrant

Provide a list or diagram of all persons directly or indirectly controlled by or under common control with the Insurance Company or the Registrant. For any person controlled by another person, disclose the percentage of voting securities owned by the immediately controlling person or other basis of that person's control. For each company, also provide the state or other sovereign power under the laws of which the company is organized.

Instructions.

1. Include the Registrant and the Insurance Company in the list or diagram and show the relationship of each company to the Registrant and Insurance Company and to the other companies named, using cross-references if a company is controlled through direct ownership of its securities by two or more persons.

2. Indicate with appropriate symbols subsidiaries that file separate financial statements, subsidiaries included in consolidated financial statements; or unconsolidated subsidiaries included in group financial statements. Indicate for other subsidiaries why financial statements are not filed.

Item 37. Indemnification

State the general effect of any contract, arrangements, or statute under which any underwriter or affiliated person of the Registrant is insured or indemnified against any liability incurred in his or her official capacity, other than insurance provided by any underwriter or affiliated person for his or her own protection.

Item 38. Business and Other Connections of Investment Adviser

Describe any other business, profession, vocation, or employment of a substantial nature in which each investment adviser of the Registrant, and each director, officer, or partner of any such investment adviser, is or has been, at any time during the past two fiscal years, engaged for his or her own account or as director, officer, employee, partner, or trustee.

Instructions.

1. State the name and principal business address of any company of which any person specified above is a director, officer, employee, partner, or trustee, and the nature of such connection.

2. If the investment adviser is the Insurance Company or an affiliate thereof that is also an insurance company, Registrants need only provide the above information for officers or directors who are engaged directly or indirectly in activities relating to the assets of the Registrant, and for executive officers including the Insurance Company's or its affiliate's president, secretary, treasurer, and vice presidents who have authority to act as president in his or her absence.

3. The names of investment advisory clients need not be given.

Item 39. Principal Underwriters

(a) *Other Activity.* State the name of each investment company (other than the Registrant) for which each principal underwriter currently distributing the Registrant's securities also acts as a principal underwriter, Insurance Company, sponsor, or investment adviser.

(b) *Management.* Provide the information required by the following table with respect to each director, officer, or partner of each principal underwriter named in the response to Item 29:

(1) Name and principal business address	(2) Positions and offices with underwriter	(3) Positions and offices with registrant

Instruction. If a principal underwriter is the Insurance Company or an affiliate of the Insurance Company, and is also an insurance company, the above information for officers or directors need only be provided for officers or directors who are engaged directly or indirectly in activities relating to the Registrant or the Contracts, and for executive officers including the Insurance Company's or its affiliate's president, secretary, treasurer, and vice presidents who have authority to act as president in his or her absence.

(c) *Compensation From the Registrant.* Provide the information required by the following table for all commissions and other compensation received, directly or indirectly, from the Registrant during the Registrant's last fiscal year by each principal underwriter:

(1)	(2)	(3)	(4)	(5)
Name of principal underwriter	Net underwriting discounts and commissions	Compensation on redemption or annuitization	Brokerage commissions	Other compensation

Instructions.

1. Disclose the type of services rendered in consideration for the compensation listed in column (5).

2. Exclude information about bona fide contracts with the Registrant or its Insurance Company for outside legal or auditing services, or bona fide contracts for personal employment entered into with the Registrant or its Insurance Company in the ordinary course of business.

3. Information need not be given about the service of mailing proxies or periodic reports of the Registrant.

4. Exclude information about any service for which total payments of less than $15,000 were made during each of the last three fiscal years.

5. Exclude information about payments made under any agreement whereby another person contracts with the Registrant or its Insurance Company to perform as custodian or administrative or servicing agent.

Item 40. Location of Accounts and Records

State the name and address of each person maintaining physical possession of each account, book, or other document, required to be maintained by Section 31(a) [15 U.S.C. 80a–30(a)] and the rules under that section.

Instruction. The Registrant may omit this information to the extent it is provided in its most recent report on Form N–CEN [17 CFR 274.101].

Item 41. Management Services

Provide a summary of the substantive provisions of any management-related service contract not discussed in Part A or Part B, disclosing the parties to the contract and the total amount paid and by whom for the Registrant's last three fiscal years.

Instructions.

1. The instructions to Item 25(c) shall also apply to this Item.

2. Exclude information about any service provided for payments totaling less than $15,000 during each of the Registrant's last three fiscal years.

Item 42. Fee Representation

Provide a representation of the Insurance Company that the fees and charges deducted under the Contracts, in the aggregate, are reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the Insurance Company.

Signatures

Pursuant to the requirements of the Securities Act of 1933 and the Investment Company Act of 1940, the Registrant (certifies that it meets all of the requirements for effectiveness of this registration statement under rule 485(b) under the Securities Act and) has duly caused this registration statement to be signed on its behalf by the undersigned, duly authorized, in the City of _____ and State of ____, on this ____d day of _____, ____.

_____
(Registrant)
By _____
(Signature)

_____
(Title)

_____
(Insurance Company)
By _____
(Name of officer of Insurance Company)

_____
(Title)

Instruction.

If the registration statement is being filed only under the Securities Act or under both the Securities Act and the Investment Company Act, it should be signed by both the Registrant and the Insurance Company. If the registration statement is being filed only under the Investment Company Act, it should be signed only by the Registrant.

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

_____
Signature

_____
Title

_____
Date

■ 38. Revise Form N–4 (referenced in §§ 239.17b and 274.11c) to read as follows.

Note: The text of Form N–4 will not appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM N-4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933
Pre-Effective Amendment No. _____[ ]
Post-Effective Amendment No. _____[ ]
and/or
REGISTRATION STATEMENT UNDER THE INVESTMENT COMPANY ACT OF 1940
Amendment No. _____[ ]

(Check appropriate box or boxes.)

_____
(Exact Name of Registrant)

_____
(Name of Depositor)

_____
(Address of Depositor's Principal Executive Offices) (Zip Code)

_____
Depositor's Telephone Number, including Area Code

_____
(Name and Address of Agent for Service)

_____
Approximate Date of Proposed Public Offering

It is proposed that this filing will become effective (check appropriate box)

[ ] immediately upon filing pursuant to paragraph (b)
[ ] on (date) pursuant to paragraph (b)
[ ] 60 days after filing pursuant to paragraph (a)(1)
[ ] on (date) pursuant to paragraph (a)(1) of rule 485

If appropriate, check the following box:

[ ] this post-effective amendment designates a new effective date for a previously filed post-effective amendment.

Omit from the facing sheet reference to the other Act if the Registration Statement or amendment is filed under only one of the Acts. Include the "Approximate Date of Proposed Public Offering" only where securities are being registered under the Securities Act of 1933.

Form N-4 is to be used by separate accounts that are unit investment trusts that offer variable annuity contracts to register under the Investment Company Act of 1940 and to offer their securities under the Securities Act of 1933. The Commission has designed Form N-4 to provide investors with information that will assist them in making a decision about investing in a variable annuity contract. The Commission also may use the information provided in Form N-4 in its regulatory, disclosure review, inspection, and policy making roles.

A Registrant is required to disclose the information specified by Form N-4, and the Commission will make this information public. A Registrant is not required to respond to the collection of information contained in Form N-4 unless the Form displays a currently valid Office of Management and Budget (''OMB'') control number. Please direct comments concerning the accuracy of the information collection burden estimate and any suggestions for reducing the burden to Secretary, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549. The OMB has reviewed this collection of information under the clearance requirements of 44 U.S.C. § 3507.

Persons who respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.

Contents of Form N–4

General Instructions

A. Definitions

References to sections and rules in this Form N–4 are to the Investment Company Act of 1940 [15 U.S.C. 80a–1 *et seq.*] (the ''Investment Company Act''), unless otherwise indicated. Terms used in this Form N–4 have the same meaning as in the Investment Company Act or the related rules, unless otherwise indicated. As used in this Form N–4, the terms set out below have the following meanings:

''Class'' means a class of a Variable Annuity Contract that varies principally with respect to distribution-related fees and expenses.

''Contractowner Account'' means any account of a contractowner, participant, annuitant, or beneficiary to which (net) purchase payments under a variable annuity contract are added and from which administrative or transaction charges may be subtracted.

''Depositor'' means the person primarily responsible for the organization of the Registrant and the person, other than the trustee or custodian, who has continuing functions or responsibilities with respect to the administration of the affairs of the Registrant. ''Depositor'' includes the sponsoring insurance company that establishes and maintains the Registrant. If there is more than one Depositor, the information called for in this Form about the Depositor shall be provided for each Depositor.

''Portfolio Company'' means any company in which the Registrant invests and which may be selected as an option by the contractowner.

''Registrant'' means the separate account (as defined in Section 2(a)(37) of the 1940 Act [15 U.S.C. 80a–2(a)(37)]) that offers the Variable Annuity Contracts.

''SAI'' means the Statement of Additional Information required by Part B of this Form.

''Securities Act'' means the Securities Act of 1933 [15 U.S.C. 77a *et seq.*].

''Securities Exchange Act'' means the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq.*].

''Statutory Prospectus'' means a prospectus that satisfies the requirements of section 10(a) of the Securities Act [15 U.S.C. 77j(a)].

''Summary Prospectus'' has the meaning provided by paragraph (a)(12) of rule 498A under the Securities Act [17 CFR 230.498A(a)(12)].

''Variable Annuity Contract'' or ''Contract'' means any accumulation contract or annuity contract, any portion thereof, or any unit of interest or participation therein pursuant to which the value of the contract, either during an accumulation period or after annuitization, or both, varies according

to the investment experience of the separate account in which the contract participates. Unless the context otherwise requires, ''Variable Annuity Contract'' or ''Contract'' refers to the Variable Annuity Contracts being offered pursuant to the registration statement prepared on this Form.

B. Filing and Use of Form N–4

1. What is Form N–4 used for?

Form N–4 is used by all separate accounts organized as unit investment trusts and offering Variable Annuity Contracts to file:

(a) An initial registration statement under the Investment Company Act and any amendments to the registration statement;

(b) An initial registration statement required under the Securities Act and any amendments to the registration statement, including amendments required by section 10(a)(3) of the Securities Act [15 U.S.C. 77j(a)(3)]; or

(c) Any combination of the filings in paragraph (a) or (b).

2. What is included in the registration statement?

(a) For registration statements or amendments filed under both the Investment Company Act and the Securities Act or only under the Securities Act, include the facing sheet of the Form, Parts A, B, and C, and the required signatures.

(b) For registration statements or amendments filed only under the Investment Company Act, include the facing sheet of the Form, responses to all Items of Parts A (except Items 1, 4, 5, 9, 10, and 17), B, and C (except Items 28(c), (k), (l), and (m)), and the required signatures.

3. What are the fees for Form N–4?

No registration fees are required with the filing of Form N–4 to register as an investment company under the Investment Company Act or to register securities under the Securities Act. If Form N–4 is filed to register securities under the Securities Act and securities are sold to the public, registration fees must be paid on an ongoing basis after the end of the Registrant's fiscal year. *See* section 24(f) [15 U.S.C. 80a–24(f)] and related rule 24f–2 [17 CFR 270.24f–2].

4. What rules apply to the filing of a registration statement on Form N–4?

(a) For registration statements and amendments filed under both the Investment Company Act and the Securities Act or under only the Securities Act, the general rules regarding the filing of registration statements in Regulation C [17 CFR 230.400–230.498A] apply to the filing of registration statements on Form N–4. Specific requirements concerning investment companies appear in rules 480–485 and 495–498A of Regulation C.

(b) For registration statements and amendments filed only under the Investment Company Act, the general provisions in rules 8b–1—8b–32 [17 CFR 270.8b–l to 8b–32] apply to the filing of registration statements on Form N–4.

(c) The plain English requirements of rule 421 under the Securities Act [17 CFR 230.421] apply to prospectus disclosure in Part A of Form N–4.

(d) Regulation S–T [17 CFR 232.10–232.903] applies to all filings on the Commission's Electronic Data Gathering, Analysis, and Retrieval system (''EDGAR'').

C. Preparation of the Registration Statement

1. Administration of the Form N–4 Requirements

(a) The requirements of Form N–4 are intended to promote effective communication between the Registrant and prospective investors. A Registrant's prospectus should clearly disclose the fundamental features and risks of the Variable Annuity Contracts, using concise, straightforward, and easy to understand language. A Registrant should use document design techniques that promote effective communication.

(b) The prospectus disclosure requirements in Form N–4 are intended to elicit information for an average or typical investor who may not be sophisticated in legal or financial matters. The prospectus should help investors to evaluate the risks of an investment and to decide whether to invest in a Variable Annuity Contract by providing a balanced disclosure of positive and negative factors. Disclosure in the prospectus should be designed to assist an investor in comparing and contrasting a Variable Annuity Contract with other Contracts.

(c) Responses to the Items in Form N–4 should be as simple and direct as reasonably possible and should include only as much information as is necessary to enable an average or typical investor to understand the particular characteristics of the Variable Annuity Contracts. The prospectus should avoid including lengthy legal and technical discussions and simply restating legal or regulatory requirements to which Contracts generally are subject. Brevity is especially important in describing the practices or aspects of the Registrant's operations that do not differ materially from those of other separate accounts. Avoid excessive detail, technical or legal terminology, and complex language. Also avoid lengthy sentences and paragraphs that may make the prospectus difficult for many investors to understand and detract from its usefulness.

(d) The requirements for prospectuses included in Form N–4 will be administered by the Commission in a way that will allow variances in disclosure or presentation if appropriate for the circumstances involved while remaining consistent with the objectives of Form N–4.

2. Form N–4 Is Divided Into Three Parts

(a) *Part A.* Part A includes the information required in a Registrant's prospectus under section 10(a) of the Securities Act. The purpose of the prospectus is to provide essential information about the Registrant and the Contracts in a way that will help investors to make informed decisions about whether to purchase the securities described in the prospectus. In responding to the Items in Part A, avoid cross-references to the SAI. Cross-references within the prospectus are most useful when their use assists investors in understanding the information presented and does not add complexity to the prospectus.

(b) *Part B.* Part B includes the information required in a Registrant's SAI. The purpose of the SAI is to provide additional information about the Registrant and the Contracts that the Commission has concluded is not necessary or appropriate in the public interest or for the protection of investors to be in the prospectus, but that some investors may find useful. Part B affords the Registrant an opportunity to expand discussions of the matters described in the prospectus by including additional information that the Registrant believes may be of interest to some investors. The Registrant should not duplicate in the SAI information that is provided in the prospectus, unless necessary to make the SAI comprehensible as a document independent of the prospectus.

(c) *Part C.* Part C includes other information required in a Registrant's registration statement.

3. Additional Matters

(a) *Organization of Information.* Organize the information in the prospectus and SAI to make it easy for investors to understand. Notwithstanding rule 421(a) under the Securities Act [17 CFR 230.421(a)] regarding the order of information required in a prospectus, disclose the

information required by Item 2 (Overview of the Contract) and Item 3 (Key Information), and Item 4 (Fee Table) in numerical order at the front of the prospectus. Do not precede Items 2, 3, and 4 with any other Item except the Cover Page (Item 1), a glossary, if any (General Instruction C.3.(d)), or a table of contents meeting the requirements of rule 481(c) under the Securities Act [17 CFR 230.481(c)]. If the discussion of the information required by Items 2 or 3 also responds to disclosure requirements in other items of the prospectus, a Registrant need not include additional disclosure in the prospectus that repeats the information disclosed in response to those items.

(b) *Other Information.* A Registrant may include, except in response to Items 2 and 3, information in the prospectus or the SAI that is not otherwise required so long as the information is not incomplete, inaccurate, or misleading and does not, because of its nature, quantity, or manner of presentation, obscure or impede understanding of the information that is required to be included. For example, Registrants are free to include in the prospectus financial statements required to be in the SAI, and may include in the SAI financial statements that may be placed in Part C.

(c) *Presentation of Information.* To aid investor comprehension, Registrants are encouraged to use, as appropriate, question-and-answer formats, tables, side-by-side comparisons, captions, bullet points, numeric examples, illustrations or similar presentation methods. For example, such presentation methods would be appropriate when presenting disclosure for similar Contract features, prospectuses describing multiple Variable Annuity Contracts, or the operation of optional benefits or annuitization.

(d) *Definitions.* Define the special terms used in the prospectus (*e.g.,* accumulation unit, contractowner, participant, sub-account, etc.) in any presentation that clearly conveys meaning to investors. If the Registrant elects to include a glossary or list of definitions, only special terms used throughout the prospectus must be defined or listed. If a special term is used in only one section of the prospectus, it may be defined there (and need not be included in any glossary or list of definitions that the Registrant includes).

(e) *Use of Form N–4 to Register Multiple Contracts.*

(i) A single prospectus may describe multiple Contracts that are essentially identical. Whether the prospectus describes Contracts that are ''essentially identical'' will depend on the facts and circumstances. For example, a Contract that does not offer optional benefits would not be essentially identical to one that does. Similarly, group and individual Contracts would not be essentially identical. However, Contracts that vary only due to state regulatory requirements would be essentially identical.

(ii) Similarly, multiple prospectuses may be combined in a single registration statement on Form N–4 when the prospectuses describe Contracts that are essentially identical. For example, a Registrant could determine it is appropriate to include multiple prospectuses in a registration statement in the following situations: (i) The prospectuses describe the same Contract that is sold through different distribution channels; (ii) the prospectuses describe Contracts that differ only with respect to underlying funds offered; or (iii) the prospectuses describe both the original and an ''enhanced'' version of the same Contract (where the ''enhanced'' version modifies the features or options that the Registrant offers under that Contract).

(iii) Paragraph (a) of General Instruction C.3 requires Registrants to disclose the information required by Items 2, 3, and 4 in numerical order at the front of the prospectus and generally not to precede the Items with other information. As a general matter, Registrants providing disclosure in a single prospectus for more than one Variable Annuity Contract, or for Contracts sold in both the group and individual markets, may depart from the requirement of paragraph (a) as necessary to present the required information clearly and effectively (although the order of information required by each Item must remain the same). For example, the prospectus may present all of the Item 2 information for several Variable Annuity Contracts, followed by all of the Item 3 information for the Contracts, and followed by all of the Item 4 information for the Contracts. Alternatively, the prospectus may present Items 2, 3, and 4 for each of several Contracts sequentially. Other presentations also would be acceptable if they are consistent with the Form's intent to disclose the information required by Items 2, 3, and 4 in a standard order at the beginning of the prospectus.

(f) *Dates.* Rule 423 under the Securities Act [17 CFR 230.423] applies to the dates of the prospectuses and the SAI. The SAI should be made available at the same time that the prospectus becomes available for purposes of rules 430 and 460 under the Securities Act [17 CFR 230.430 and 230.460].

(g) *Sales Literature.* A Registrant may include sales literature in the prospectus so long as the amount of this information does not add substantial length to the prospectus and its placement does not obscure essential disclosure.

(h) *Interactive Data File*

(i) An Interactive Data File (§ 232.11 of this chapter) is required to be submitted to the Commission in the manner provided by Rule 405 of Regulation S–T (§ 232.405 of this chapter) for any registration statement or post-effective amendment thereto on Form N–4 that includes or amends information provided in response to Items 3, 4, 5, 11, or 18.

(A) Except as required by paragraph (h)(i)(B), the Interactive Data File must be submitted as an amendment to the registration statement to which the Interactive Data File relates. The amendment must be submitted on or before the date the registration statement or post-effective amendment that contains the related information becomes effective.

(B) In the case of a post-effective amendment to a registration statement filed pursuant to paragraphs (b)(1)(i), (ii), (v), (vi), or (vii) of rule 485 under the Securities Act [17 CFR 230.485(b)], the Interactive Data File must be submitted either with the filing, or as an amendment to the registration statement to which the Interactive Data Filing relates that is submitted on or before the date the post-effective amendment that contains the related information becomes effective.

(ii) An Interactive Data File is required to be submitted to the Commission in the manner provided by rule 405 of Regulation S–T for any form of prospectus filed pursuant to paragraphs (c) or (e) of rule 497 under the Securities Act [17 CFR 230.497(c) or (e)] that includes information provided in response to Items 3, 4, 5, 11, or 18 that varies from the registration statement. The Interactive Data File must be submitted with the filing made pursuant to rule 497.

(iii) The Interactive Data File must be submitted in accordance with the specifications in the EDGAR Filer Manual, and in such a manner that will permit the information for each Contract, and, for any information that does not relate to all of the Classes in a filing, each Class of the Contract to be separately identified.

(i) *Website Addresses and Cross-References.* Any website address or cross-reference that is included in an

electronic version of the Statutory Prospectus must be an active hyperlink. This requirement does not apply to Statutory Prospectuses that are filed on the EDGAR system. Rule 105 of Regulation S–T [17 CFR 232.405] prohibits hyperlinking to websites, locations, or other documents that are outside of the EDGAR system.

D. Incorporation by Reference

1. Specific Rules for Incorporation by Reference in Form N–4

(a) A Registrant may not incorporate by reference into a prospectus information that Part A of this Form requires to be included in a prospectus, except as specifically permitted by Part A of the Form.

(b) A Registrant may incorporate by reference any or all of the SAI into the prospectus (but not to provide any information required by Part A to be included in the prospectus) without delivering the SAI with the prospectus.

(c) A Registrant may incorporate by reference into the SAI or its response to Part C information that Parts B and C require to be included in the Registrant's registration statement.

2. General Requirements

All incorporation by reference must comply with the requirements of this Form and the following rules on incorporation by reference: Rule 10(d) of Regulation S–K under the Securities Act [17 CFR 229.10(d)] (general rules on incorporation by reference, which, among other things, prohibit, unless specifically required by this Form, incorporating by reference a document that includes incorporation by reference to another document, and limits incorporation to documents filed within the last 5 years, with certain exceptions); rule 411 under the Securities Act [17 CFR 230.411] (general rules on incorporation by reference in a prospectus); rule 303 of Regulation S–T [17 CFR 232.303] (specific requirements for electronically filed documents); and rules 0–4, 8b–23, and 8b–32 [17 CFR 270.0–4, 270.8b–23, and 270.8b–32] (additional rules on incorporation by reference for investment companies).

Part A—Information Required in a Prospectus

Item 1. Front and Back Cover Pages

(a) *Front Cover Page.* Include the following information on the outside front cover page of the prospectus:

(1) The Registrant's name.

(2) The Depositor's name.

(3) The types of Variable Annuity Contracts offered by the prospectus (*e.g.,* group, individual, single premium immediate, flexible premium deferred).

(4) The name of the Contract and the Class or Classes, if any, to which the Contract relates.

(5) The date of the prospectus.

(6) The statement required by rule 481(b)(1) under the Securities Act.

(7) The statement that additional information about certain investment products, including variable annuities, has been prepared by the Securities and Exchange Commission's staff and is available at Investor.gov.

(8) The legend: ''If you are a new investor in the [Contract], you may cancel your [Contract] within 10 days of receiving it without paying fees or penalties. In some states, this cancellation period may be longer. Upon cancellation, you will receive either a full refund of the amount you paid with your application or your total contract value. You should review this prospectus, or consult with your investment professional, for additional information about the specific cancellation terms that apply.''

Instruction. A Registrant may include on the front cover page any additional information, subject to the requirements of General Instruction C.3.(b) and (c).

(b) *Back Cover Page.* Include the following information on the outside back cover page of the prospectus:

(1) A statement that the SAI includes additional information about the Registrant. Explain that the SAI is available, without charge, upon request, and explain how contractowners may make inquiries about their Contracts. Provide a toll-free (or collect) telephone number for investors to call: To request the SAI; to request other information about the Contracts; and to make contractowner inquiries.

Instructions.

1. A Registrant may indicate, if applicable, that the SAI and other information are available on its internet site and/or by email request.

2. A Registrant may indicate, if applicable, that the SAI and other information are available from an insurance agent or financial intermediary (such as a broker-dealer or bank) through which the Contracts may be purchased or sold.

3. When a Registrant (or an insurance agent or financial intermediary through which Contracts may be purchased or sold) receives a request for the SAI, the Registrant (or insurance agent or financial intermediary) must send the SAI within 3 business days of receipt of the request, by first-class mail or other means designed to ensure equally prompt delivery.

(2) A statement whether and from where information is incorporated by reference into the prospectus as permitted by General Instruction D. Unless the information is delivered with the prospectus, explain that the Registrant will provide the information without charge, upon request (referring to the telephone number provided in response to paragraph (b)(i)).

Instruction. The Registrant may combine the information about incorporation by reference with the statements required under paragraph (b)(i).

(3) A statement that reports and other information about the Registrant are available on the Commission's internet site at *http://www.sec.gov,* and that copies of this information may be obtained, upon payment of a duplicating fee, by electronic request at the following email address: *publicinfo@sec.gov.*

(4) The EDGAR contract identifier for the Contract on the bottom of the back cover page in type size smaller than that generally used in the prospectus (*e.g.,* 8-point modern type).

Item 2. Overview of the Contract

Provide a concise description of the Contract including the following information:

(a) *Purpose.* Briefly describe the purpose(s) of the Contract (*e.g.,* to help the contractowner accumulate assets through an investment portfolio, to provide or supplement the contractowner's retirement income, to provide death and/or other benefits). State for whom the Contract may be appropriate (*e.g.,* by discussing a representative investor's time horizon, liquidity needs, and financial goals).

(b) *Phases of Contract.* Briefly describe the accumulation (savings) phase and annuity (income) phase of the Contract.

(1) This discussion should include of brief overview of the investment options available under the Contract (*e.g.,* any Portfolio Companies, as well as any general (fixed) account options).

Instructions.

1. Prominently disclose that additional information about each Portfolio Company is provided in an appendix to the prospectus, and provide a cross-reference to the relevant appendix.

2. A detailed explanation of the separate account, sub-accounts, and Portfolio Companies is not necessary and should be avoided.

(2) State, if applicable, that if a contractowner annuitizes, he or she will receive a stream of income payments, however (i) he or she will be unable to

make withdrawals and (ii) death benefits and living benefits will terminate.

(c) *Contract Features.* Summarize the Contract's primary features, including death benefits, withdrawal options, loan provisions, and any available optional benefits. If applicable, state that the contractowner will incur an additional fee for selecting a particular benefit.

Item 3. Key Information

Include the following information:

Important Information You Should Consider About the Contract

An investment in the Contract is subject to fees, risks, and other important considerations, some of which are briefly summarized in the following table. You should review the prospectus for additional information about these topics.

Fees and Expenses	
Surrender Charge (charges for early withdrawal).	
Transaction Charges (charges for certain transactions).	
Ongoing Fees and Expenses (annual charges).	
Risks	
Risk of Loss.	
Not a Short-Term Investment.	
Risks Associated with Investment Options.	
Insurance Company Risks.	
Restrictions	
Investment Options.	
Optional Benefits.	
Taxes	
Tax Implications.	
Conflicts of Interest	
Investment Professional Compensation.	
Exchanges.	

Instructions.

1. *General.*

(a) A Registrant should disclose the required information in the tabular presentation(s) reflected herein, in the order specified. A Registrant may exclude any disclosures that are not applicable, or modify any of the statements required to be included, so long as the modified statement contains comparable information.

(b) A Registrant should provide cross-references to the location in the Statutory Prospectus where the subject matter is described in greater detail. Cross-references in electronic versions of the Summary Prospectus and/or Statutory Prospectus should link directly to the location in the Statutory Prospectus where the subject matter is discussed in greater detail. The cross-reference should be adjacent to the relevant disclosure, either within the table row, or presented in an additional table column.

(c) All disclosures provided in response to this Item 3 should be short and succinct, consistent with the limitations of a tabular presentation.

2. *Fees and Expenses.*

(a) *Surrender Charges (charges for early withdrawal).* Include a statement that if the contractowner withdraws money from the Contract within [x] years following his or her last premium payment, he or she will be assessed a surrender charge. Include in this statement the maximum surrender charge (as a percentage of [contribution/premium or amount surrendered]), and the maximum number of years that a surrender charge may be assessed since the last premium payment under the contract. Provide an example of the maximum surrender charge a contractowner could pay (in dollars) under the Contract assuming a $100,000 investment (*e.g.,* ''[i]f you make an early withdrawal, you could pay a surrender charge of up to $9,000 on a $100,000 investment.'').

(b) *Transaction Charges (charges for certain transactions).* State that in addition to surrender charges (if applicable) the contractowner may also be charged for other transactions, and provide a brief narrative description of the types of such charges (*e.g.,* front-end loads, charges for transferring cash value between investment options, charges for wire transfers, etc.).

(c) *Ongoing Fees and Expenses (annual charges).*

Include the following information, in the order specified:

(i) *Minimum and Maximum Annual Fee Table.*

(A) The legend: ''The table below describes the fees and expenses that you may pay *each year,* depending on the options you choose. Please refer to your contract specifications page for information about the specific fees you will pay each year based on the options you have elected.''

(B) Provide Minimum and Maximum Annual Fees in substantially the following tabular format, in the order specified.

Annual fee	Minimum	Maximum
Base contract (varies by contract class)	[ ]%	[ ]%
Investment options (Portfolio Company fees and expenses)	[ ]%	[ ]%
Optional benefits (if elected)	[ ]%	[ ]%

(C) Explain, in a parenthetical or footnote to the table or each caption, the basis for each percentage (*e.g.,* % of separate account value or benefit base, or % of net asset value).

(D) If a Registrant offers multiple Portfolio Companies, it should disclose the minimum and maximum ''Total Annual [Portfolio Company] Operating Expenses'' calculated in accordance with Item 3 of Form N–1A (before expense reimbursements or fee waiver arrangements).

(E) The Minimum Annual Fee means the lowest available current fee for each annual fee category (*i.e.,* the least expensive contract class, the lowest Total Annual Portfolio Company Operating Expense, and the least expensive optional benefit available for an additional charge). The Maximum Annual Fee means the highest available current fee for each annual fee category (*i.e.,* the most expensive contract class, the highest Portfolio Company Total Operating Expense, and the most expensive optional benefit available for an additional charge).

(ii) *Lowest and Highest Annual Cost Table.*

(A) The legend: ''Because your contract is customizable, the choices you make affect how much you will pay. To help you understand the cost of owning your contract, the following table shows the lowest and highest cost you could pay *each year.* This estimate assumes that you do not take withdrawals from the contract, which could add surrender charges that substantially increase costs.''

(B) Provide Lowest and Highest Annual Costs in substantially the following tabular format, in the order specified.

Lowest annual cost: $[ ]	Highest annual cost: $[ ]
Assumes: • Investment of $100,000 • 5% annual appreciation	Assumes: • Investment of $100,000. • 5% annual appreciation.

Lowest annual cost: $[ ]	Highest annual cost: $[ ]
• Least expensive combination of contract classes and Portfolio Company fees and expenses. • No optional benefits • No sales charges • No additional contributions, transfers or withdrawals.	• Most expensive combination of classes, optional benefits, and Portfolio Company fees and expenses. • No sales charges. • No additional contributions, transfers or withdrawals.

(C) Calculate the Lowest and Highest Annual Cost estimates in the following manner:

a. Calculate the dollar amount of fees that would be assessed based on the assumptions described in the table above for each of the first 10 Contract years.

b. Total each year's fees (discounted to the present value using a 5% annual discount rate) and divide by 10 to calculate the estimated dollar amounts that are required to be set forth in the table above.

c. Sales loads, other than ongoing sales charges, may be excluded from the Lowest and Highest Annual Cost estimates.

d. Amounts of any premium bonus may be excluded from the Lowest and Highest Annual Cost estimates.

e. Unless otherwise stated, the least and most expensive combination of contract classes, Portfolio Company fees and expenses, and optional benefits available for an additional charge should be based on the disclosures provided in the Example in Item 4. If a different combination of contract classes, Total Annual Portfolio Company Operating Expenses, and/or optional benefits available for an additional charge would result in different Minimum or Maximum fees in different years, use the least expensive or most expensive combination of contract classes, Total Annual Portfolio Company Operating Expenses, and optional benefits each year.

3. *Risks.*

(a) *Risk of loss.* State that a contractowner can lose money by investing in the Contract.

(b) *Not a Short-Term Investment.* State that a Contract is not a short-term investment vehicle and is not appropriate for an investor who needs ready access to cash, accompanied by a brief explanation.

(c) *Risks Associated with Investment Options.* State that an investment in the Contract is subject to the risk of poor investment performance and can vary depending on the performance of the investment options available under the Contract (*e.g.,* Portfolio Companies, as well as any fixed account investment option), that each investment option will have its own unique risks, and that the contractowner should review a Portfolio Company's prospectus before making an investment decision.

(d) *Insurance Company Risks.* State that an investment in the Contract is subject to the risks related to the Depositor, including that any obligations, guarantees, or benefits are subject to the claims-paying ability of the Depositor. If applicable, further state that more information about the Depositor, including its financial strength ratings, is available upon request from the Registrant.

Instruction. A Registrant may include the Depositor's financial strength rating(s) and omit the disclosures contemplated by the last sentence of Instruction 3.(d).

4. *Restrictions.*

(a) *Investment Options.* State whether there are any restrictions that may limit the investment options that a contractowner may choose, as well as any limitations on the transfer of contract value among Portfolio Companies. If applicable, state that the insurer reserves the right to remove or substitute Portfolio Companies as investment options.

(b) *Optional Benefits.* State whether there are any restrictions or limitations relating to optional benefits, and/or whether an optional benefit may be modified or terminated by the Registrant. If applicable, state that withdrawals may affect the availability of optional benefits by reducing the benefit by an amount greater than the value withdrawn, and/or could terminate a benefit.

5. *Taxes—Tax Implications.* State that a contractowner should consult with a tax professional to determine the tax implications of an investment in and payments received under the Contract, and that there is no additional tax benefit to the contractowner if the Contract is purchased through a tax-qualified plan or individual retirement account (IRA). Explain that withdrawals will be subject to ordinary income tax, and may be subject to tax penalties.

6. *Conflicts of Interest.*

(a) *Investment Professional Compensation.* State that some investment professionals receive compensation for selling the Contract to investors, and briefly describe the basis upon which such compensation is typically paid (*e.g.,* commissions, revenue sharing, compensation from affiliates and third parties). State that these investment professionals may have a financial incentive to offer or recommend the Contract over another investment for which the investment professional is not compensated (or compensated less).

(b) *Exchanges.* State that some investment professionals may have a financial incentive to offer a contractowner a new contract in place of the one he or she already owns, and that a contractowner should only exchange his or her contract if he or she determines, after comparing the features, fees, and risks of both contracts, that it is preferable for him or her to purchase the new contract rather than continue to own the existing contract.

Instruction. A Registrant may omit these line-items if neither the Registrant nor any of its related companies pay financial intermediaries for the sale of the Contract or related services.

Item 4. Fee Table

Include the following information:

The following tables describe the fees and expenses that you will pay when buying, owning, and surrendering the contract. Please refer to your contract specifications page for information about the specific fees you will pay each year based on the options you have elected.

The first table describes the fees and expenses that you will pay *at the time* that you buy the contract, surrender the contract, or transfer cash value between investment options. State premium taxes may also be deducted.

ANNUAL TRANSACTION EXPENSES

Sales Load Imposed on Purchases (as a percentage of purchase payments)	___%

ANNUAL TRANSACTION EXPENSES—Continued

Deferred Sales Load (or Surrender Charge) (as a percentage of purchase payments or amount surrendered, as applicable)	____%
Exchange Fee	____%

The next table describes the fees and expenses that you will pay *each year* during the time that you own the contract (not including [Portfolio Company] fees and expenses).

If you choose to purchase an optional benefit, you will pay additional charges, as shown below.

ANNUAL CONTRACT EXPENSES

Administrative [Expenses]	____%
Base Contract [Expenses] (as a percentage of average account value)	____%
Optional Benefit [Expenses] (as a percentage of benefit base or other (*e.g.,* average account value))	____%

The next item shows the minimum and maximum total operating expenses charged by the [Portfolio Companies] that you may pay periodically during the time that you own the contract. A complete list of [Portfolio Companies] available under the Contract, including their annual expenses, may be found at the back of this document.

	Minimum	Maximum
Total Annual [Portfolio Company] Operating Expenses (expenses that are deducted from [Portfolio Company] assets, including management fees, distribution [and/or (12b–1) fees, and other expenses)	____%	____%

Example

This Example is intended to help you compare the cost of investing in the contract with the cost of investing in other variable annuity contracts. These costs include transaction expenses, annual contract expenses, and [Portfolio Company] operating expenses.

The Example assumes that you invest $100,000 in the contract for the time periods indicated. The Example also assumes that your investment has a 5% return each year and assumes the most expensive combination of [Portfolio Company] operating expenses and optional benefits available for an additional charge. Although your actual costs may be higher or lower, based on these assumptions, your costs would be:

If you surrender your contract at the end of the applicable time period:	1 year $____	3 years $____	5 years $____	10 years $____
If you annuitize at the end of the applicable time period:	1 year $____	3 years $____	5 years $____	10 years $____
If you do *not* surrender your contract:	1 year $____	3 years $____	5 years $____	10 years $____

Instructions.

1. Include the narrative explanations in the order indicated. A Registrant may modify a narrative explanation if the explanation contains comparable information to that shown.

2. Assume that the annuity contract is owned during the accumulation period for purposes of the table (including the Example). If an annuitant would pay different fees or be subject to different expenses, disclose this in a brief narrative and provide a cross-reference to those portions of the prospectus describing these fees.

3. A Registrant may omit captions if the Registrant does not charge the fees or expenses covered by the captions. A Registrant may modify or add captions if the captions shown do not provide an accurate description of the Registrant's fees and expenses.

4. Round all dollar figures to the nearest dollar and all percentages to the nearest hundredth of one percent.

5. In the Annual Transaction Expenses and Annual Contract Expenses tables, the Registrant must disclose the maximum guaranteed charge, unless a specific instruction directs otherwise. If a fee is calculated based on a benchmark (*e.g.,* a fee that varies according to volatility levels or Treasury yields), the Registrant must also disclose the maximum guaranteed charge as a single number. The Registrant may disclose the current charge, in addition to the maximum charge, if the disclosure of the current charge is no more prominent than, and does not obscure or impede understanding of, the disclosure of the maximum charge. In addition, the Registrant may include in a footnote to the table a tabular, narrative, or other presentation providing further detail regarding variations in the charge. For example, if deferred sales charges decline over time, the Registrant may include in a footnote a presentation regarding the scheduled reductions in the deferred sales charges.

6. Provide a separate fee table (or separate column within the table) for each Contract form offered by the prospectus that has different fees.

7. In a Contract with more than one class, provide a separate response for each class.

Administrative [Expenses]

8. Administrative expenses include any contract, account, or similar fee imposed on all Contractowner Accounts on any recurring basis.

Annual Transaction [Expenses]

9. ''Sales Load Imposed on Purchases'' includes the maximum sales

load imposed upon purchase payments and may include a tabular presentation, within the larger table, of the range of such sales loads.

10. ''Deferred Sales Load'' includes the maximum contingent deferred sales load (or surrender charge), expressed as a percentage of the original purchase price or amount surrendered, and may include a tabular presentation, within the larger table, of the range of contingent deferred sales loads over time.

11. ''Exchange Fee'' includes the maximum fee charged for any exchange or transfer of contract value from the Registrant to another investment company or from one sub-account of the Registrant to another sub-account or the insurance company's general account. The Registrant may include a tabular presentation of the range of exchange fees unless such a presentation would be so lengthy as to encumber the larger table, in which case the Registrant should only provide a cross-reference to the narrative portion of the prospectus discussing the exchange fee.

12. If the Registrant (or any other party pursuant to an agreement with the Registrant) charges any other transaction fee, add another caption describing it and list the (maximum) amount or basis on which the fee is deducted.

Base Contract [Expenses]

13. Base Contract expenses includes mortality and expense risk fees, and account fees and expenses. Account fees and expenses include all fees and expenses (except sales loads, mortality and expense risk fees, and optional benefits expenses) that are deducted from separate account assets or charged to all Contractowner Accounts.

Other Annual Expenses

14. If the Registrant (or any other party pursuant to an agreement with the Registrant) imposes any other recurring charge (other than Total Annual [Portfolio Company] Operating Expenses), add another caption describing it and list the (maximum) amount or basis on which the charge is deducted.

Optional Benefits [Expenses]

15. Optional Benefits expenses include any optional features (*e.g.,* enhanced death benefits and living benefits) offered under the Contract for an additional charge.

Total Annual [Portfolio Company] Operating Expenses

16. If a Registrant offers multiple Portfolio Companies, it should disclose the minimum and maximum ''Total Annual [Portfolio Company] Operating Expenses'' for any Portfolio Company calculated in accordance with Item 3 of Form N–1A (before expense reimbursements or fee waiver arrangements).

17. A Registrant may also reflect minimum and maximum Total [Portfolio Company] Operating Expenses that include expense reimbursement or fee waiver arrangements in an additional line-item to the range of Portfolio Company operating expenses. If the Registrant provides this disclosure, also disclose the period for which the expense reimbursement or fee waiver arrangement is expected to continue, and, if applicable, that it can be terminated at any time at the option of a Portfolio Company.

Example

18. For purposes of the Example(s) in the table, provide the following for each contract class:

(a) Assume that the percentage amounts listed under ''Base Contract [Expenses]'' remain the same in each year of the 1-, 3-, 5, and 10-year periods;

(b) The most expensive combination of contract features must be shown first. Additional expense presentations are permitted, but not required;

(c) Assume the maximum sales load that may be deducted from purchase payments is deducted;

(d) For any breakpoint in any fee, assume that the amount of the Registrant's (and the Portfolio Company's) assets remains constant as of the level at the end of the most recently completed fiscal year;

(e) Assume no exchanges or other transactions;

(f) Reflect any [annual] contract expenses by dividing the total amount of [annual] contract expenses collected during the year that are attributable to the contract offered by the prospectus by the total average net assets that are attributable to the contract offered by the prospectus. Add the resulting percentage to Base Contract expenses and assume that it remains the same in each year of the 1-, 3-, 5-, and 10-year periods;

(g) Reflect any contingent deferred sales load by assuming a complete surrender on the last day of the year;

(h) Provide the information required in the third section of the Example only if a sales load or other fee is charged upon a complete surrender; and

(i) Include in the Example the information provided by the caption ''If you annuitize at the end of the applicable time period'' only if the Registrant charges fees upon annuitization that are different from those charged upon surrender.

Item 5. Principal Risks of Investing in the Contract

Summarize the principal risks of purchasing a Contract, including the risks of poor investment performance, that Contracts are unsuitable as short-term savings vehicles, limitations on access to cash value through withdrawals, and the possibility of adverse tax consequences.

Item 6. General Description of Registrant, Depositor, and Portfolio Companies

Concisely discuss the organization and operation or proposed operation of the Registrant. Include the information specified below.

(a) *Depositor.* Provide the name and address of the Depositor.

(b) *Registrant.* Briefly describe the Registrant. Include a statement indicating that:

(1) Income, gains, and losses credited to, or charged against, the Registrant reflect the Registrant's own investment experience and not the investment experience of the Depositor's other assets;

(2) the assets of the Registrant may not be used to pay any liabilities of the Depositor other than those arising from the Contracts; and

(3) the Depositor is obligated to pay all amounts promised to contractowners under the Contracts.

(c) *Portfolio Companies.* State that information regarding each Portfolio Company, including (i) its name, (ii) its type (*e.g.,* money market fund, bond fund, balanced fund, etc.) or a brief statement concerning its investment objectives, (iii) its investment adviser and any sub-investment adviser, (iv) expense ratio, and (v) performance is available in the appendix to the prospectus (*see* Item 18), and provide cross-references. State conspicuously that each Portfolio Company has issued a prospectus that contains more detailed information about the Portfolio Company, and provide instructions regarding how investors may obtain paper or electronic copies.

(d) *Voting.* Concisely discuss the rights of contractowners to instruct the Depositor on the voting of shares of the Portfolio Companies, including the manner in which votes will be allocated.

Item 7. Charges

(a) *Description.* Briefly describe all charges deducted from purchase payments, Contractowner Accounts, or assets of the Registrant, or any other

source (*e.g.,* sales loads, premium taxes and other taxes, administrative and transaction charges, risk charges, contract loan charges, and optional benefit charges). Indicate whether each charge will be deducted from purchase payments, Contractowner Accounts, or the Registrant's assets, the proceeds of withdrawals or surrenders, or some other source. When possible, specify the amount of any current charge as a percentage or dollar figure (*e.g.,* 0.95% of average daily net assets or $5 per exchange). For recurring charges, specify the frequency of the deduction (*e.g.,* daily, monthly, annually). Identify the person who receives the amount deducted, briefly explain what is provided in consideration for the charges, and explain the extent to which any charge can be modified. Where it is possible to identify what is provided in consideration for a particular charge (*e.g.,* use of sales load to pay distribution costs), please explain what is provided in consideration for that charge separately.

Instructions.

1. Describe the sales loads applicable to the Contract and how sales loads are charged and calculated, including the factors affecting the computation of the amount of the sales load. If the Contract has a front-end sales load, describe the sales load as a percentage of the applicable measure of purchase payments and as a percentage of the net amount invested for each breakpoint. For Contracts with a deferred sales load, describe the sales load as a percentage of the applicable measure of purchase payments (or other basis) that the deferred sales load may represent. Percentages should be shown in a table. Identify any events on which a deferred sales load is deducted (*e.g.,* surrender or partial surrender). The description of any deferred sales load should include how the deduction will be allocated among sub-accounts of the Registrant and when, if ever, the sales load will be waived (*e.g.,* if the Contract provides a free withdrawal amount).

2. Unless set forth in response to Instruction 1, list any special purchase plans or methods established pursuant to a rule or an exemptive order that reflect scheduled variations in, or elimination of, the sales load (*e.g.,* group discounts, waiver of sales load upon annuitization or attainment of a certain age, waiver of deferred sales load for a certain percentage of contract value (''free corridor''), investment of proceeds from another policy, exchange privileges, employee benefit plans, or the terms of a merger, acquisition or exchange offer made pursuant to a plan of reorganization); identify each class of individuals or transactions to which such plans apply; state each different sales charge available as a percentage of the public offering price and as a percentage of the net amount invested; and state from whom additional information may be obtained. Describe any other special purchase plans or methods established pursuant to a rule that reflect other variations in, or elimination of, the sales load or in any administrative charge or other deductions from purchase payments, and generally describe the basis for the variation or elimination in the sales load or other deduction (*i.e.,* the size of the purchaser, a prior or existing relationship with the purchaser, the purchaser's assumption of certain administrative functions, or other characteristics that result in differences in costs or services).

3. If proceeds from sales loads will not cover the expected costs of distributing the contracts, identify from what source the shortfall, if any, will be paid. If any shortfall is to be made from assets from the depositor's general account, disclose, if applicable, that any amounts paid by the depositor may consist, among other things, of proceeds derived from Base Contract Expenses deducted from the account.

4. If the Contract's charge for premium or other taxes varies according to jurisdiction, identification of the range of current premium or other taxes is sufficient.

(b) *Commissions Paid to Dealers.* State the commissions paid to dealers as a percentage of purchase payments.

(c) *Portfolio Company Charges.* State that charges are deducted from and expenses paid out of the assets of the Portfolio Companies that are described in the prospectuses for those companies.

(d) *Operating Expenses.* Describe the type of operating expenses for which the Registrant is responsible. If organizational expenses of the Registrant are to be paid out of its assets, explain how the expenses will be amortized and the period over which the amortization will occur.

Item 8. General Description of Contracts

(a) *Contract Rights.* Identify the person or persons (*e.g.,* the contractowner, participant, annuitant, or beneficiary) who have material rights under the Contracts, and the nature of those rights, (1) during the accumulation period, (2) during the annuity period, or (3) after the death of the annuitant or contractowner.

Instruction. Disclose all material state variations and intermediary-specific variations (*e.g.,* variations resulting from different brokerage channels) to the offering.

(b) *Contract Provisions and Limitations.* Briefly describe any provisions and limitations for:

(1) Minimum contract value, and the consequences of falling below that amount;

(2) allocation of purchase payments among sub-accounts of the Registrant;

(3) transfer of contract value between sub-accounts of the Registrant, including transfer programs (*e.g.,* dollar cost averaging, portfolio rebalancing, asset allocation programs, and automatic transfer programs);

(4) conversion or exchange of Contracts for another contract, including a fixed or variable annuity or life insurance contract; and

Instruction. In discussing conversion or exchange of Contracts, the Registrant should include any time limits on conversion or exchange, the name of the company issuing the other contract and whether that company is affiliated with the issuer of the Contract, and how the cash value of the Contract will be affected by the conversion or exchange.

(5) buyout offers of variable annuity contracts, including interests or participations therein.

(c) *General Account.* Describe the obligations under the contract that are funded by the insurer's general account (*e.g.,* death benefits, living benefits, or other benefits available under the contract), and state that these amounts are subject to the insurer's claims-paying ability and financial strength.

(d) *Contract or Registrant Changes.* Briefly describe the changes that can be made in the Contracts or the operations of the Registrant by the Registrant or the Depositor, including:

(1) Why a change may be made (*e.g.,* changes in applicable law or interpretations of law);

(2) who, if anyone, must approve any change (*e.g.,* the contractowner or the Commission); and

(3) who, if anyone, must be notified of any change.

Instruction. Describe only those changes that would be material to a purchaser of the Contracts, such as a reservation of the right to deregister the Registrant under the Investment Company Act or to substitute one Portfolio Company for another pursuant to section 26(c) of the Investment Company Act. Do not describe possible non-material changes, such as changing the time of day at which accumulation unit values are determined.

(e) *Class of Purchasers.* Disclose any limitations on the class or classes of purchasers to whom the Contract is being offered.

(f) *Frequent Transfers among Sub-accounts of the Registrant.*

(1) Describe the risks, if any, that frequent transfers of contract value among sub-accounts of the Registrant may present for other contractowners and other persons (*e.g.,* participants, annuitants, or beneficiaries) who have material rights under the Contract.

(2) State whether or not the Registrant or Depositor has adopted policies and procedures with respect to frequent transfers of contract value among sub-accounts of the Registrant.

(3) If neither the Registrant nor the Depositor has adopted any such policies and procedures, provide a statement of the specific basis for the view of the Depositor that it is appropriate for the Registrant and Depositor not to have such policies and procedures.

(4) If the Registrant or Depositor has any such policies and procedures, describe those policies and procedures, including:

(i) Whether or not the Registrant or Depositor discourages frequent transfers of contract value among sub-accounts of the Registrant;

(ii) whether or not the Registrant or Depositor accommodates frequent transfers of contract value among sub-accounts of the Registrant; and

(iii) any policies and procedures of the Registrant or Depositor for deterring frequent transfers of contract value among sub-accounts of the Registrant, including any restrictions imposed by the Registrant or Depositor to prevent or minimize frequent transfers. Describe each of these policies, procedures, and restrictions with specificity. Indicate whether each of these restrictions applies uniformly in all cases or whether the restriction will not be imposed under certain circumstances, including whether each of these restrictions applies to trades that occur through omnibus accounts at intermediaries, such as investment advisers, broker-dealers, transfer agents, and third party administrators. Describe with specificity the circumstances under which any restriction will not be imposed. Include a description of the following restrictions, if applicable:

(A) Any restrictions on the volume or number of transfers that may be made within a given time period;

(B) any transfer fee;

(C) any costs or administrative or other fees or charges that are imposed on persons deemed to be engaged in frequent transfers of contract value among sub-accounts of the Registrant, together with a description of the circumstances under which such costs, fees, or charges will be imposed;

(D) any minimum holding period that is imposed before a transfer may be made from a sub-account into another sub-account of the Registrant;

(E) any restrictions imposed on transfer requests submitted by overnight delivery, electronically, or via facsimile or telephone; and

(F) any right of the Registrant or Depositor to reject, limit, delay, or impose other conditions on transfers or to terminate or otherwise limit Contracts based on a history of frequent transfers among sub-accounts, including the circumstances under which such right will be exercised.

(5) If applicable, include a statement, adjacent to the disclosure required by paragraphs (f)(i) through (f)(iv) of this Item, that the Statement of Additional Information includes a description of all arrangements with any person to permit frequent transfers of contract value among sub-accounts of the Registrant.

Item 9. Annuity Period

Briefly describe the annuity options available. The discussion should include:

(a) Material factors that determine the level of annuity benefits;

(b) The annuity commencement date (give the earliest and latest possible dates);

(c) Frequency and duration of annuity payments, and the effect of these on the level of payment;

(d) The effect of assumed investment return;

(e) Any minimum amount necessary for an annuity option and the consequences of an insufficient amount; and

(f) Rights, if any, to change annuity options or to effect a transfer of investment base after the annuity commencement date.

Instructions:

1. Describe the choices, if any, available to a prospective annuitant, and the effect of not specifying a choice. Where an annuitant is given a choice in assumed investment return, explain the effect of choosing a higher, as opposed to a lower, assumed investment return.

2. Detailed disclosure on the method of calculating annuity payments should be placed in the SAI in response to Item 25.

(g) If applicable, state that the contractowner will not be able to withdraw any contract value amounts after the annuity commencement date.

Item 10. Standard Death Benefit

Briefly describe the standard death benefit provided under the Contract during the accumulation and the annuity periods. Include:

(a) The operation of the standard death benefit, including the amount of the death benefit and how the death benefit amount may vary, the circumstances under which the value of the benefit may increase or be reduced (including the impact of withdrawals), and how the benefit may be terminated.

(b) When the death benefit is calculated and payable and the effect of choosing a specific method of payment on calculation of the death benefit.

(c) The forms the benefit may take, including the effect of not choosing a payment option and the period, if any, during which payments must begin under any annuity option.

Item 11. Other Benefits Available Under the Contract

(a) Include the following information:

In addition to the standard death benefit associated with your contract, other [standard and/or optional] benefits may also be available to you. The purposes, fees, and restrictions/limitations of these additional benefits are briefly summarized in the following table[s].

Name of benefit	Purpose	Statement of whether benefit is standard or optional	Fee	Brief description of restrictions/limitations
			[ ]% [ ]%	

Instructions.

1. *General.*

(a) The table required by this Item 11(a) is meant to provide a tabular summary overview of the benefits described in Item 11(b) (*e.g.,* optional death benefits, optional or standard living benefits, etc.)

(b) If the Contract offers multiple benefits of the same type (*e.g.,* death benefit, accumulation benefit, withdrawal benefit, long-term care benefit), the Registrant may include multiple tables in response to this Item 11(a), if doing so might better permit

comparisons of different benefits of the same type.

(c) The Registrant should include appropriate titles, headings, or any other information to promote clarity and facilitate understanding of the table(s) presented in response to this Item 11(a). For example, if certain optional benefits are only available to certain contractowners (*e.g.,* contractowners who invested during specific time periods), the table could include footnotes or headings to identify which optional benefits are affected and to whom those optional benefits are available. In addition, if the Registrant includes titles or headings for the table(s) specifying whether the benefit is standard or optional, the Registrant does not need to include the ''Statement of Whether Benefit is Standard or Optional'' column in the table(s).

2. *Name of Benefit.* State the name of each benefit included in the table(s).

3. *Purpose.* Briefly describe the purpose of each benefit included in the table(s).

4. *Statement of Whether Benefit Is Standard or Optional.* State whether the benefit is standard or optional.

5. *Fee.* State the fee associated with each benefit included in the table(s). Include parentheticals providing information about what the stated percentage refers to (*e.g.,* percentage of contract value, percentage of benefit base, etc.).

6. *Brief Description of Restrictions/Limitations.* For each benefit for which the Registrant has stated that there are restrictions or limitations, briefly describe the restriction(s) or limitation(s) associated with each benefit. Registrants are encouraged to use short phrases (*e.g.,* ''benefit limits investment options available,'' ''withdrawals could terminate benefit'') to describe the restriction(s) or limitation(s).

(b) Briefly describe any other benefits (other than standard death benefit, *e.g.,* optional death benefits, optional or standard living benefits, etc.) offered under a Contract, including:

(1) Whether the benefit is standard or elected;

(2) The operation of the benefit, including the amount of the benefit and how the benefit amount may vary, the circumstances under which the value of the benefit may increase or be reduced (including the impact of withdrawals), and how the benefit may be terminated;

(3) Fees and costs, if any, associated with the benefit; and

(4) How the benefit amount is calculated and payable and the effect of choosing a specific method of payment on calculation of the benefit.

(c) Briefly describe any limitations, restrictions and risks associated with any benefit (other than the standard death benefit) offered under the contract (*e.g.,* restrictions on which Portfolio Companies may be selected; risk of reduction or termination of benefit resulting from excess withdrawals).

Instruction. In responding to paragraphs (b) and (c) of this Item, provide one or more examples illustrating the operation of each benefit in a clear, concise, and understandable manner.

Item 12. Purchases and Contract Value

(a) Briefly describe the procedures for purchasing a Contract. Include a concise explanation of:

(1) The minimum initial and subsequent purchase payments required and any limitations on the amount of purchase payments that will be accepted (if there are separate limits for each sub-account, state these limits); and

(2) a statement of when initial and subsequent purchase payments are credited.

(b) Describe the manner in which purchase payments are credited, including: (A) An explanation that purchase payments are credited on the basis of accumulation unit value; (B) how accumulation unit value is determined; and (C) how the number of accumulation units credited to a contract is determined.

(c) Explain that investment performance of the Portfolio Companies, expenses, and deduction of certain charges affect accumulation unit value and/or the number of accumulation units.

(d) Describe when calculations of accumulation unit value are made and that purchase payments are credited to a contract on the basis of accumulation unit value next determined after receipt of a purchase payment.

(e) Identify each principal underwriter (other than the depositor) of the variable annuity contracts and state its principal business address. If the principal underwriter is affiliated with the Registrant, the depositor, or any affiliated person of the Registrant or the depositor, identify how they are affiliated (*e.g.,* the principal underwriter is controlled by the depositor).

Item 13. Surrenders and Withdrawals

(a) *Surrender.* Briefly describe how a contractowner or annuitant (if the annuity option chosen by the annuitant is not based on a life contingency) can surrender (or partially surrender or make withdrawals from) a Contract, including any limits on the ability to surrender, how the proceeds are calculated, and when they are payable.

(b) *Partial Surrender and Withdrawal.* Indicate generally whether and under what circumstances partial surrenders and partial withdrawals are available under a Contract, including the minimum and maximum amounts that may be surrendered or withdrawn, any limits on their availability, how the proceeds are calculated, and when the proceeds are payable.

(c) *Effect of Partial Surrender and Withdrawal.* Indicate generally whether and under what circumstances partial surrenders or partial withdrawals will affect a Contract's cash value, death benefit(s), and/or any living benefits, and whether any charge(s) will apply.

(d) *Sub-Account Allocation.* Describe how partial surrenders and partial withdrawals will be allocated to the sub-accounts.

Instruction. The Registrant should generally describe the terms and conditions that apply to these transactions. Technical information regarding the determination of amounts available to be surrendered or withdrawn should be included in the SAI.

(e) *Involuntary Redemption.* Briefly describe any provision for involuntary redemptions under the Contract and the reasons for it, such as the size of the account or infrequency of purchase payments.

(f) *Revocation Rights.* Briefly describe any revocation rights (*e.g.,* ''free look'' provisions), including a description of how the amount refunded is determined, the method for crediting earnings to purchase payments during the free look period, and whether investment options are limited during the free look period.

Item 14. Loans

Briefly describe the loan provisions of the Contract, including any of the following that are applicable.

(a) *Availability of Loans.* State that a portion of the Contract's cash surrender value may be borrowed. State how the amount available for a loan is calculated.

(b) *Limitations.* Describe any limits on availability of loans (*e.g.,* a prohibition on loans during the first Contract year).

(c) *Interest.* Describe how interest accrues on the loan, when it is payable, and how interest is treated if not paid. Explain how interest earned on the loaned amount is credited to the Contract and allocated to the sub-accounts.

(d) *Effect on Contract Value and Death Benefit.* Describe how loans and loan repayments affect cash value and

how they are allocated among the sub-accounts. Include (i) a brief explanation that amounts borrowed under a Contract do not participate in a Registrant's investment experience and that loans, therefore, can affect the Contract's value and death benefit whether or not the loan is repaid, and (ii) a brief explanation that the cash surrender value and the death proceeds payable will be reduced by the amount of any outstanding Contract loan plus accrued interest.

(e) *Other Effects.* Describe any other effect that a loan could have on the Contract (*e.g.,* the effect of a Contract loan in excess of contract value).

(f) *Procedures.* Describe the loan procedures, including how and when amounts borrowed are transferred out of the Registrant and how and when amounts repaid are credited to the Registrant.

Item 15. Taxes

(a) *Tax Consequences.* Describe the material tax consequences to the contractowner and beneficiary of buying, holding, exchanging, or exercising rights under the Contract.

Instruction. Discuss the taxation of annuity payments, death benefit proceeds, periodic and non-periodic withdrawals, loans, and any other distribution that may be received under the Contract, as well as the tax benefits accorded the Contract, and other material tax consequences. Describe, if applicable, whether the tax consequences vary with different uses of the Contract.

(b) *Qualified plans.* Identify the types of qualified plans for which the Contracts are intended to be used.

Instructions:

1. Identify the types of persons who may use the plans (*e.g.,* corporations, self-employed individuals) and disclose, if applicable, that the terms of the plan may limit the rights otherwise available under the contracts.

2. Do not describe the Internal Revenue Code requirements for qualifications of plans or the non-annuity tax consequences of qualification (*e.g.,* the effect on employer taxation).

(c) *Effect.* Describe the effect, if any, of taxation on the determination of cash values or sub-account values.

Item 16. Legal Proceedings

Describe any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the Registrant, the Registrant's principal underwriter or the Depositor is a party. Include the name of the court where the case is pending, the date instituted, the principal parties involved, a description of the factual basis alleged to underlie the proceeding, and the relief sought. Include similar information as to any proceedings instituted, or known to be contemplated, by a governmental authority.

Instruction. For purposes of this requirement, legal proceedings are material only to the extent that they are likely to have a material adverse effect on the Registrant, the ability of the principal underwriter to perform its contract with the Registrant, or the ability of the Depositor to meet its obligations under the Contracts.

Item 17. Financial Statements

If all of the required financial statements of the Registrant and the Depositor (see Item 26 and General Instruction C.3(b)) are not in the prospectus, state, under a separate caption, where the financial statements may be found. Briefly explain how investors may obtain any financial statements not in the Statement of Additional Information.

Item 18. Portfolio Companies Available Under the Contract

Include as an Appendix under the heading ''Appendix: [Portfolio Companies] Available Under [the Contract]'' the following information, in the format specified below:

The following is a list of [Portfolio Companies] currently available under [the Contract], which is subject to change as discussed in [the Statutory Prospectus for the Contract]. Before you invest, you should review the prospectuses for the [Portfolio Companies]. These prospectuses contain more information about the [Portfolio Companies] and their risks and may be amended from time to time. You can find the prospectuses and other information about the [Portfolio Companies] online at [____]. You can also request this information at no cost by calling [____] or by sending an email request to [____].

The performance information below reflects fees and expenses of the [Portfolio Companies], but does not reflect the other fees and expenses that your contract may charge. Performance would be lower if these charges were included. Each [Portfolio Company's] past performance is not necessarily an indication of future performance.

[Type/investment objective]	[Portfolio company and *adviser/subadviser]*	Expense ratio (expenses/ average assets)	Average annual total returns *(as of 12/31/____)*		
			1 year	5 year	10 year
[Insert]	[Names of Portfolio Company and *adviser/subadviser*]	[____]%	[____]%	[____]%	[____]%

Instructions.

1. *General.*

(a) Only include those Portfolio Companies that are currently offered under the Contract.

(b) The introductory legend to the table must provide a website address, other than the address of the Commission's electronic filing system; toll free telephone number; and email address that investors can use to obtain the prospectuses of the Portfolio Companies and to request other information about the Portfolio Companies. The website address must be specific enough to lead investors directly to the prospectuses of the Portfolio Companies, rather than to the home page or other section of the website on which the materials are posted. The website could be a central site with prominent links to each document. The legend may indicate, if applicable, that the prospectuses and other information are available from a financial intermediary (such as an insurance sales agent or broker-dealer) through which the Contract may be purchased or sold. Registrants not relying upon rule 498A(j) under the Securities Act [17 CFR 230.498A(j)] with respect to the Portfolio Companies that are offered under the Contract may, but are not required to, provide the next-to-last sentence of the first paragraph of the introductory legend to the table regarding online availability of the prospectuses.

(c) If the availability of one or more Portfolio Companies varies by benefit offered under the Contract, include as another Appendix a separate table that indicates which Portfolio Companies are available under each of the benefits offered under the Contract. This Appendix could incorporate a table that is structured pursuant to the following

example, or could use any other presentation that might promote clarity and facilitate understanding:

[Portfolio Company]	[Benefit #1]	[Benefit #2]	[Benefit #3]	[Benefit #4]
Portfolio Company A	☑	☑	☑	☑
Portfolio Company B	☑	☑		
Portfolio Company C	☑	☑		
Portfolio Company D	☑			

2. *Type/Investment Objective.* Briefly describe each Portfolio Company's type (*e.g.,* money market fund, bond fund, balanced fund, etc.), or include a brief statement concerning the Portfolio Company's investment objectives.

3. *Portfolio Company and Adviser/Subadviser.* State the name of each Portfolio Company and its adviser/subadviser, as applicable. The adviser's/sub-adviser's name may be omitted if it is incorporated into the name of the Portfolio Company.

4. *Expense ratio.* For purposes of this Item 18, ''expense ratio'' means ''Total Annual Fund Operating Expenses'' as calculated pursuant to Item 3 of Form N–1A for open-end funds, before waivers and reimbursements that reduce the Portfolio Company's rate of return.

5. *Average Annual Total Returns.* For purposes of this Item 18, ''average annual total returns'' means the ''average annual total return'' (before taxes) as calculated pursuant to Item 4(b)(2)(iii) of Form N–1A for open-end funds.

Part B—Information Required in a Statement of Additional Information

Item 19. Cover Page and Table of Contents

(a) *Front Cover Page.* Include the following information on the outside front cover page of the SAI:

(1) The Registrant's name.

(2) The Depositor's name.

(3) The name of the Contract and the Class or Classes, if any, to which the Contract relates.

(4) A statement or statements:

(i) That the SAI is not a prospectus;

(ii) How the prospectus may be obtained; and

(iii) Whether and from where information is incorporated by reference into the SAI, as permitted by General Instruction D.

Instruction. Any information incorporated by reference into the SAI must be delivered with the SAI.

(5) The date of the SAI and the prospectus to which the SAI relates.

(b) *Table of Contents.* Include under appropriate captions (and subcaptions) a list of the contents of the SAI and, when useful, provide cross references to related disclosure in the prospectus.

Item 20. General Information and History

(a) *Depositor.* Provide the date and form of organization of the Depositor, the name of the state or other jurisdiction in which the Depositor is organized, and a description of the general nature of the Depositor's business.

Instruction. The description of the Depositor's business should be short and need not list all of the businesses in which the Depositor engages or identify the jurisdictions in which it does business if a general description (*e.g.,* ''variable annuity'' or ''reinsurance'') is provided.

(b) *Registrant.* Provide the date and form of organization of the Registrant and the Registrant's classification pursuant to Section 4 [15 U.S.C. 80a–4] (*i.e.,* a separate account and a unit investment trust).

(c) *History of Depositor and Registrant.* If the Depositor's name was changed during the past five years, state its former name and the approximate date on which it was changed. If, at the request of any state, sales of contracts offered by the Registrant have been suspended at any time, or if sales of contracts offered by the Depositor have been suspended during the past five years, briefly describe the reasons for and results of the suspension. Briefly describe the nature and results of any bankruptcy, receivership, or similar proceeding, or any other material reorganization, readjustment, or succession of the Depositor during the past five years.

(d) *Ownership of Sub-Account Assets.* If 10 percent or more of the assets of any sub-account are not attributable to Contracts or to accumulated deductions or reserves (*e.g.,* initial capital contributed by the Depositor), state what percentage those assets are of the total assets of the Registrant. If the Depositor, or any other person controlling the assets, has any present intention of removing the assets from the sub-account, so state.

(e) *Control of Depositor.* State the name of each person who controls the Depositor and the nature of its business.

Instruction. If the Depositor is controlled by another person that, in turn, is controlled by another person, give the name of each control person and the nature of its business.

Item 21. Services

(a) *Expenses Paid by Third Parties.* Describe all fees, expenses, and costs of the Registrant that are to be paid by persons other than the Depositor or the Registrant, and identify those persons.

(b) *Service Agreements.* Summarize the substantive provisions of any management-related service contract that may be of interest to a purchaser of the Registrant's securities, under which services are provided to the Registrant, unless the contract is described in response to some other item of the form. Indicate the parties to the contract, and the total dollars paid and by whom for each of the past three years.

Instructions:

1. The term ''management-related service contract'' includes any contract with the Registrant to keep, prepare, or file accounts, books, records, or other documents required under federal or state law, or to provide any similar services with respect to the daily administration of the Registrant, but does not include the following:

(a) Any agreement with the Registrant to act as custodian or agent to administer purchases and redemptions under the Contracts, and

(b) Any contract with the Registrant for outside legal or auditing services, or contract for personal employment entered into with the Registrant in the ordinary course of business.

2. In summarizing the substantive provisions of any management-related service contract, include the following:

(a) The name of the person providing the service;

(b) The direct or indirect relationships, if any, of the person with the Registrant, its Depositor, or its principal underwriter; and

(c) The nature of the services provided; and the basis of the compensation paid for the services for the Registrant's last three fiscal years.

(c) *Other Service Providers.*

(1) Unless disclosed in response to paragraph (b) or another item of this form, identify and state the principal business address of any person who provides significant administrative or business affairs management services for the Registrant (*e.g.,* an ''Administrator,'' ''Sub-Administrator,'' ''Servicing Agent''), describe the services provided, and the compensation paid for the services.

(2) State the name and principal business address of the Registrant's custodian and independent public accountant and describe generally the services performed by each.

(3) If the Registrant's assets are held by a person other than the Depositor, a commercial bank, trust company, or depository registered with the Commission as custodian, state the nature of the business of each such person.

(4) If an affiliated person of the Registrant or the Depositor, or an affiliated person of such an affiliated person, acts as administrative or servicing agent for the Registrant, describe the services the person performs and the basis for remuneration. State, for the past three years, the total dollars paid for the services, and by whom.

Instruction. No disclosure need be given in response to paragraph (c)(4) of this Item for an administrative or servicing agent who is also the Depositor.

(5) If the Depositor is the principal underwriter of the Contracts, so state.

Item 22. Purchase of Securities Being Offered

(a) Describe the manner in which Registrant's securities are offered to the public. Include a description of any special purchase plans and any exchange privileges not described in the prospectus.

Instruction. Address exchange privileges between sub-accounts, between the Registrant and other separate accounts, and between the Registrant and contracts offered through the depositor's general account.

(b) Describe the method that will be used to determine the sales load on the variable annuity contracts offered by the Registrant.

Instruction. Explain fully any difference in the price at which variable annuity contracts are offered to members of the public, as individuals or as groups, and the prices at which the contracts are offered for any class of transactions or to any class of individuals, including officers, directors, members of the board of managers, or employees of the Registrant's depositor, underwriter, Portfolio Company, or investment adviser to the Portfolio Company.

(c) *Frequent Transfer Arrangements.* Describe any arrangements with any person to permit frequent transfers of contract value among sub-accounts of the Registrant, including the identity of the persons permitted to engage in frequent transfers pursuant to such arrangements, and any compensation or other consideration received by the Registrant, the depositor, or any other party pursuant to such arrangements.

Instructions:

1. The consideration required to be disclosed by Item 22(c) includes any agreement to maintain assets in the Registrant or in other investment companies or accounts managed or sponsored by the Depositor, any investment adviser of a Portfolio Company, or any affiliated person of the Depositor or of any such investment adviser.

2. If the Registrant has an arrangement to permit frequent transfers of contract value among sub-accounts of the Registrant by a group of individuals, such as the participants in a defined contribution plan that meets the requirements for qualification under Section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), the Registrant may identify the group rather than identifying each individual group member.

Item 23. Underwriters

(a) *Identification.* Identify each principal underwriter (other than the Depositor) of the Contracts, and state its principal business address. If the principal underwriter is affiliated with the Registrant, the Depositor, or any affiliated person of the Registrant or the Depositor, identify how they are affiliated (*e.g.,* the principal underwriter is controlled by the Depositor).

(b) *Offering and Commissions.* For each principal underwriter distributing Contracts of the Registrant, state:

(1) Whether the offering is continuous; and

(2) the aggregate dollar amount of underwriting commissions paid to, and the amount retained by, the principal underwriter for each of the Registrant's last three fiscal years.

(c) *Other Payments.* With respect to any payments made by the Registrant to an underwriter of or dealer in the Contracts during the Registrant's last fiscal year, disclose the name and address of the underwriter or dealer, the amount paid; and basis for determining the amount, the circumstances surrounding the payments, and the consideration received by the Registrant. Do not include information about:

(1) Payments made through deduction from premiums paid at the time of sale of the Contracts; or

(2) Payments made from cash values upon full or partial surrender of the Contracts or from an increase or decrease in the face amount of the Contracts.

Instructions.

1. Information need not be given about the service of mailing proxies or periodic reports of the Registrant.

2. Exclude information about bona fide contracts with the Registrant or its Depositor for outside legal or auditing services, or bona fide contracts for

personal employment entered into with the Registrant or its Depositor in the ordinary course of business.

3. Information need not be given about any service for which total payments of less than $15,000 were made during each of the Registrant's last three fiscal years.

4. Information need not be given about payments made under any contract to act as administrative or servicing agent.

5. If the payments were made under an arrangement or policy applicable to dealers generally, describe only the arrangement or policy.

Item 24. Calculation of Performance Data

(a) *Money Market Funded Sub-Accounts.* Yield quotation(s) included in the prospectus for an account or sub-account that holds itself out as a ''money market'' account or sub-account should be calculated according to paragraphs (a)(1)–(2).

(1) *Yield Quotation.* Based on the 7 days ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate the yield by determining the net change, exclusive of capital changes and income other than investment income, in the value of a hypothetical pre-existing account having a balance of one accumulation unit of the account or sub-account at the beginning of the base period, subtracting a hypothetical charge reflecting deductions from Contractowner Accounts, and dividing the difference by the value of the account at the beginning of the base period to obtain the base period return, and then multiplying the base period return by (365/7) with the resulting yield figure carried to at least the nearest hundredth of one percent.

(2) *Effective Yield Quotation.* Based on the 7 days ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate the effective yield, carried to at least the nearest hundredth of one percent, by determining the net change, exclusive of capital changes and income other than investment income, in the value of a hypothetical pre-existing account having a balance of one accumulation unit of the account or sub-account at the beginning of the period, subtracting a hypothetical charge reflecting deductions from Contractowner Accounts, and dividing the difference by the value of the account at the beginning of the base period to obtain the base period return, and then compounding the base period return by adding 1, raising the sum to a power equal to 365 divided by 7, and subtracting 1 from the result, according to the following formula:

EFFECTIVE YIELD = [(BASE PERIOD RETURN + 1)$^{365/7}$] − 1.

Instructions:

1. When calculating the yield or effective yield quotations, the calculation of net change in account value must include all deductions that are charged to all Contractowner Accounts in proportion to the length of the base period. For any account fees that vary with the size of the account, assume an account size equal to the sub-account's mean (or median) account size.

2. Deductions from purchase payments and sales loads assessed at the time of redemption or annuitization should not be reflected in the computation of yield and effective yield. However, the amount or specific rate of such deductions must be disclosed.

3. Exclude realized gains and losses from the sale of securities and unrealized appreciation and depreciation from the calculation of yield and effective yield. Exclude income other than investment income.

(b) *Other Sub-Accounts.* Performance information included in the prospectus should be calculated according to paragraphs (b)(i)–(iii).

(1) *Average Annual Total Return Quotation.* For the 1-, 5-, and 10-year periods ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate the average annual total return by finding the average annual compounded rates of return over the 1-, 5-, and 10-year periods that would equate the initial amount invested to the ending redeemable value, according to the following formula:

$P(1+T)^n = ERV$

Where:

P = a hypothetical initial payment of $1,000
T = average annual total return
n = number of years
ERV = ending redeemable value of a hypothetical $1,000 payment made at the beginning of the 1-, 5-, or 10-year periods at the end of the 1-, 5-, or 10-year periods (or fractional portion).

Instructions:

1. Assume the maximum sales load (or other charges deducted from payments) is deducted from the initial $1,000 payment.

2. Include all recurring fees that are charged to all Contractowner Accounts. For any account fees that vary with the size of the account, assume an account size equal to the sub-account's mean (or median) account size. If recurring fees charged to Contractowner Accounts are paid other than by redemption of accumulation units, they should be appropriately reflected.

3. Determine the ending redeemable value by assuming a complete redemption at the end of the 1, 5, or 10 year periods and the deduction of all nonrecurring charges deducted at the end of each period.

4. If the Registrant's registration statement has been in effect less than one, five, or ten years, the time period during which the registration statement has been in effect should be substituted for the period stated.

5. Carry the total return quotation to the nearest hundredth of one percent.

6. Total return information in the prospectus need only be current to the end of the Registrant's most recent fiscal year.

(2) *Yield Quotation.* Based on a 30-day (or one month) period ended on the date of the most recent balance sheet of the Registrant included in the registration statement, calculate yield by dividing the net investment income per accumulation unit earned during the period by the maximum offering price per unit on the last day of the period, according to the following formula:

$$YIELD = 2\left[\left(\frac{a-b}{cd}+1\right)^{6}-1\right]$$

Where:

a = net investment income earned during the period by the Portfolio Company attributable to shares owned by the sub-account.
b = expenses accrued for the period (net of reimbursements).
c = the average daily number of accumulation units outstanding during the period.
d = the maximum offering price per accumulation unit on the last day of the period.

Instructions:

1. Include among the expenses accrued for the period all recurring fees that are charged to all Contractowner Accounts. For any account fees that vary with the size of the account, assume an account size equal to the sub-account's mean (or median) account size.

2. If a broker-dealer or an affiliate (as defined in paragraph (b) of Rule 1–02 [17 CFR 210.1–02(b) of Regulation S–X) of the broker-dealer has, in connection with directing the Portfolio Company's brokerage transactions to the broker-dealer, provided, agreed to provide, paid for, or agreed to pay for, in whole or in part, services provided to the Portfolio Company (other than brokerage and research services as these terms are defined in Section 28(e) of the Securities Exchange Act of 1934 [15 U.S.C. 78bb(e)]), add to expenses accrued for the period an estimate of

additional amounts that would have been accrued for the period if the Portfolio Company had paid for the services directly in an arms-length transaction.

3. Net investment income must be calculated by the Portfolio Company as prescribed by Item 26(b)(4) of Form N–1A.

Note: (a − b) = net investment income in the Item 26(b)(4) equation.

4. Disclose the amount or specific rate of any nonrecurring account or sales charges.

(3) *Non-Standardized Performance Quotation.* A Registrant may calculate performance using any other historical measure of performance (not subject to any prescribed method of computation) if the measurement reflects all elements of return.

Item 25. Annuity Payments

Describe the method for determining the amount of annuity payments if not described in the prospectus. In addition, describe how any change in the amount of a payment after the first payment is determined.

Item 26. Financial Statements

(a) *Registrant.* Provide financial statements of the Registrant.

Instructions. Include, in a separate section, the financial statements and schedules required by Regulation S–X [17 CFR 210]. Financial statements of the Registrant may be limited to:

(i) An audited balance sheet or statement of assets and liabilities as of the end of the most recent fiscal year;

(ii) An audited statement of operations of the most recent fiscal year conforming to the requirements of Rule 6–07 of Regulation S–X [17 CFR 210.6–07];

(iii) An audited statement of cash flows for the most recent fiscal year if necessary to comply with generally accepted accounting principles; and

(iv) Audited statements of changes in net assets conforming to the requirements of Rule 6–09 of Regulation S–X [17 CFR 210.6–09] for the two most recent fiscal years.

(b) *Depositor.* Provide financial statements of the Depositor.

Instructions:

1. Include, in a separate section, the financial statements and schedules of the Depositor required by Regulation S–X. If the Depositor would not have to prepare financial statements in accordance with generally accepted accounting principles except for use in this registration statement or other registration statements filed on Forms N–3, N–4, or N–6, its financial statements may be prepared in accordance with statutory requirements. The Depositor's financial statements must be prepared in accordance with generally accepted accounting principles if the Depositor prepares financial information in accordance with generally accepted accounting principles for use by the Depositor's parent, as defined in Rule 1–02(p) of Regulation S–X [17 CFR 210.1–02(p)], in any report under sections 13(a) and 15(d) of the Securities Exchange Act [15 U.S.C. 78m(a) and 78*o*(d)] or any registration statement filed under the Securities Act.

2. All statements and schedules of the Depositor required by Regulation S–X, except for the consolidated balance sheets described in Rule 3–01 of Regulation S–X [17 CFR 210.3–01], and any notes to these statements or schedules, may be omitted from Part B and instead included in Part C of the registration statement. If any of this information is omitted from Part B and included in Part C, the consolidated balance sheets included in Part B should be accompanied by a statement that additional financial information about the Depositor is available, without charge, upon request. When a request for the additional financial information is received, the Registrant should send the information within 3 business days of receipt of the request, by first-class mail or other means designed to ensure equally prompt delivery.

3. Notwithstanding Rule 3–12 of Regulation S–X [17 CFR 210.3–12], the financial statements of the Depositor need not be more current than as of the end of the most recent fiscal year of the Depositor. In addition, when the anticipated effective date of a registration statement falls within 90 days subsequent to the end of the fiscal year of the Depositor, the registration statement need not include financial statements of the Depositor more current than as of the end of the third fiscal quarter of the most recently completed fiscal year of the Depositor unless the audited financial statements for such fiscal year are available. The exceptions to Rule 3–12 of Regulation S–X contained in this Instruction 3 do not apply when:

(a) The Depositor's financial statements have never been included in an effective registration statement under the Securities Act of 1933 of a separate account that offers variable annuity contracts or variable life insurance contracts; or

(b) The balance sheet of the Depositor at the end of either of the two most recent fiscal years included in response to this Item shows a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of less than $2,500,000; or

(c) The balance sheet of the Depositor at the end of a fiscal quarter within 135 days of the expected date of effectiveness under the Securities Act (or a fiscal quarter within 90 days of filing if the registration statement is filed solely under the Investment Company Act) would show a combined capital surplus, if a stock company, or an unassigned surplus, if a mutual company, of less than $2,500,000. If two fiscal quarters end within the 135 day period, the Depositor may choose either for purposes of this test.

Any interim financial statements required by this Item need not be comparative with financial statements for the same interim period of an earlier year.

Item 27. Condensed Financial Information

Furnish the following information for each class of accumulation units of the Registrant.

ACCUMULATION UNIT VALUES (for an accumulation unit outstanding throughout the period)

1. accumulation unit value at beginning of period;
2. accumulation unit value at end of period;
3. number of accumulation units outstanding at the end of period.

Instructions:

1. For purpose of this Item, ''class of accumulation units'' means any variation that affects accumulation units, including variations related to contract class, optional benefits, and sub-accounts.

2. The above information must be provided for each class of accumulation units of the Registrant derived from contracts offered by means of any prospectus (and each class derived from contracts no longer offered for sale) to which the SAI relates, but for which registrant may continue to accept payments. Information need not be provided for any class of accumulation units of the Registrant derived from contracts that are currently offered for sale by means of a different prospectus. Also, information need not be provided for any class of accumulation units that is no longer offered for sale but for which Registrant may continue to accept payments, if the information is provided in a different, but current prospectus of the Registrant.

3. The information shall be presented in comparative columns for each of the last five fiscal years of the Registrant (or for life of the Registrant and its immediate predecessors, if less) but

only from the later of the effective date of Registrant's or the relevant Portfolio Company's first 1933 Act Registration Statement. In addition, the information shall be presented for the period between the end of the latest fiscal year and the date of the latest balance sheet or statement of assets and liabilities furnished.

4. Accumulation unit amounts shall be given at least to the nearest cent. If the computation of the offering price is extended to tenths of a cent or more, then the amounts on the table should be given in tenths of a cent.

5. Accumulation unit values should only be given for sub-accounts that fund obligations of the Registrant under variable annuity contracts offered by means of this prospectus.

6. Registrants may, but are not required to, omit the AUV tables, if the registrant provides an annual account statement to each individual contractowner that discloses, with respect to each class of accumulation units held by the contractowner, the actual performance of each subaccount reflecting all contract charges incurred by the contractowner. For accounts held less than one year, the annual account statement must disclose the actual performance of each sub-account for the length of time the investor has owned the sub-account.

Part C—Other Information

Item 28. Exhibits

Subject to General Instruction D regarding incorporation by reference and rule 483 under the Securities Act [17 CFR 230.483], file the exhibits listed below as part of the registration statement. Letter or number the exhibits in the sequence indicated and file copies rather than originals, unless otherwise required by rule 483. Reflect any exhibit incorporated by reference in the list below and identify the previously filed document containing the incorporated material.

(a) *Board of Directors Resolution.* The resolution of the board of directors of the Depositor authorizing the establishment of the Registrant.

(b) *Custodian Agreement.* All agreements for custody of securities and similar investments of the Registrant, including the schedule of remuneration.

(c) *Underwriting Contracts.* Underwriting or distribution contract between the Registrant or Depositor and a principal underwriter and agreements between principal underwriters and dealers or the Depositor and dealers.

(d) *Contracts.* The form of each Contract, including any riders or endorsements.

(e) *Applications.* The form of application used with any Contract provided in response to (d) above;

(f) *Depositor's Certificate of Incorporation and By-Laws.* The Depositor's current certificate of incorporation or other instrument of organization and by-laws and any related amendment.

(g) *Reinsurance Contracts.* Any contract of reinsurance related to a Contract.

(h) *Participation Agreements.* Any participation agreement or other contract relating to the investment by the Registrant in a Portfolio Company.

(i) *Administrative Contracts.* Any contract relating to the performance of administrative services in connection with administering a Contract.

(j) *Other Material Contracts.* Other material contracts not made in the ordinary course of business to be performed in whole or in part on or after the filing date of the registration statement.

(k) *Legal Opinion.* An opinion and consent of counsel regarding the legality of the securities being registered, stating whether the securities will, when sold, be legally issued and represent binding obligations of the Depositor.

(l) *Other Opinions.* Copies of any other opinions, appraisals, or rulings, and consents of their use relied on in preparing this Registration Statement and required by Section 7 of the 1933 Act.

(m) *Omitted Financial Statements.* Financial statements omitted from Item 26.

(n) *Initial Capital Agreement.* Any agreements or understandings made in consideration for providing the initial capital between or among the Registrant, Depositor, underwriter, or initial contractowners and written assurances from the Depositor or initial contractowners that purchases were made for investment purposes and not with the intention of redeeming or reselling.

(o) *Preliminary Summary Prospectuses.* The form of any Initial Summary Prospectus and Updating Summary Prospectus that the Registrant intends to use on or after the effective date of the registration statement, pursuant to rule 498A under the Securities Act.

Instruction. Registrants are required to provide the preliminary Summary Prospectus exhibits only in connection with the filing of an initial registration statement, or in connection with a pre-effective amendment or a post-effective amendment filed in accordance with paragraph (a) of rule 485 under the Securities Act.

Item 29. Directors and Officers of the Depositor

(1) Name and principal business address	(2) Positions and offices with depositor

Instruction. Registrants are required to provide the above information only for officers or directors who are engaged directly or indirectly in activities relating to the Registrant or the Contracts, and for executive officers including the Depositor's president, secretary, treasurer, and vice presidents who have authority to act as president in his or her absence.

Item 30. Persons Controlled by or Under Common Control With the Depositor or Registrant

Provide a list or diagram of all persons directly or indirectly controlled by or under common control with the Depositor or the Registrant. For any person controlled by another person, disclose the percentage of voting securities owned by the immediately controlling person or other basis of that person's control. For each company, also provide the state or other sovereign power under the laws of which the company is organized.

Instructions:

1. Include the Registrant and the Depositor in the list or diagram and show the relationship of each company to the Registrant and Depositor and to the other companies named, using cross-references if a company is controlled through direct ownership of its securities by two or more persons.

2. Indicate with appropriate symbols subsidiaries that file separate financial statements, subsidiaries included in consolidated financial statements; or unconsolidated subsidiaries included in group financial statements. Indicate for other subsidiaries why financial statements are not filed.

Item 31. Indemnification

State the general effect of any contract, arrangements, or statute under which any underwriter or affiliated person of the Registrant is insured or indemnified against any liability incurred in his or her official capacity, other than insurance provided by any underwriter or affiliated person for his or her own protection.

Item 32. Principal Underwriters

(a) *Other Activity.* State the name of each investment company (other than the Registrant) for which each principal underwriter currently distributing the Registrant's securities also acts as a

principal underwriter, depositor, sponsor, or investment adviser.

(b) *Management.* Provide the information required by the following table with respect to each director, officer, or partner of each principal underwriter named in the response to Item 23:

(1) Name and principal business address	(2) Positions and offices with underwriter

Instruction. If a principal underwriter is the Depositor or an affiliate of the Depositor, and is also an insurance company, the above information for officers or directors need only be provided for officers or directors who are engaged directly or indirectly in activities relating to the Registrant or the Contracts, and for executive officers including the Depositor's or its affiliate's president, secretary, treasurer, and vice presidents who have authority to act as president in his or her absence.

(c) *Compensation From the Registrant.* Provide the information required by the following table for all commissions and other compensation received, directly or indirectly, from the Registrant during the Registrant's last fiscal year by each principal underwriter:

(1)	(2)	(3)	(4)	(5)
Name of principal underwriter	Net underwriting discounts and commissions	Compensation on redemption	Brokerage commissions	Other compensation

Instructions:

1. Disclose the type of services rendered in consideration for the compensation listed in column (5).

2. Information need not be given about the service of mailing proxies or periodic reports of the Registrant.

3. Exclude information about bona fide contracts with the Registrant or its Depositor for outside legal or auditing services, or bona fide contracts for personal employment entered into with the Registrant or its Depositor in the ordinary course of business.

4. Exclude information about any service for which total payments of less than $15,000 were made during each of the last three fiscal years.

5. Exclude information about payments made under any agreement whereby another person contracts with the Registrant or its Depositor to perform as custodian or administrative or servicing agent.

Item 33. Location of Accounts and Records

State the name and address of each person maintaining physical possession of each account, book, or other document, required to be maintained by Section 31(a) [15 U.S.C. 80a–30(a)] and the rules under that section.

Instruction. The Registrant may omit this information to the extent it is provided in its most recent report on Form N–CEN [17 CFR 274.101].

Item 34. Management Services

Provide a summary of the substantive provisions of any management-related service contract not discussed in Part A or Part B, disclosing the parties to the contract and the total amount paid and by whom for the Registrant's last three fiscal years.

Instructions:

1. The instructions to Item 21(b) of this Form shall also apply to this Item.

2. Exclude information about any service provided for payments totaling less than $15,000 during each of the Registrant's last three fiscal years.

Item 35. Fee Representation

Provide a representation of the Depositor that the fees and charges deducted under the Contracts, in the aggregate, are reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the Depositor.

Signatures

Pursuant to the requirements of the Securities Act of 1933 and the Investment Company Act of 1940, the Registrant (certifies that it meets all of the requirements for effectiveness of this registration statement under rule 485(b) under the Securities Act and) has duly caused this registration statement to be signed on its behalf by the undersigned, duly authorized, in the City of_____, and State of____, on this____ day of_____.

_____

(Registrant)

By _____

(Signature)

_____

(Title)

_____

(Depositor)

By _____

(Name of officer of Depositor)

_____

(Title)

Instruction

If the registration statement is being filed only under the Securities Act or under both the Securities Act and the Investment Company Act, it should be signed by both the Registrant and the Depositor. If the registration statement is being filed only under the Investment Company Act, it should be signed only by the Registrant.

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

_____

Signature

_____

Title

_____

Date

■ 39. Revise Form N–6 (referenced in §§ 239.17c and 274.11d) to read as follows

Note: The text of Form N–6 will not appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM N-6

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933
Pre-Effective Amendment No. _____[ ]
Post-Effective Amendment No. _____[ ]
and/or
REGISTRATION STATEMENT UNDER THE INVESTMENT COMPANY ACT OF 1940
Amendment No. _____[ ]

(Check appropriate box or boxes.)

_____
(Exact Name of Registrant)

_____
(Name of Depositor)

_____
(Address of Depositor's Principal Executive Offices) (Zip Code)

_____
Depositor's Telephone Number, including Area Code

_____
(Name and Address of Agent for Service)

_____
Approximate Date of Proposed Public Offering

It is proposed that this filing will become effective (check appropriate box)
[ ] immediately upon filing pursuant to paragraph (b)
[ ] on (date) pursuant to paragraph (b)
[ ] 60 days after filing pursuant to paragraph (a)(1)
[ ] on (date) pursuant to paragraph (a)(1) of rule 485

If appropriate, check the following box:

[ ] this post-effective amendment designates a new effective date for a previously filed post-effective amendment.

Omit from the facing sheet reference to the other Act if the registration statement or amendment is filed under only one of the Acts. Include the "Approximate Date of Proposed

Public Offering" only where securities are being registered under the Securities Act of 1933.

Form N-6 is to be used by separate accounts that are unit investment trusts that offer variable life insurance contracts to register under the Investment Company Act of 1940 and to offer their securities under the Securities Act of 1933. The Commission has designed Form N-6 to provide investors with information that will assist them in making a decision about investing in a variable life insurance contract. The Commission also may use the information provided in Form N-6 in its regulatory, disclosure review, inspection, and policy-making roles.

A Registrant is required to disclose the information specified by Form N-6, and the Commission will make this information public. A Registrant is not required to respond to the collection of information contained in Form N-6 unless the Form displays a currently valid Office of Management and Budget ("OMB") control number. Please direct comments concerning the accuracy of the information collection burden estimate and any suggestions for reducing the burden to Secretary, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549. The OMB has reviewed this collection of information under the clearance requirements of 44 U.S.C. § 3507.

Persons who respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.

Contents of Form N–6

General Instructions

A. Definitions

References to sections and rules in this Form N–6 are to the Investment Company Act of 1940 [15 U.S.C. 80a–1 *et seq.*] (the "Investment Company Act"), unless otherwise indicated. Terms used in this Form N–6 have the same meaning as in the Investment Company Act or the related rules, unless otherwise indicated. As used in this Form N–6, the terms set out below have the following meanings:

"Class" means a version of a Variable Life Insurance Contract that varies principally with respect to distribution-related fees and expenses.

"Depositor" means the person primarily responsible for the organization of the Registrant and the person, other than the trustee or custodian, who has continuing functions or responsibilities for the administration of the affairs of the Registrant. "Depositor" includes the sponsoring insurance company that establishes and maintains the Registrant. If there is more than one Depositor, the information called for in this Form about the Depositor must be provided for each Depositor.

"Portfolio Company" means any company in which the Registrant invests and which may be selected as an option by the contractowner.

"Registrant" means the separate account (as defined in section 2(a)(37) of the Investment Company Act [15 U.S.C. 80a–2(a)(37)]) that offers the Variable Life Insurance Contracts.

"SAI" means the Statement of Additional Information required by Part B of this Form.

"Securities Act" means the Securities Act of 1933 [15 U.S.C. 77a *et seq.*].

"Securities Exchange Act" means the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq.*].

"Statutory Prospectus" means a prospectus that satisfies the requirements of section 10(a) of the Securities Act [15 U.S.C. 77j(a)].

"Summary Prospectus" has the meaning provided by paragraph (a)(12) of rule 498A under the Securities Act [17 CFR 230.498A(a)(12)].

"Variable Life Insurance Contract" or "Contract" means a life insurance contract that provides for death benefits and cash values that may vary with the investment experience of any separate

account. Unless the context otherwise requires, ''Variable Life Insurance Contract'' or ''Contract'' refers to the Variable Life Insurance Contracts being offered pursuant to the registration statement prepared on this Form.

B. Filing and Use of Form N–6

1. What is Form N–6 used for?

Form N–6 is used by all separate accounts organized as unit investment trusts and offering Variable Life Insurance Contracts to file:

(a) An initial registration statement under the Investment Company Act and any amendments to the registration statement;

(b) An initial registration statement required under the Securities Act and any amendments to the registration statement, including amendments required by section 10(a)(3) of the Securities Act [15 U.S.C. 77j(a)(3)]; or

(c) Any combination of the filings in paragraph (a) or (b).

2. What is included in the registration statement?

(a) For registration statements or amendments filed under both the Investment Company Act and the Securities Act or only under the Securities Act, include the facing sheet of the Form, Parts A, B, and C, and the required signatures.

(b) For registration statements or amendments filed only under the Investment Company Act, include the facing sheet of the Form, responses to all Items of Parts A (except Items 1, 4, 5, 10, and 17), B, and C (except Items 29(c), (k), (l), (n), and (o)), and the required signatures.

3. What are the fees for Form N–6?

No registration fees are required with the filing of Form N–6 to register as an investment company under the Investment Company Act or to register securities under the Securities Act. If Form N–6 is filed to register securities under the Securities Act and securities are sold to the public, registration fees must be paid on an ongoing basis after the end of the Registrant's fiscal year. *See* section 24(f) [15 U.S.C. 80a–24(f)] and related rule 24f–2 [17 CFR 270.24f–2].

4. What rules apply to the filing of a registration statement on Form N–6?

(a) For registration statements and amendments filed under both the Investment Company Act and the Securities Act or under only the Securities Act, the general rules regarding the filing of registration statements in Regulation C under the Securities Act [17 CFR 230.400–230.498A] apply to the filing of registration statements on Form N–6. Specific requirements concerning investment companies appear in rules 480–485 and 495–498A of Regulation C.

(b) For registration statements and amendments filed only under the Investment Company Act, the general provisions in rules 8b–1—8b–32 [17 CFR 270.8b–1 to 270.8b–32] apply to the filing of registration statements on Form N–6.

(c) The plain English requirements of rule 421 under the Securities Act [17 CFR 230.421] apply to prospectus disclosure in Part A of Form N–6.

(d) Regulation S–T [17 CFR 232.10–232.903] applies to all filings on the Commission's Electronic Data Gathering, Analysis, and Retrieval system (''EDGAR'').

C. Preparation of the Registration Statement

1. Administration of the Form N–6 Requirements

(a) The requirements of Form N–6 are intended to promote effective communication between the Registrant and prospective investors. A Registrant's prospectus should clearly disclose the fundamental features and risks of the Variable Life Insurance Contracts, using concise, straightforward, and easy to understand language. A Registrant should use document design techniques that promote effective communication.

(b) The prospectus disclosure requirements in Form N–6 are intended to elicit information for an average or typical investor who may not be sophisticated in legal or financial matters. The prospectus should help investors to evaluate the risks of an investment and to decide whether to invest in a Variable Life Insurance Contract by providing a balanced disclosure of positive and negative factors. Disclosure in the prospectus should be designed to assist an investor in comparing and contrasting a Variable Life Insurance Contract with other Contracts.

(c) Responses to the Items in Form N–6 should be as simple and direct as reasonably possible and should include only as much information as is necessary to enable an average or typical investor to understand the particular characteristics of the Variable Life Insurance Contracts. The prospectus should avoid including lengthy legal and technical discussions and simply restating legal or regulatory requirements to which Contracts generally are subject. Brevity is especially important in describing the practices or aspects of the Registrant's operations that do not differ materially from those of other separate accounts. Avoid excessive detail, technical or legal terminology, and complex language. Also avoid lengthy sentences and paragraphs that may make the prospectus difficult for many investors to understand and detract from its usefulness.

(d) The requirements for prospectuses included in Form N–6 will be administered by the Commission in a way that will allow variances in disclosure or presentation if appropriate for the circumstances involved while remaining consistent with the objectives of Form N–6.

2. Form N–6 Is Divided Into Three Parts

(a) *Part A.* Part A includes the information required in a Registrant's prospectus under section 10(a) of the Securities Act. The purpose of the prospectus is to provide essential information about the Registrant and the Variable Life Insurance Contracts in a way that will help investors to make informed decisions about whether to purchase the securities described in the prospectus. In responding to the Items in Part A, avoid cross-references to the SAI. Cross-references within the prospectus are most useful when their use assists investors in understanding the information presented and does not add complexity to the prospectus.

(b) *Part B.* Part B includes the information required in a Registrant's SAI. The purpose of the SAI is to provide additional information about the Registrant and the Variable Life Insurance Contracts that the Commission has concluded is not necessary or appropriate in the public interest or for the protection of investors to be in the prospectus, but that some investors may find useful. Part B affords the Registrant an opportunity to expand discussions of the matters described in the prospectus by including additional information that the Registrant believes may be of interest to some investors. The Registrant should not duplicate in the SAI information that is provided in the prospectus, unless necessary to make the SAI comprehensible as a document independent of the prospectus.

(c) *Part C.* Part C includes other information required in a Registrant's registration statement.

3. Additional Matters

(a) *Organization of Information.* Organize the information in the prospectus and SAI to make it easy for investors to understand. Notwithstanding rule 421(a) under the

Securities Act [17 CFR 230.421(a)] regarding the order of information required in a prospectus, disclose the information required by Item 2 (Overview of the Contract) and Item 3 (Key Information), and Item 4 (Fee Table) in numerical order at the front of the prospectus. Do not precede Items 2, 3, and 4 with any other Item except the Cover Page (Item 1), a glossary, if any (General Instruction C.3.(d)), or a table of contents meeting the requirements of rule 481(c) under the Securities Act [17 CFR 230.481(c)]. If the discussion of the information required by Items 2 or 3 also responds to disclosure requirements in other items of the prospectus, a Registrant need not include additional disclosure in the prospectus that repeats the information disclosed in response to those items.

(b) *Other Information.* A Registrant may include, except in response to Items 2 and 3, information in the prospectus or the SAI that is not otherwise required so long as the information is not incomplete, inaccurate, or misleading and does not, because of its nature, quantity, or manner of presentation, obscure or impede understanding of the information that is required to be included. For example, Registrants are free to include in the prospectus financial statements required to be in the SAI, and may include in the SAI financial statements that may be placed in Part C.

(c) *Presentation of Information.* To aid investor comprehension, Registrants are encouraged to use, as appropriate, question-and-answer formats, tables, side-by-side comparisons, captions, bullet points, numeric examples, illustrations or similar presentation methods. For example, such presentation methods would be appropriate when presenting disclosure for similar Contract features, prospectuses describing multiple Variable Life Insurance Contracts, or the operation of optional benefits.

(d) *Definitions.* Define the special terms used in the prospectus (*e.g.,* accumulation unit, contractowner, participant, sub-account, etc.) in any presentation that clearly conveys meaning to investors. If the Registrant elects to include a glossary or list of definitions, only special terms used throughout the prospectus must be defined or listed. If a special term is used in only one section of the prospectus, it may be defined there (and need not be included in any glossary or list of definitions that the Registrant includes).

(e) *Use of Form N–6 to Register Multiple Contracts.*

(i) A single prospectus may describe multiple Contracts that are essentially identical. Whether the prospectus describes Contracts that are ''essentially identical'' will depend on the facts and circumstances. For example, a Contract that does not offer optional benefits would not be essentially identical to one that does. Similarly, group and individual Contracts would not be essentially identical. However, Contracts that vary only due to state regulatory requirements would be essentially identical.

(ii) Similarly, multiple prospectuses may be combined in a single registration statement on Form N–6 when the prospectuses describe Contracts that are essentially identical. For example, a Registrant could determine it is appropriate to include multiple prospectuses in a registration statement in the following situations: (i) The prospectuses describe the same Contract that is sold through different distribution channels; (ii) the prospectuses describe Contracts that differ only with respect to underlying funds offered; or (iii) the prospectuses describe both the original and an ''enhanced'' version of the same Contract (where the ''enhanced'' version modifies the features or options that the Registrant offers under that Contract).

(iii) Paragraph (a) of General Instruction C.3 requires Registrants to disclose the information required by Items 2, 3, and 4 in numerical order at the front of the prospectus and generally not to precede the Items with other information. As a general matter, Registrants providing disclosure in a single prospectus for more than one Variable Life Contract, or for Contracts sold in both the group and individual markets, may depart from the requirement of paragraph (a) as necessary to present the required information clearly and effectively (although the order of information required by each Item must remain the same). For example, the prospectus may present all of the Item 2 information for several Variable Life Contracts, followed by all of the Item 3 information for the Contracts, and followed by all of the Item 4 information for the Contracts. Alternatively, the prospectus may present Items 2, 3, and 4 for each of several Contracts sequentially. Other presentations also would be acceptable if they are consistent with the Form's intent to disclose the information required by Items 2, 3, and 4 in a standard order at the beginning of the prospectus.

(f) *Dates.* Rule 423 under the Securities Act [17 CFR 230.423] applies to the dates of the prospectus and the SAI. The SAI should be made available at the same time that the prospectus becomes available for purposes of rules 430 and 460 under the Securities Act [17 CFR 230.430 and 230.460].

(g) *Sales Literature.* A Registrant may include sales literature in the prospectus so long as the amount of this information does not add substantial length to the prospectus and its placement does not obscure essential disclosure.

(h) *Interactive Data File*

(i) An Interactive Data File (§ 232.11 of this chapter) is required to be submitted to the Commission in the manner provided by Rule 405 of Regulation S–T (§ 232.405 of this chapter) for any registration statement or post-effective amendment thereto on Form N–6 that includes or amends information provided in response to Items 3, 4, 5, 11, or 18.

(A) Except as required by paragraph (h)(i)(B), the Interactive Data File must be submitted as an amendment to the registration statement to which the Interactive Data File relates. The amendment must be submitted on or before the date the registration statement or post-effective amendment that contains the related information becomes effective.

(B) In the case of a post-effective amendment to a registration statement filed pursuant to paragraphs (b)(1)(i), (ii), (v), (vi), or (vii) of rule 485 under the Securities Act [17 CFR 230.485(b)], the Interactive Data File must be submitted either with the filing, or as an amendment to the registration statement to which the Interactive Data Filing relates that is submitted on or before the date the post-effective amendment that contains the related information becomes effective.

(ii) An Interactive Data File is required to be submitted to the Commission in the manner provided by rule 405 of Regulation S–T for any form of prospectus filed pursuant to paragraphs (c) or (e) of rule 497 under the Securities Act [17 CFR 230.497(c) or (e)] that includes information provided in response to Items 3, 4, 5, 11, or 18 that varies from the registration statement. The Interactive Data File must be submitted with the filing made pursuant to rule 497.

(iii) The Interactive Data File must be submitted in accordance with the specifications in the EDGAR Filer Manual, and in such a manner that will permit the information for each Contract, and, for any information that does not relate to all of the Classes in a filing, each Class of the Contract to be separately identified.

(i) *Website Addresses and Cross-References.* Any website address or cross-reference that is included in an electronic version of the Statutory Prospectus must be an active hyperlink. This requirement does not apply to Statutory Prospectuses that are filed on the EDGAR system. Rule 105 of Regulation S–T [17 CFR 232.405] prohibits hyperlinking to websites, locations, or other documents that are outside of the EDGAR system.

D. Incorporation by Reference

1. Specific Rules for Incorporation by Reference in Form N–6

(a) A Registrant may not incorporate by reference into a prospectus information that Part A of this Form requires to be included in a prospectus, except as specifically permitted by Part A of the Form.

(b) A Registrant may incorporate by reference any or all of the SAI into the prospectus (but not to provide any information required by Part A to be included in the prospectus) without delivering the SAI with the prospectus.

(c) A Registrant may incorporate by reference into the SAI or its response to Part C information that Parts B and C require to be included in the Registrant's registration statement.

2. General Requirements

All incorporation by reference must comply with the requirements of this Form and the following rules on incorporation by reference: Rule 10(d) of Regulation S–K under the Securities Act [17 CFR 229.10(d)] (general rules on incorporation by reference, which, among other things, prohibit, unless specifically required by this Form, incorporating by reference a document that includes incorporation by reference to another document, and limits incorporation to documents filed within the last 5 years, with certain exceptions); rule 411 under the Securities Act [17 CFR 230.411] (general rules on incorporation by reference in a prospectus); rule 303 of Regulation S–T [17 CFR 232.303] (specific requirements for electronically filed documents); and rules 0–4, 8b–23, and 8b–32 [17 CFR 270.0–4, 270.8b–23, and 270.8b–32] (additional rules on incorporation by reference for investment companies).

Part A—Information Required in a Prospectus

Item 1. Front and Back Cover Pages

(a) *Front Cover Page.* Include the following information on the outside front cover page of the prospectus:

(1) The Registrant's name.

(2) The Depositor's name.

(3) The types of Variable Life Insurance Contracts offered by the prospectus (*e.g.,* group, individual, scheduled premium, flexible premium).

(4) The name of the Contract and the Class or Classes, if any, to which the Contract relates.

(5) The date of the prospectus.

(6) The statement required by rule 481(b)(1) under the Securities Act.

(7) The statement that additional information about certain investment products, including variable life insurance, has been prepared by the Securities and Exchange Commission's staff and is available at *Investor.gov*.

(8) The legend: ''If you are a new investor in the [Contract], you may cancel your [Contract] within 10 days of receiving it without paying fees or penalties. In some states, this cancellation period may be longer. Upon cancellation, you will receive either a full refund of the amount you paid with your application or your total contract value. You should review this prospectus, or consult with your investment professional, for additional information about the specific cancellation terms that apply.''

Instruction. A Registrant may include on the front cover page any additional information, subject to the requirements of General Instruction C.3.(b) and (c).

(b) *Back Cover Page.* Include the following information on the outside back cover page of the prospectus:

(1) A statement that the SAI includes additional information about the Registrant. Explain that the SAI is available, without charge, upon request, and explain how contractowners may make inquiries about their Contracts. Provide a toll-free (or collect) telephone number for investors to call: To request the SAI; to request other information about the Contracts; and to make contractowner inquiries.

Instructions.

1. A Registrant may indicate, if applicable, that the SAI and other information are available on its internet site and/or by email request.

2. A Registrant may indicate, if applicable, that the SAI and other information are available from an insurance agent or financial intermediary (such as a broker-dealer or bank) through which the Contracts may be purchased or sold.

3. When a Registrant (or an insurance agent or financial intermediary through which Contracts may be purchased or sold) receives a request for the SAI, the Registrant (or insurance agent or financial intermediary) must send the SAI within 3 business days of receipt of the request, by first-class mail or other means designed to ensure equally prompt delivery.

(2) A statement whether and from where information is incorporated by reference into the prospectus as permitted by General Instruction D. Unless the information is delivered with the prospectus, explain that the Registrant will provide the information without charge, upon request (referring to the telephone number provided in response to paragraph (b)(i)).

Instruction. The Registrant may combine the information about incorporation by reference with the statements required under paragraph (b)(i).

(3) A statement that reports and other information about the Registrant are available on the Commission's internet site at *http://www.sec.gov,* and that copies of this information may be obtained, upon payment of a duplicating fee, by electronic request at the following email address: *publicinfo@sec.gov.*

(4) The EDGAR contract identifier for the Contract on the bottom of the back cover page in type size smaller than that generally used in the prospectus (*e.g.,* 8-point modern type).

Item 2. Overview of the Contract

Provide a concise description of the Contract, including the following information:

(a) *Purpose.* Briefly describe the purpose(s) of the Contract (*e.g.,* to help the contractowner accumulate assets through an investment portfolio, to provide or supplement the contractowner's retirement income, to provide death and/or other benefits). State for whom the Contract may be appropriate (*e.g.,* by discussing a representative investor's time horizon, liquidity needs, and financial goals).

(b) *Premiums.* Briefly describe the payment of premiums under the Contract.

(1) State whether premiums may vary in timing and amount (*e.g.,* flexible premiums).

(2) State whether restrictions may be imposed on premium payments (*e.g.,* by age of insured, or by amount).

(3) Describe how premiums may be allocated. This discussion should include a brief overview of the investment options available under the Contract, as well as any general (fixed) account options.

Instructions.

1. Prominently disclose that additional information about each Portfolio Company is provided in an appendix to the prospectus, and provide a cross-reference to the relevant appendix.

2. A detailed explanation of the separate account, sub-accounts, and Portfolio Companies is not necessary and should be avoided.

(4) State that payment of insufficient premiums may result in a lapse of the Contract.

(c) *Contract Features.* Summarize the Contract's primary features, including death benefits, withdrawal options, loan provisions, and any available optional benefits. If applicable, state that the contractowner will incur an additional fee for selecting a particular benefit.

Item 3. Key Information

Include the following information:

Important Information You Should Consider About the Contract

An investment in the Contract is subject to fees, risks, and other important considerations, some of which are briefly summarized in the following table. You should review the prospectus for additional information about these topics.

Fees and Expenses	
Surrender Charge (charges for early withdrawal).	
Transaction Charges (charges for certain transactions).	
Ongoing Fees and Expenses (annual charges).	
Risks	
Risk of Loss	
Not a Short-Term Investment.	
Risks Associated with Investment Options.	
Insurance Company Risks.	
Contract Lapse	
Restrictions	
Investment Options	
Optional Benefits	
Taxes	
Tax Implications.	
Conflicts of Interest	
Investment Professional Compensation.	
Exchanges	

Instructions.

1. *General.*

(a) A Registrant should disclose the required information in the tabular presentation(s) reflected herein, in the order specified. A Registrant may exclude any disclosures that are not applicable, or modify any of the statements required to be included, so long as the modified statement contains comparable information.

(b) A Registrant should provide cross-references to the location in the Statutory Prospectus where the subject matter is described in greater detail. Cross-references in electronic versions of the Summary Prospectus and/or Statutory Prospectus should link directly to the location in the Statutory Prospectus where the subject matter is discussed in greater detail. The cross-reference should be adjacent to the relevant disclosure, either within the table row, or presented in an additional table column.

(c) All disclosures provided in response to this Item 3 should be short and succinct, consistent with the limitations of a tabular presentation.

2. *Fees and Expenses.*

(a) *Surrender Charges (charges for early withdrawal).* Include a statement that if the contractowner withdraws money from the Contract within [x] years following his or her last premium payment, he or she will be assessed a surrender charge. Include in this statement the maximum surrender charge (as a percentage of [contribution/premium or amount surrendered]), and the maximum number of years that a surrender charge may be assessed since the last premium payment under the contract. Provide an example of the maximum surrender charge a contractowner could pay (in dollars) under the Contract assuming a $100,000 investment (*e.g.,* ''[i]f you make an early withdrawal, you could pay a surrender charge of up to $9,000 on a $100,000 investment.'').

(b) *Transaction Charges (charges for certain transactions).* State that in addition to surrender charges (if applicable) the contractowner may also be charged for other transactions, and provide a brief narrative description of the types of such charges (*e.g.,* front-end loads, charges for transferring cash value between investment options, charges for wire transfers, etc.).

(c) *Ongoing Fees and Expenses (annual charges).*

(i) Briefly state that in addition to surrender charges and transaction charges, an investment in the Contract is subject to certain ongoing fees and expenses, including fees and expenses covering the cost of insurance under the Contract and the cost of optional benefits available under the Contract, and that such fees and expenses are set based on characteristics of the insured (*e.g.,* age, sex, and rating classification). State that contractowners should view the policy specifications page of their Contract for rates applicable to their Contract.

(ii) Briefly state that contractowners will also bear expenses associated with the Portfolio Companies under the Contract, as shown in the following table:

Annual fee	Minimum	Maximum
Investment options (Portfolio Company fees and expenses)	[ ]%	[ ]%

(A) Explain, in a parenthetical or footnote to the table or the caption, the basis for the percentage (*e.g.,* % of net asset value).

(B) If a Registrant offers multiple Portfolio Companies, it should disclose the minimum and maximum ''Total Annual [Portfolio Company] Operating Expenses'' calculated in accordance with Item 3 of Form N–1A (before expense reimbursements or fee waiver arrangements).

(C) The Minimum Annual Fee means the lowest available current fee for each annual fee category (*i.e.,* the lowest Total Annual Portfolio Company Operating Expense). The Maximum Annual Fee means the highest available current fee for each annual fee category (*i.e.,* the highest Portfolio Company Total Operating Expense).

3. *Risks.*

(a) *Risk of Loss.* State that a contractowner can lose money by investing in the Contract.

(b) *Not a Short-Term Investment.* State that a Contract is not a short-term investment vehicle and is not appropriate for an investor who needs ready access to cash, accompanied by a brief explanation.

(c) *Risks Associated with Investment Options.* State that an investment in the Contract is subject to the risk of poor investment performance and can vary depending on the performance of the investment options available under the Contract (*e.g.,* Portfolio Companies, as well as any fixed account investment option), that each investment option will have its own unique risks, and that the contractowner should review a Portfolio Company's prospectus before making an investment decision.

(d) *Insurance Company Risks.* State that an investment in the Contract is

subject to the risks related to the Depositor, including that any obligations, guarantees, or benefits are subject to the claims-paying ability of the Depositor. If applicable, further state that more information about the Depositor, including its financial strength ratings, is available upon request from the Registrant.

Instruction. A Registrant may include the Depositor's financial strength rating(s) and omit the disclosures contemplated by the last sentence of Instruction 3.(d).

(e) *Contract Lapse.* Briefly state (1) the circumstances under which the Contract may lapse (*e.g.,* insufficient premium payments, poor investment performance, withdrawals, unpaid loans or loan interest), (2) whether there is a cost associated with reinstating a lapsed Contract, and (3) that death benefits will not be paid if the Contract has lapsed.

4. *Restrictions.*

(a) *Investment Options.* State whether there are any restrictions that may limit the investment options that a contractowner may choose, as well as any limitations on the transfer of contract value among Portfolio Companies. If applicable, state that the insurer reserves the right to remove or substitute Portfolio Companies as investment options.

(b) *Optional Benefits.* State whether there are any restrictions or limitations relating to optional benefits, and/or whether an optional benefit may be modified or terminated by the Registrant. If applicable, state that withdrawals may affect the availability of optional benefits by reducing the benefit by an amount greater than the value withdrawn, and/or could terminate a benefit.

5. *Taxes—Tax Implications.* State that a contractowner should consult with a tax professional to determine the tax implications of an investment in and payments received under the Contract, and that there is no additional tax benefit to the contractowner if the Contract is purchased through a tax-qualified plan or individual retirement account (IRA). Explain that withdrawals will be subject to ordinary income tax, and may be subject to tax penalties.

6. *Conflicts of Interest.*

(a) *Investment Professional Compensation.* State that some investment professionals receive compensation for selling the Contract to investors, and briefly describe the basis upon which such compensation is typically paid (*e.g.,* commissions, revenue sharing, compensation from affiliates and third parties). State that these investment professionals may have a financial incentive to offer or recommend the Contract over another investment for which the investment professional is not compensated (or compensated less).

(b) *Exchanges.* State that some investment professionals may have a financial incentive to offer a contractowner a new contract in place of the one he or she already owns, and that a contractowner should only exchange his or her contract if he or she determines, after comparing the features, fees, and risks of both contracts, that it is preferable for him or her to purchase the new contract rather than continue to own the existing contract.

Instruction. A Registrant may omit these line-items if neither the Registrant nor any of its related companies pay financial intermediaries for the sale of the Contract or related services.

Item 4. Fee Table

Include the following information:

The following tables describe the fees and expenses that you will pay when buying, owning, and surrendering the Contract. Please refer to your contract specifications page for information about the specific fees you will pay each year based on the options you have elected.

The first table describes the fees and expenses that you will pay at the time that you buy the Contract, surrender the Contract, or transfer cash value between investment options.

TRANSACTION FEES

Charge	When charge is deducted	Amount deducted
Maximum Sales Charge Imposed on Premiums (Load). Premium Taxes. Maximum Deferred Sales Charge (Load). Other Surrender Fees. Transfer Fees.		

The next table describes the fees and expenses that you will pay periodically during the time that you own the Policy, not including [Portfolio Company] fees and expenses.

PERIODIC CHARGES OTHER THAN [PORTFOLIO COMPANY] OPERATING EXPENSES

Charge	When charge is deducted	Amount deducted
Base Contract Charge: Cost of Insurance: *. *Minimum and Maximum Charge.* *Charge for a [Representative Contractowner].* Annual Maintenance Fee. Mortality and Expense Risk Fees. Administrative Fees. Optional Benefit Charges:		

* [Footnote: Include disclosure required by Instruction 3(b).]

The next item shows the minimum and maximum total operating expenses charged by the [Portfolio Companies] that you may pay periodically during the time that you own the contract. A complete list of [Portfolio Companies] available under the Contract, including their annual expenses, may be found at the back of this document.

	Minimum	Maximum
Total Annual [Portfolio Company] Operating Expenses (expenses that are deducted from [Portfolio Company] assets, including management fees, distribution [and/or (12b–1) fees, and other expenses)	____%	____%

Instructions.

1. *General.*

(a) Round all percentages to the nearest hundredth of one percent.

(b) Include the narrative explanations in the order indicated. A Registrant may modify a narrative explanation if the explanation contains comparable information to that shown.

(c) A Registrant may omit captions if the Registrant does not charge the fees or expenses covered by the captions. A Registrant may modify or add captions if the captions shown do not provide an accurate description of the Registrant's fees and expenses.

(d) If a Registrant uses one prospectus to offer a Contract in both the group and individual variable life markets, the Registrant may include narrative disclosure in a footnote or following the tables identifying markets where certain fees are either inapplicable or waived or lower fees are charged. In the alternative, a Registrant may present the information for group and individual contracts in another format consistent with General Instruction C.3.(c).

(e) The ''When Charge is Deducted'' column must be used to show when a charge is deducted, *e.g.,* upon purchase, surrender or partial surrender, policy anniversary, monthly, or daily.

(f) Under the ''Amount Deducted'' column, the Registrant must disclose the maximum guaranteed charge unless a specific instruction directs otherwise. The Registrant should include the basis on which the charge is imposed (*e.g.,* 0.95% of average daily net assets, $5 per exchange, $5 per thousand dollars of face amount). The Registrant may disclose the current charge, in addition to the maximum charge, if the disclosure of the current charge is no more prominent than, and does not obscure or impede understanding of, the disclosure of the maximum charge. In addition, the Registrant may include in a footnote to the table a tabular, narrative, or other presentation providing further detail regarding variations in the charge. For example, if deferred sales charges decline over time, the Registrant may include in a footnote a presentation regarding the scheduled reductions in the deferred sales charges. Charges assessed on the basis of the face amount should be disclosed as the charge per $1000 of face amount.

(g) Provide a separate fee table (or separate column within the table) for each Contract form offered by the prospectus that has different fees.

(h) In a Contract with more than one class, provide a separate response for each class.

2. *Transaction Fees.*

(a) ''Other Surrender Fees'' include any fees charged for surrender or partial surrender, other than sales charges imposed upon surrender or partial surrender.

(b) ''Transfer Fees'' include any fees charged for any transfer or exchange of cash value from the Registrant to another investment company, from one sub-account of the Registrant to another sub-account or the Depositor's general account, or from the Depositor's general account to the Registrant.

(c) If the Registrant (or any other party pursuant to an agreement with the Registrant) charges any other transaction fee, add another caption describing it and complete the other columns of the table for that fee.

3. *Periodic Charges Other Than [Portfolio Company] Operating Expenses.*

(a) The Registrant may substitute the term used in the prospectus to refer to the Portfolio Companies for the bracketed portion of the caption provided.

(b) For ''Cost of Insurance'' and any other charges that depend on contractowner characteristics, such as age or rating classification, the Registrant should disclose the minimum and maximum charges that may be imposed for a Contract, and the charges that may be paid by a representative contractowner, using appropriate sub-captions. In a footnote to the table, disclose (i) that the cost of insurance or other charge varies based on individual characteristics; (ii) that the cost of insurance charge or other charge shown in the table may not be representative of the charge that a particular contractowner will pay; and (iii) how the contractowner may obtain more information about the particular cost of insurance or other charges that would apply to him or her.

(i) In disclosing cost of insurance or other charges that depend on contractowner characteristics for a representative contractowner, the Registrant should assume characteristics (*e.g.,* sex, age, and rating classification) that are fairly representative of actual or expected Contract sales, and describe these characteristics in the sub-caption for the charge (*e.g.,* ''charge for a 40-year-old non-smoking female''). The rating classification used for the representative contractowner should be the classification with the greatest number of outstanding Contracts (or expected Contracts in the case of a new Contract), unless this rating classification is not fairly representative of actual or expected Contract sales. In this case, the Registrant should use a commonly used rating classification that is fairly representative of actual or expected Contract sales.

(ii) The Registrant may supplement this disclosure of the minimum charges, maximum charges, and charges for a representative contractowner with additional disclosure immediately following the fee table. For example, the additional disclosure may include an explanation of the factors that affect the cost of insurance or other charge or tables showing the cost of insurance or other charge for a spectrum of representative contractowners.

(c) ''[Annual] Maintenance Fee'' includes any Contract, account, or similar fee imposed on any recurring basis. Any non-recurring Contract, account, or similar fee should be included in the ''Transaction Fees'' table.

(d) ''Mortality and Expense Risk Fees'' may be listed separately on two lines in the table.

(e) A Registrant may consolidate any charges that are assessed on a similar basis (*e.g.,* Administrative charges and Mortality and Expense Risk Fees).

(f) Optional Benefits expenses include any optional features (*e.g.,* terminal illness or term insurance riders) offered under the Contract for an additional charge.

(g) If the Registrant (or any other party pursuant to an agreement with the Registrant) imposes any other recurring charge other than annual Portfolio Company Operating Expenses, add

another caption describing it and complete the other columns of the table for that charge.

4. *Total Annual [Portfolio Company] Operating Expenses.*

(a) If a Registrant offers multiple Portfolio Companies, it should disclose the minimum and maximum ''Total Annual [Portfolio Company] Operating Expenses'' for any Portfolio Company calculated in accordance with Item 3 of Form N–1A (before expense reimbursements or fee waiver arrangements).

(b) A Registrant may also reflect minimum and maximum Total [Portfolio Company] Operating Expenses that include expense reimbursement or fee waiver arrangements in an additional line-item to the range of portfolio company operating expenses. If the Registrant provides this disclosure, also disclose the period for which the expense reimbursement or fee waiver arrangement is expected to continue, and, if applicable, that it can be terminated at any time at the option of a portfolio company.

Item 5. Principal Risks of Investing in the Contract

Summarize the principal risks of purchasing a Contract, including the risks of poor investment performance, that Contracts are unsuitable as short-term savings vehicles, the risks of Contract lapse, limitations on access to cash value through withdrawals, and the possibility of adverse tax consequences.

Item 6. General Description of Registrant, Depositor, and Portfolio Companies

Concisely discuss the organization and operation or proposed operation of the Registrant. Include the information specified below.

(a) *Depositor.* Provide the name and address of the Depositor.

(b) *Registrant.* Briefly describe the Registrant. Include a statement indicating that:

(1) Income, gains, and losses credited to, or charged against, the Registrant reflect the Registrant's own investment experience and not the investment experience of the Depositor's other assets;

(2) the assets of the Registrant may not be used to pay any liabilities of the Depositor other than those arising from the Contracts; and

(3) the Depositor is obligated to pay all amounts promised to contractowners under the Contracts.

(c) *Portfolio Companies.* State that information regarding each Portfolio Company, including (i) its name; (ii) its type (*e.g.,* money market fund, bond fund, balanced fund, etc.) or a brief statement concerning its investment objectives; (iii) its investment adviser and any sub-investment adviser; (iv) expense ratio; and (v) performance is available in an appendix to the prospectus (*see* Item 18), and provide cross-references. State conspicuously that each Portfolio Company has issued a prospectus that contains more detailed information about the Portfolio Company, and provide instructions regarding how investors may obtain paper or electronic copies.

(d) *Voting.* Concisely discuss the rights of contractowners to instruct the Depositor on the voting of shares of the Portfolio Companies, including the manner in which votes will be allocated.

Item 7. Charges

(a) *Description.* Briefly describe all charges deducted from premiums, cash value, assets of the Registrant, or any other source (*e.g.,* sales loads, premium taxes and other taxes, administrative and transaction charges, risk charges, contract loan charges, cost of insurance, and rider charges). Indicate whether each charge will be deducted from premium payments, cash value, the Registrant's assets, the proceeds of withdrawals or surrenders, or some other source. When possible, specify the amount of any current charge as a percentage or dollar figure (*e.g.,* 0.95% of average daily net assets, $5 per exchange, $5 per thousand dollars of face amount). For recurring charges, specify the frequency of the deduction (*e.g.,* daily, monthly, annually). Identify the person who receives the amount deducted, briefly explain what is provided in consideration for the charges, and explain the extent to which any charge can be modified. Where it is possible to identify what is provided in consideration for a particular charge (*e.g.,* use of sales load to pay distribution costs, use of cost of insurance charge to pay for insurance coverage), please explain what is provided in consideration for that charge separately.

Instructions.

1. Describe the sales loads applicable to the Contract and how sales loads are charged and calculated, including the factors affecting the computation of the amount of the sales load. If the Contract has a front-end sales load, describe the sales load as a percentage of the applicable measure of premium payments (*e.g.,* actual premiums paid, target or guideline premiums). For Contracts with a deferred sales load, describe the sales load as a percentage of the applicable measure of premium payments (or other basis) that the deferred sales load may represent. Percentages should be shown in a table. Identify any events on which a deferred sales load is deducted (*e.g.,* surrender, partial surrender, increase or decrease in face amount). The description of any deferred sales load should include how the deduction will be allocated among sub-accounts of the Registrant and when, if ever, the sales load will be waived (*e.g.,* if the Contract provides a free withdrawal amount).

2. Identify the factors that determine the applicable cost of insurance rate. Specify whether the mortality charges guaranteed in the contracts differ from the current charges. Identify the factors that affect the amount at risk, including investment performance, payment of premiums, and charges. Disclose how the cost of insurance charge is calculated based on the cost of insurance rate, amount at risk, and any other applicable factors. If the Depositor intends to use simplified underwriting or other underwriting methods that would cause healthy individuals to pay higher cost of insurance rates than they would pay under a substantially similar policy that is offered by the Depositor using different underwriting methods, state that the cost of insurance rates are higher for healthy individuals when this method of underwriting is used than under the substantially similar policy.

3. If the Contract's charge for premium or other taxes varies according to jurisdiction, identification of the range of current premium or other taxes is sufficient.

4. Identify charges that may be different in amount or method of computation when imposed in connection with, or subsequent to, increases in face amount of a Contract and briefly describe the differences.

(b) *Commissions Paid to Dealers.* State the commissions paid to dealers as a percentage of premiums.

(c) *Portfolio Company Charges.* State that charges are deducted from and expenses paid out of the assets of the Portfolio Companies that are described in the prospectuses for those companies.

(d) *Incidental Insurance Charges.* If incidental insurance benefits (as defined in Rules 6e–2 and 6e–3(T) [17 CFR 270.6e–2, 17 CFR 270.6e–3(T)]) are offered along with the Contract, state that charges also will be made for those benefits.

(e) *Operating Expenses.* Describe the type of operating expenses for which the Registrant is responsible. If organizational expenses of the Registrant are to be paid out of its assets,

explain how the expenses will be amortized and the period over which the amortization will occur.

Item 8. General Description of Contracts

(a) *Contract Rights.* Identify the person or persons (*e.g.,* the contractowner, insured, or beneficiary) who have material rights under the Contracts, and the nature of those rights.

Instruction. Disclose all material state variations and intermediary specific variations (*e.g.,* variations resulting from different brokerage channels) to the offering.

(b) *Contract Limitations.* Briefly describe any provisions for and limitations on:

(1) Allocation of premiums among sub-accounts of the Registrant;

(2) transfer of contract value between sub-accounts of the Registrant, including transfer programs (*e.g.,* dollar cost averaging, portfolio rebalancing, asset allocation programs, and automatic transfer programs); and

(3) conversion or exchange of Contracts for another contract, including a fixed or variable annuity or life insurance contract.

Instruction. In discussing conversion or exchange of Contracts, the Registrant should include any time limits on conversion or exchange, the name of the company issuing the other contract and whether that company is affiliated with the issuer of the Contract, and how the cash value of the Contract will be affected by the conversion or exchange.

(c) *General Account.* Describe the obligations under the contract that are funded by the insurer's general account (*e.g.,* death benefits, living benefits, or other benefits available under the contract), and state that these amounts are subject to the insurer's claims-paying ability and financial strength.

(d) *Contract or Registrant Changes.* Briefly describe the changes that can be made in the Contracts or the operations of the Registrant by the Registrant or the Depositor, including:

(1) Why a change may be made (*e.g.,* changes in applicable law or interpretations of law);

(2) who, if anyone, must approve any change (*e.g.,* the contractowner or the Commission); and

(3) who, if anyone, must be notified of any change.

Instruction. Describe only those changes that would be material to a purchaser of the Contracts, such as a reservation of the right to deregister the Registrant under the Investment Company Act or to substitute one Portfolio Company for another pursuant to section 26(c) of the Investment Company Act. Do not describe possible non-material changes, such as changing the time of day at which contract values are determined.

(e) *Class of Purchasers.* Disclose any limitations on the class or classes of purchasers to whom the Contracts are being offered.

(f) *Frequent Transfers among Sub-accounts of the Registrant.*

(1) Describe the risks, if any, that frequent transfers of contract value among sub-accounts of the Registrant may present for other contractowners and other persons (*e.g.,* the insured or beneficiaries) who have material rights under the Contract.

(2) State whether or not the Registrant or Depositor has adopted policies and procedures with respect to frequent transfers of contract value among sub-accounts of the Registrant.

(3) If neither the Registrant nor the Depositor has adopted any such policies and procedures, provide a statement of the specific basis for the view of the Depositor that it is appropriate for the Registrant and Depositor not to have such policies and procedures.

(4) If the Registrant or Depositor has any such policies and procedures, describe those policies and procedures, including:

(i) Whether or not the Registrant or Depositor discourages frequent transfers of contract value among sub-accounts of the Registrant;

(ii) whether or not the Registrant or Depositor accommodates frequent transfers of contract value among sub-accounts of the Registrant; and

(iii) any policies and procedures of the Registrant or Depositor for deterring frequent transfers of contract value among sub-accounts of the Registrant, including any restrictions imposed by the Registrant or Depositor to prevent or minimize frequent transfers. Describe each of these policies, procedures, and restrictions with specificity. Indicate whether each of these restrictions applies uniformly in all cases or whether the restriction will not be imposed under certain circumstances, including whether each of these restrictions applies to trades that occur through omnibus accounts at intermediaries, such as investment advisers, broker-dealers, transfer agents, and third party administrators. Describe with specificity the circumstances under which any restriction will not be imposed. Include a description of the following restrictions, if applicable:

(A) any restrictions on the volume or number of transfers that may be made within a given time period;

(B) any transfer fee;

(C) any costs or administrative or other fees or charges that are imposed on persons deemed to be engaged in frequent transfers of contract value among sub-accounts of the Registrant, together with a description of the circumstances under which such costs, fees, or charges will be imposed;

(D) any minimum holding period that is imposed before a transfer may be made from a sub-account into another sub-account of the Registrant;

(E) any restrictions imposed on transfer requests submitted by overnight delivery, electronically, or via facsimile or telephone; and

(F) any right of the Registrant or Depositor to reject, limit, delay, or impose other conditions on transfers or to terminate or otherwise limit Contracts based on a history of frequent transfers among sub-accounts, including the circumstances under which such right will be exercised.

(5) If applicable, include a statement, adjacent to the disclosure required by paragraphs (f)(1) through (f)(4) of this Item, that the Statement of Additional Information includes a description of all arrangements with any person to permit frequent transfers of contract value among sub-accounts of the Registrant.

Item 9. Premiums

(a) *Purchase Procedures.* Describe the provisions of the Contract that relate to premiums and the procedures for purchasing a Contract, including:

(1) The minimum initial and subsequent premiums required and any limitations on the amount and the frequency of premiums that will be accepted. If there are separate limits for each sub-account, state these limits;

(2) whether required premiums, if any, are payable for the life of the Contract or some other term;

(3) whether payment of certain levels of premiums will guarantee that the Contract will not lapse regardless of the Contract's cash value;

(4) if applicable, under what circumstances premiums may be required in order to avoid lapse and how the amount of the additional premiums will be determined;

(5) if applicable, under what circumstances nonpayment of a required premium will not cause the Contract to lapse;

(6) if applicable, under what circumstances premiums in addition to the required premiums will be permitted; and

(7) if applicable, whether the level of the Contract's required premiums may change and, if so, how the amount of the change will be determined.

(b) *Premium Amount.* Briefly describe the factors that determine the amount of any required premiums (*e.g.,* face

amount, death benefit option, and charges and expenses).

(c) *Premium Payment Plans.* Identify the premium payment plans available. Include the available payment frequencies, payment facilities such as employee payroll deduction plans and preauthorized checking arrangements, and any special billing arrangements. Indicate whether the premium payment plan or schedule may be changed.

(d) *Premium Due Dates.* Briefly explain the provisions of the Contract that relate to premium due dates and the operation of any grace period, including the effect of the insured's death during the grace period.

(e) *Automatic Premium Loans.* If applicable, briefly describe the circumstances under which required premiums may be paid by means of an automatic premium loan.

(f) *Sub-Account Valuation.* Describe the procedures for valuing sub-account assets, including:

(1) An explanation of when the required premiums and additional premiums are credited to the Contract's cash value in the sub-accounts, and the basis (*e.g.,* accumulation unit value) on which premiums are credited;

(2) an explanation, to the extent applicable, that premiums are credited to the Contract's cash value on the basis of the sub- account valuation next determined after receipt of a premium;

Instruction. If, in any case, a delay occurs between the receipt of premiums and the crediting of premiums to the sub-accounts (*e.g.,* a delay during the ''free-look'' period), describe where the premiums are held in the interim.

(3) an explanation of when valuations of the assets of the sub-accounts are made; and

(4) a statement identifying in a general manner any national holidays when sub-account assets will not be valued and specifying any additional local or regional holidays when sub-account assets will not be valued.

Instruction. In responding to this paragraph, a Registrant may use a list of specific days or any other means that effectively communicates the information (*e.g.,* explaining that sub-account assets will not be valued on the days on which the New York Stock Exchange is closed for trading).

Item 10. Standard Death Benefit

(a) *Standard Death Benefit.* Briefly describe the standard death benefit available under the Contract.

Instruction. Include:

(i) When insurance coverage is effective;

(ii) when the death benefit is calculated and payable;

(iii) how the death benefit is calculated;

(iv) who has the right to choose the form of benefit and the procedure for choosing the form of benefit, including when the choice is made and whether the choice is revocable;

(v) the forms the benefit may take and the form of benefit that will be provided if a particular form has not been elected; and

(vi) whether there is a minimum death benefit guarantee associated with the Contract.

Also describe if and how a contractowner may increase or decrease the face amount, including the minimum and the maximum amounts, any requirement of additional evidence of insurability, and whether charges, including sales load, are affected.

(b) *Charges and Contract Values.* Explain how the investment performance of the Portfolio Companies, expenses, and deduction of charges affect contract values and death benefits.

Item 11. Other Benefits Available Under the Contract

(a) Include the following information:

In addition to the standard death benefit associated with your contract, other [standard and/or optional] benefits may also be available to you. The purposes, fees, and restrictions/limitations of these additional benefits are briefly summarized in the following table[s].

Name of benefit	Purpose	Statement of whether benefit is standard or optional	Fee	Brief description of restrictions/limitations
			[ ]% [ ]%	

Instructions.

1. *General.*

(a) The table required by this Item 11(a) is meant to provide a tabular summary overview of the benefits described in Item 11(b) (*e.g.,* optional death benefits, optional or standard living benefits, etc.).

(b) If the Contract offers multiple benefits of the same type (*e.g.,* death benefit, accumulation benefit, withdrawal benefit, long-term care benefit), the Registrant may include multiple tables in response to this Item 11(a), if doing so might better permit comparisons of different benefits of the same type.

(c) The Registrant should include appropriate titles, headings, or any other information to promote clarity and facilitate understanding of the table(s) presented in response to this Item 11(a). For example, if certain optional benefits are only available to certain contractowners (*e.g.,* contractowners who invested during specific time periods), the table could include footnotes or headings to identify which optional benefits are affected and to whom those optional benefits are available. In addition, if the Registrant includes titles or headings for the table(s) specifying whether the benefit is standard or optional, the Registrant does not need to include the ''Statement of Whether Benefit is Standard or Optional'' column in the table(s).

2. *Name of Benefit.* State the name of each benefit included in the table(s).

3. *Purpose.* Briefly describe the purpose of each benefit included in the table(s).

4. *Statement of Whether Benefit Is Standard or Optional.* State whether the benefit is standard or optional.

5. *Fee.* State the fee associated with each benefit included in the table(s). Include parentheticals providing information about what the stated percentage refers to (*e.g.,* percentage of contract value, percentage of benefit base, etc.).

6. *Brief Description of Restrictions/Limitations.* For each benefit for which the Registrant has stated that there are restrictions or limitations, briefly describe the restriction(s) or limitation(s) associated with each benefit. Registrants are encouraged to use short phrases (*e.g.,* ''benefit limits investment options available,'' ''withdrawals could terminate benefit'') to describe the restriction(s) or limitation(s).

(b) Briefly describe any other benefits (other than standard death benefit, *e.g.,* optional death benefits, optional or standard living benefits, etc.) offered under a Contract, including:

(1) Whether the benefit is standard or elected;

(2) The operation of the benefit, including the amount of the benefit and how the benefit amount may vary, the circumstances under which the value of

the benefit may increase or be reduced (including the impact of withdrawals), and how the benefit may be terminated;

(3) Fees and costs, if any, associated with the benefit; and

(4) How the benefit amount is calculated and payable and the effect of choosing a specific method of payment on calculation of the benefit.

(c) Briefly describe any limitations, restrictions and risks associated with any benefit (other than the standard death benefit) offered under the contract (*e.g.,* restrictions on which Portfolio Companies may be selected; risk of reduction or termination of benefit resulting from excess withdrawals).

Instruction. In responding to paragraphs (b) and (c) of this Item, provide one or more examples illustrating the operation of each benefit in a clear, concise, and understandable manner.

Item 12. Surrenders and Withdrawals

(a) *Surrender.* Briefly describe how a contractowner can surrender (or partially surrender or make withdrawals from) a Contract, including any limits on the ability to surrender, how the proceeds are calculated, and when they are payable.

(b) *Partial Surrender and Withdrawal.* Indicate generally whether and under what circumstances partial surrenders and partial withdrawals are available under a Contract, including the minimum and maximum amounts that may be surrendered or withdrawn, any limits on their availability, how the proceeds are calculated, and when the proceeds are payable.

(c) *Effect of Partial Surrender and Withdrawal.* Indicate generally whether and under what circumstances partial surrenders or partial withdrawals will affect a Contract's cash value or death benefit and whether any charge(s) will apply.

(d) *Sub-Account Allocation.* Describe how partial surrenders and partial withdrawals will be allocated among the sub-accounts.

Instruction. The Registrant should generally describe the terms and conditions that apply to these transactions. Technical information regarding the determination of amounts available to be surrendered or withdrawn should be included in the SAI.

(e) *Revocation Rights.* Briefly describe any revocation rights (*e.g.,* ''free-look'' provisions), including a description of how the amount refunded is determined, the method for crediting earnings to premiums during the free-look period, and whether investment options are limited during the free-look period.

Item 13. Loans

Briefly describe the loan provisions of the Contract, including any of the following that are applicable.

(a) *Availability of Loans.* State that a portion of the Contract's cash surrender value may be borrowed. State how the amount available for a loan is calculated.

(b) *Limitations.* Describe any limits on availability of loans (*e.g.,* a prohibition on loans during the first contract year).

(c) *Interest.* Describe how interest accrues on the loan, when it is payable, and how interest is treated if not paid. Explain how interest earned on the loaned amount is credited to the Contract and allocated among the sub-accounts.

(d) *Effect on Cash Value and Death Benefit.* Describe how loans and loan repayments affect cash value and how they are allocated among the sub-accounts. Include (i) a brief explanation that amounts borrowed under a Contract do not participate in a Registrant's investment experience and that loans, therefore, can affect the Contract's value and death benefit whether or not the loan is repaid, and (ii) a brief explanation that the cash surrender value and the death proceeds payable will be reduced by the amount of any outstanding Contract loan plus accrued interest.

(e) *Other Effects.* Describe any other effect that a loan could have on the Contract (*e.g.,* the effect of a Contract loan in excess of contract value).

(f) *Procedures.* Describe the loan procedures, including how and when amounts borrowed are transferred out of the Registrant and how and when amounts repaid are credited to the Registrant.

Item 14. Lapse and Reinstatement

(a) *Lapse.* State when and under what circumstances a Contract will lapse.

(b) *Lapse Options.* Describe briefly any lapse options available. Indicate those that will not apply unless they are elected and those that will apply in the absence of an election. Indicate whether the availability of any of the lapse options is limited.

(c) *Effect of Lapse.* Describe briefly the factors that will determine the amount of insurance coverage provided under the available lapse options. Describe concisely how the cash value, surrender value, and death benefit will be determined. If these values and benefits will be determined in the same manner as prior to lapse, a statement to that effect is sufficient.

(d) *Reinstatement.* State under what circumstances a Contract may be reinstated. Explain any requirements for reinstatement, including charges to be paid by the contractowner, outstanding loan repayments, and evidence of insurability.

Item 15. Taxes

(a) *Tax Consequences.* Describe the material tax consequences to the contract owner and beneficiary of buying, holding, exchanging, or exercising rights under the Contract.

Instruction. Discuss the taxation of death benefit proceeds, periodic and non-periodic withdrawals, loans, and any other distribution that may be received under the Contract, as well as the tax benefits accorded the Contract and other material tax consequences. Describe, if applicable, whether the tax consequences vary with different uses of the Contract.

(b) *Effect.* Describe the effect, if any, of taxation on the determination of cash values or sub-account values.

Item 16. Legal Proceedings

Describe any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the Registrant, the Registrant's principal underwriter, or the Depositor is a party. Include the name of the court in which the proceedings are pending, the date instituted, the principal parties involved, a description of the factual basis alleged to underlie the proceeding, and the relief sought. Include similar information as to any legal proceedings instituted, or known to be contemplated, by a governmental authority.

Instruction. For purposes of this requirement, legal proceedings are material only to the extent that they are likely to have a material adverse effect on the Registrant, the ability of the principal underwriter to perform its contract with the Registrant, or the ability of the Depositor to meet its obligations under the Contracts.

Item 17. Financial Statements

If all of the required financial statements of the Registrant and the Depositor (*see* Item 27 and General Instruction C.3.(b)) are not in the prospectus, state, under a separate caption, where the financial statements may be found. Briefly explain how investors may obtain any financial statements not in the Statement of Additional Information.

Item 18. Portfolio Companies Available Under the Contract

Include as an Appendix under the heading ''Appendix: [Portfolio Companies] Available Under [the Contract]'' the following information, in the format specified below:

The following is a list of [Portfolio Companies] currently available under [the Contract], which is subject to change as discussed in [the Statutory Prospectus for the Contract]. Before you invest, you should review the prospectuses for the [Portfolio Companies]. These prospectuses contain more information about the [Portfolio Companies] and their risks and may be amended from time to time. You can find the prospectuses and other information about the [Portfolio Companies] online at [____]. You can also request this information at no cost by calling [____] or by sending an email request to [____].

The performance information below reflects fees and expenses of the [Portfolio Companies], but does not reflect the other fees and expenses that your contract may charge. Performance would be lower if these charges were included. Each [Portfolio Company's] past performance is not necessarily an indication of future performance.

[Type/investment objective]	[Portfolio company and *adviser/subadviser*]	Expense ratio (expenses/average assets)	Average annual total returns *(as of 12/31/____)*		
			1 year	5 year	10 year
[Insert]	[Names of Portfolio Company and *adviser/subadviser*]	[____]%	[____]%	[____]%	[____]%

Instructions.

1. *General.*

(a) Only include those Portfolio Companies that are currently offered under the Contract.

(b) The introductory legend to the table must provide a website address, other than the address of the Commission's electronic filing system; toll free telephone number; and email address that investors can use to obtain the prospectuses of the Portfolio Companies and to request other information about the Portfolio Companies. The website address must be specific enough to lead investors directly to the prospectuses of the Portfolio Companies, rather than to the home page or other section of the website on which the materials are posted. The website could be a central site with prominent links to each document. The legend may indicate, if applicable, that the prospectuses and other information are available from a financial intermediary (such as an insurance sales agent or broker-dealer) through which the Contract may be purchased or sold. Registrants not relying upon rule 498A(j) under the Securities Act [17 CFR 230.498A(j)] with respect to the Portfolio Companies that are offered under the Contract may, but are not required to, provide the next-to-last sentence of the first paragraph of the introductory legend to the table regarding online availability of the prospectuses.

(c) If the availability of one or more Portfolio Companies varies by benefit offered under the Contract, include as another Appendix a separate table that indicates which Portfolio Companies are available under each of the benefits offered under the Contract. This Appendix could incorporate a table that is structured pursuant to the following example, or could use any other presentation that might promote clarity and facilitate understanding:

[Portfolio Company]	[Benefit #1]	[Benefit #2]	[Benefit #3]	[Benefit #4]
Portfolio Company A	☑	☑	☑	☑
Portfolio Company B	☑	☑		
Portfolio Company C	☑	☑		
Portfolio Company D	☑			

2. *Type/Investment Objective.* Briefly describe each Portfolio Company's type (*e.g.,* money market fund, bond fund, balanced fund, etc.), or include a brief statement concerning the Portfolio Company's investment objectives.

3. *Portfolio Company and Adviser/Subadviser.* State the name of each Portfolio Company and its adviser/subadviser, as applicable. The adviser's/sub-adviser's name may be omitted if it is incorporated into the name of the Portfolio Company.

4. *Expense ratio.* For purposes of this Item 18, ''expense ratio'' means ''Total Annual Fund Operating Expenses'' as calculated pursuant to Item 3 of Form N–1A for open-end funds, before waivers and reimbursements that reduce the Portfolio Company's rate of return.

5. *Average Annual Total Returns.* For purposes of this Item 18, ''average annual total returns'' means the ''average annual total return'' (before

taxes) as calculated pursuant to Item 4(b)(2)(iii) of Form N–1A for open-end funds.

Part B—Information Required in a Statement of Additional Information

Item 19. Cover Page and Table of Contents

(a) *Front Cover Page.* Include the following information on the outside front cover page of the SAI:

(1) The Registrant's name.

(2) The Depositor's name.

(3) The name of the Contract and the Class or Classes, if any, to which the Contract relates.

(4) A statement or statements:

(i) That the SAI is not a prospectus;

(ii) How the prospectus may be obtained; and

(iii) Whether and from where information is incorporated by reference into the SAI, as permitted by General Instruction D.

Instruction. Any information incorporated by reference into the SAI must be delivered with the SAI.

(5) The date of the SAI and of the prospectus to which the SAI relates.

(b) *Table of Contents.* Include under appropriate captions (and subcaptions) a list of the contents of the SAI and, when useful, provide cross-references to related disclosure in the prospectus.

Item 20. General Information and History

(a) *Depositor.* Provide the date and form of organization of the Depositor, the name of the state or other jurisdiction in which the Depositor is organized, and a description of the general nature of the Depositor's business.

Instruction. The description of the Depositor's business should be short and need not list all of the businesses in which the Depositor engages or identify the jurisdictions in which it does business if a general description (*e.g.,* ''life insurance'' or ''reinsurance'') is provided.

(b) *Registrant.* Provide the date and form of organization of the Registrant and the Registrant's classification pursuant to Section 4 [15 U.S.C. 80a–4] (*i.e.,* a separate account and a unit investment trust).

(c) *History of Depositor and Registrant.* If the Depositor's name was changed during the past five years, state its former name and the approximate date on which it was changed. If, at the request of any state, sales of contracts offered by the Registrant have been suspended at any time, or if sales of contracts offered by the Depositor have been suspended during the past five years, briefly describe the reasons for and results of the suspension. Briefly describe the nature and results of any bankruptcy, receivership, or similar proceeding, or any other material reorganization, readjustment, or succession of the Depositor during the past five years.

(d) *Ownership of Sub-Account Assets.* If 10 percent or more of the assets of any sub-account are not attributable to Contracts or to accumulated deductions or reserves (*e.g.,* initial capital contributed by the Depositor), state what percentage those assets are of the total assets of the Registrant. If the Depositor, or any other person controlling the assets, has any present intention of removing the assets from the sub-account, so state.

(e) *Control of Depositor.* State the name of each person who controls the Depositor and the nature of its business.

Instruction. If the Depositor is controlled by another person that, in turn, is controlled by another person, give the name of each control person and the nature of its business.

Item 21. Services

(a) *Expenses Paid by Third Parties.* Describe all fees, expenses, and costs of the Registrant that are to be paid by persons other than the Depositor or the Registrant, and identify those persons.

(b) *Service Agreements.* Summarize the substantive provisions of any management-related service contract that may be of interest to a purchaser of the Registrant's securities, under which services are provided to the Registrant, unless the contract is described in response to some other item of this form. Indicate the parties to the contract, and the total dollars paid and by whom for each of the past three years.

Instructions.

1. The term ''management-related service contract'' includes any contract with the Registrant to keep, prepare, or file accounts, books, records, or other documents required under federal or state law, or to provide any similar services with respect to the daily administration of the Registrant, but does not include the following:

(a) Any agreement with the Registrant to act as custodian or agent to administer purchases and redemptions under the Contracts; and

(b) Any contract with the Registrant for outside legal or auditing services, or contract for personal employment entered into with the Registrant in the ordinary course of business.

2. In summarizing the substantive provisions of any management-related service contract, include the following:

(a) The name of the person providing the service;

(b) The direct or indirect relationships, if any, of the person with the Registrant, its Depositor, or its principal underwriter; and

(c) The nature of the services provided, and the basis of the compensation paid for the services for the Registrant's last three fiscal years.

(c) *Other Service Providers.*

(1) Unless disclosed in response to paragraph (b) or another item of this form, identify and state the principal business address of any person who provides significant administrative or business affairs management services for the Registrant (*e.g.,* an ''Administrator,'' ''Sub-Administrator,'' ''Servicing Agent''), describe the services provided, and the compensation paid for the services.

(2) State the name and principal business address of the Registrant's custodian and independent public accountant and describe generally the services performed by each.

(3) If the Registrant's assets are held by a person other than the Depositor, a commercial bank, trust company, or depository registered with the Commission as custodian, state the nature of the business of that person.

(4) If an affiliated person of the Registrant or the Depositor, or an affiliated person of the affiliated person, acts as administrative or servicing agent for the Registrant, describe the services the person performs and the basis for remuneration. State, for the past three years, the total dollars paid for the services, and by whom.

Instruction. No disclosure need be given in response to paragraph (c)(4) of this Item for an administrative or servicing agent who is also the Depositor.

(5) If the Depositor is the principal underwriter of the Contracts, so state.

Item 22. Premiums

(a) *Administrative Procedures.* Discuss generally the Registrant's administrative rules applicable to premium payments, to the extent that they are not discussed in the prospectus.

Instruction. Examples include information regarding any condition applicable to changes in premium payment schedules, any limitations on prepayments of premiums, any relevant rules for classifying payments made other than in response to a bill or in an amount other than the amount billed for, etc.

(b) *Automatic Premium Loans.* If the contract provides an automatic premium loan option, describe the

option, including the circumstances under which it will be used to pay a required premium and whether, and how, interest will be charged on the loan. Describe any effect not described in the prospectus that an automatic premium loan could have on the Contract (*e.g.,* how automatic premium loans affect cash value).

Item 23. Additional Information About Operation of Contracts and Registrant

(a) *Incidental Benefits.* To the extent not described in the prospectus, explain the manner in which the purchase or operation of other incidental benefits affects the exercise of rights and the determination of benefits under the Contract such as whether the Contract or any rider provides for a change of insured or for all or a portion of the death benefit to be paid while the insured is still alive.

(b) *Surrender and Withdrawal.* To the extent not described in the prospectus, explain the Contract's surrender and withdrawal provisions.

(c) *Material Contracts Relating to the Registrant.* Disclose any material contract relating to the operation or administration of the Registrant.

(d) Describe any arrangements with any person to permit frequent transfers of contract value among sub-accounts of the Registrant, including the identity of the persons permitted to engage in frequent transfers pursuant to such arrangements, and any compensation or other consideration received by the Registrant, the Depositor, or any other party pursuant to such arrangements.

Instructions.

1. The consideration required to be disclosed by Item 23(d) includes any agreement to maintain assets in the Registrant or in other investment companies or accounts managed or sponsored by the Depositor, any investment adviser of a Portfolio Company, or any affiliated person of the Depositor or of any such investment adviser.

2. If the Registrant has an arrangement to permit frequent transfers of contract value among sub-accounts of the Registrant by a group of individuals, such as the participants in a defined contribution plan that meets the requirements for qualification under Section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), the Registrant may identify the group rather than identifying each individual group member.

Item 24. Underwriters

(a) *Identification.* Identify each principal underwriter (other than the Depositor) of the Contracts, and state its principal business address. If the principal underwriter is affiliated with the Registrant, the Depositor, or any affiliated person of the Registrant or the Depositor, identify how they are affiliated (*e.g.,* the principal underwriter is controlled by the Depositor).

(b) *Offering and Commissions.* For each principal underwriter distributing Contracts of the Registrant, state:

(1) Whether the offering is continuous; and

(2) the aggregate dollar amount of underwriting commissions paid to, and the amount retained by, the principal underwriter for each of the Registrant's last three fiscal years.

(c) *Other Payments.* With respect to any payments made by the Registrant to an underwriter of or dealer in the Contracts during the Registrant's last fiscal year, disclose the name and address of the underwriter or dealer, the amount paid and basis for determining that amount, the circumstances surrounding the payments, and the consideration received by the Registrant. Do not include information about:

(1) Payments made through deduction from premiums paid at the time of sale of the Contracts; or

(2) Payments made from cash values upon full or partial surrender of the Contracts or from an increase or decrease in the face amount of the Contracts.

Instructions.

1. Information need not be given about the service of mailing proxies or periodic reports of the Registrant.

2. Exclude information about bona fide contracts with the Registrant or its Depositor for outside legal or auditing services, or bona fide contracts for personal employment entered into with the Registrant or its Depositor in the ordinary course of business.

3. Information need not be given about any service for which total payments of less than $5,000 were made during each of the Registrant's last three fiscal years.

4. Information need not be given about payments made under any contract to act as administrative or servicing agent.

5. If the payments were made under an arrangement or policy applicable to dealers generally, describe only the arrangement or policy.

Item 25. Additional Information About Charges

(a) *Sales Load.* Describe the method that will be used to determine the sales load on the Contracts offered by the Registrant.

(b) *Special Purchase Plans.* Describe any special purchase plans (*e.g.,* group life insurance plans) or methods that reflect scheduled variations in, or elimination of, any applicable charges (*e.g.,* group discounts, waiver of deferred sales loads for a specified percentage of cash value, investment of proceeds from another Contract, exchange privileges, employee benefit plans, or the terms of a merger, acquisition, or exchange offer made pursuant to a plan of reorganization). Identify each class of individuals or transactions to which the plans or methods apply, including officers, directors, members of the board of managers, or employees of the Depositor, underwriter, Portfolio Companies, or investment adviser to Portfolio Companies, and the amount of the reductions, and state from whom additional information may be obtained. For special purchase plans or methods that reflect variations in, or elimination of, charges other than according to a fixed schedule, describe the basis for the variation or elimination (*e.g.,* the size of the purchaser, a prior existing relationship with the purchaser, the purchaser's assumption of certain administrative functions, or other characteristics that result in differences in costs or services).

(c) *Underwriting Procedures.* Briefly identify underwriting procedures used in connection with the Contract and any effect of different types of underwriting on the charges in the Contract. Specify the basis of the mortality charges guaranteed in the Contracts.

(d) *Increases in Face Amount.* Describe in more detail the charges assessed on increases in face amount, including the procedures used following an increase in face amount to allocate cash values and premium payments between the original Contract and incremental Contracts.

Item 26. Lapse and Reinstatement

To the extent that the prospectus does not do so, describe the lapse and reinstatement provisions of the Contract. Include a discussion of any time limits that apply, how the charge to reinstate is determined, and any other conditions that apply to reinstatement. Describe the features of any lapse options not described in the prospectus, including any factors that will determine the amount or duration of the insurance coverage, and the limitations and conditions on availability of each lapse option. Identify which contract transactions (*e.g.,* loans, partial withdrawals and surrenders, transfers) are available while the Contract is continued under a lapse option. Indicate

when limits on contract transactions are different from those that apply prior to lapse.

Item 27. Financial Statements

(a) *Registrant.* Provide financial statements of the Registrant.

Instruction. Include, in a separate section, the financial statements and schedules required by Regulation S–X [17 CFR 210]. Financial statements of the Registrant may be limited to:

(i) An audited balance sheet or statement of assets and liabilities as of the end of the most recent fiscal year;

(ii) An audited statement of operations for the most recent fiscal year conforming to the requirements of Rule 6–07 of Regulation S–X [17 CFR 210.6–07];

(iii) An audited statement of cash flows for the most recent fiscal year if necessary to comply with generally accepted accounting principles; and

(iv) Audited statements of changes in net assets conforming to the requirements of Rule 6–09 of Regulation S–X [17 CFR 210.6–09] for the two most recent fiscal years.

(b) *Depositor.* Provide financial statements of the Depositor.

Instructions.

1. Include, in a separate section, the financial statements and schedules of the Depositor required by Regulation S–X. If the Depositor would not have to prepare financial statements in accordance with generally accepted accounting principles except for use in this registration statement or other registration statements filed on Forms N–3, N–4, or N–6, its financial statements may be prepared in accordance with statutory requirements. The Depositor's financial statements must be prepared in accordance with generally accepted accounting principles if the Depositor prepares financial information in accordance with generally accepted accounting principles for use by the Depositor's parent, as defined in Rule 1–02(p) of Regulation S–X [17 CFR 210.1–02(p)], in any report under sections 13(a) and 15(d) of the Securities Exchange Act [15 U.S.C. 78m(a) and 78*o*(d)] or any registration statement filed under the Securities Act.

2. All statements and schedules of the Depositor required by Regulation S–X, except for the consolidated balance sheets described in Rule 3–01 of Regulation S–X [17 CFR 210.3–01], and any notes to these statements or schedules, may be omitted from Part B and instead included in Part C of the registration statement. If any of this information is omitted from Part B and included in Part C, the consolidated balance sheets included in Part B should be accompanied by a statement that additional financial information about the Depositor is available, without charge, upon request. When a request for the additional financial information is received, the Registrant should send the information within 3 business days of receipt of the request, by first-class mail or other means designed to ensure equally prompt delivery.

3. Notwithstanding Rule 3–12 of Regulation S–X [17 CFR 210.3–12], the financial statements of the Depositor need not be more current than as of the end of the most recent fiscal year of the Depositor. In addition, when the anticipated effective date of a registration statement falls within 90 days subsequent to the end of the fiscal year of the Depositor, the registration statement need not include financial statements of the Depositor more current than as of the end of the third fiscal quarter of the most recently completed fiscal year of the Depositor unless the audited financial statements for such fiscal year are available. The exceptions to Rule 3–12 of Regulation S–X contained in this Instruction 3 do not apply when:

(a) The Depositor's financial statements have never been included in an effective registration statement under the Securities Act of a separate account that offers variable annuity contracts or variable life insurance contracts; or

(b) The balance sheet of the Depositor at the end of either of the two most recent fiscal years included in response to this Item shows a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of less than $2,500,000; or

(c) The balance sheet of the Depositor at the end of a fiscal quarter within 135 days of the expected date of effectiveness under the Securities Act (or a fiscal quarter within 90 days of filing if the registration statement is filed solely under the Investment Company Act) would show a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of less than $2,500,000. If two fiscal quarters end within the 135 day period, the Depositor may choose either for purposes of this test.

Any interim financial statements required by this Item need not be comparative with financial statements for the same interim period of an earlier year.

Item 28. Illustrations

The Registrant may, but is not required to, include a table of hypothetical illustrations of death benefits, cash surrender values, and cash values in either the prospectus or the SAI. The following standards should be used to prepare any table of hypothetical illustrations that is included in the prospectus or the SAI:

(a) *Narrative Information.* The illustrations should be preceded by a clear and concise explanation, including (i) a description of the expenses reflected in the illustrations; (ii) that the illustrations are based on assumptions about investment returns and contractowner characteristics; (iii) the circumstances under which actual results for a particular purchaser of the Contract would differ from the illustrations; and (iv) whether personalized illustrations are available and, if available, how they may be obtained.

(b) *Headings.* The headings should contain the following information: Sex, age, rating classification (*e.g.,* nonsmoker, smoker, preferred, or standard), premium amount and payment schedule, face amount, and death benefit option.

(c) *Premiums, Ages.* Premium amounts used in the illustrations should be representative of the actual or expected typical premium amount. The typical premium amount may be based on the average or median premium amount or some other reasonable basis that results in a typical premium amount that is fairly representative of actual or expected Contract sales. Ages used in the illustrations should be representative of actual or expected Contract sales.

(d) *Rating Classifications.* Illustrations should be shown for the rating classification with the greatest number of outstanding Contracts (or expected Contracts in the case of a new Contract), unless this rating classification is not fairly representative of actual or expected Contract sales. In this case, illustrations should be shown for a commonly used rating classification that is fairly representative of actual or expected Contract sales.

(e) *Years.* Illustrated values should be provided for Contract years one through ten, for every five years beyond the tenth Contract year, and for the year of Contract maturity.

(f) *Illustrated Values.* Death benefits and cash surrender values should be illustrated at three rates of return and two levels of charges (described in paragraphs (g) and (i)). The Registrant may also illustrate cash values, but cash values must be accompanied by corresponding cash surrender values. All illustrated values should be determined as of the end of the Contract year.

(g) *Rates of Return.* The Registrant should use gross rates of return of 0%, 6%, and one other rate not greater than 12%. Additional gross rates of return no greater than 12% may be used. Explain that the gross rates of return used in the illustrations do not reflect the deductions of the charges and expenses of the Portfolio Companies.

(h) *Portfolio Company Charges.* Portfolio Company management fees and other Portfolio Company charges and expenses should be reflected using the arithmetic average of those charges and expenses incurred during the most recent fiscal year for all of the available Portfolio Companies or any materially greater amount expected to be incurred during the current fiscal year. In determining charges and expenses incurred during the most recent fiscal year or expected to be incurred during the current fiscal year, include amounts that would have been incurred absent expense reimbursement or fee waiver arrangements.

(i) *Other Charges.* Values should be illustrated using both current and guaranteed maximum charges at the 0% rate of return, the 6% rate of return, and one other rate of return no greater than 12%. Illustrated values should accurately reflect all charges deducted under the Contract (*e.g.,* mortality and expense risk, administrative, cost of insurance) as well as the actual timing of the deduction of those charges (*e.g.,* daily, monthly, annually). For example, for a Contract with a mortality and expense risk charge that is deducted from sub-account assets at a given annual rate, the illustrated values will be lower if the charge is deducted from assets on a daily basis rather than on a monthly or annual basis.

Additional Information. Subject to the requirement set out in General Instruction C.3.(b), additional information may be shown as part of the illustrations, provided that it is consistent with the standards of this Item 28.

Part C—Other Information

Item 29. Exhibits

Subject to General Instruction D regarding incorporation by reference and rule 483 under the Securities Act [17 CFR 230.483], file the exhibits listed below as part of the registration statement. Letter or number the exhibits in the sequence indicated and file copies rather than originals, unless otherwise required by rule 483. Reflect any exhibit incorporated by reference in the list below and identify the previously filed document containing the incorporated material.

(a) *Board of Directors Resolution.* The resolution of the board of directors of the Depositor authorizing the establishment of the Registrant.

(b) *Custodian Agreements.* All agreements for custody of securities and similar investments of the Registrant, including the schedule of remuneration.

(c) *Underwriting Contracts.* Underwriting or distribution contracts between the Registrant or Depositor and a principal underwriter and agreements between principal underwriters or the Depositor and dealers.

(d) *Contracts.* The form of each Contract, including any riders or endorsements.

(e) *Applications.* The form of application used with any Contract provided in response to (d) above.

(f) *Depositor's Certificate of Incorporation and By-Laws.* The Depositor's current certificate of incorporation or other instrument of organization and by-laws and any related amendment.

(g) *Reinsurance Contracts.* Any contract of reinsurance related to a Contract.

(h) *Participation Agreements.* Any participation agreement or other contract relating to the investment by the Registrant in a Portfolio Company.

(i) *Administrative Contracts.* Any contract relating to the performance of administrative services in connection with administering a Contract.

(j) *Other Material Contracts.* Other material contracts not made in the ordinary course of business to be performed in whole or in part on or after the filing date of the registration statement.

(k) *Legal Opinion.* An opinion and consent of counsel regarding the legality of the securities being registered, stating whether the securities will, when sold, be legally issued and represent binding obligations of the Depositor.

(l) *Actuarial Opinion.* If illustrations are included in the registration statement as permitted by Item 28, an opinion of an actuarial officer of the Depositor as to those illustrations indicating that:

(1) The illustrations of cash surrender values, cash values, death benefits, and/or any other values illustrated are consistent with the provisions of the Contract and the Depositor's administrative procedures;

(2) the rate structure of the Contract has not been designed, and the assumptions for the illustrations (including sex, age, rating classification, and premium amount and payment schedule) have not been selected, so as to make the relationship between premiums and benefits, as shown in the illustrations, appear to be materially more favorable than for any other prospective purchaser with different assumptions; and

(3) the illustrations are based on a commonly used rating classification and premium amounts and ages appropriate for the markets in which the Contract is sold.

(m) *Calculation.* If illustrations are included in the registration statement as permitted by Item 28, one sample calculation for each item illustrated, *e.g.,* cash surrender value, cash value, and death benefits, showing how the illustrated values for the fifth Contract year have been calculated. Demonstrate how the annual investment returns of the sub-accounts were derived from the hypothetical gross rates of return, how charges against sub-account assets were deducted from the annual investment returns of the sub-accounts, and how the periodic deductions for cost of insurance and other Contract charges were made to arrive at the illustrated values. Describe how the calculation would differ for other years.

(n) *Other Opinions.* Any other opinions, appraisals, or rulings, and related consents relied on in preparing the registration statement and required by section 7 of the Securities Act [15 U.S.C. 77g].

(o) *Omitted Financial Statements.* Financial statements omitted from Item 27.

(p) *Initial Capital Agreements.* Any agreements or understandings made in consideration for providing the initial capital between or among the Registrant, Depositor, underwriter, or initial contractowners and written assurances from the Depositor or initial contractowners that purchases were made for investment purposes and not with the intention of redeeming or reselling.

(q) *Redeemability Exemption.* Disclosure (if not provided elsewhere in the registration statement) of insurance procedures for which the Registrant and Depositor claim any exemption pursuant to rule 6e–2(b)(12)(ii) or rule 6e–3(T)(b)(12)(iii) under the Investment Company Act.

(r) *Preliminary Summary Prospectuses.* The form of any Initial Summary Prospectus and Updating Summary Prospectus that the Registrant intends to use on or after the effective date of the registration statement, pursuant to rule 498A under the Securities Act.

Instruction. Registrants are required to provide the preliminary Summary Prospectus exhibits only in connection with the filing of an initial registration statement, or in connection with a pre-

effective amendment or a post-effective amendment filed in accordance with paragraph (a) of rule 485 under the Securities Act.

Item 30. Directors and Officers of the Depositor

Provide the following information about each director or officer of the Depositor:

(1)	(2)
Name and principal business address	Positions and offices with depositor

Instruction. Registrants are required to provide the above information only for officers or directors who are engaged directly or indirectly in activities relating to the Registrant or the Contracts, and for executive officers including the Depositor's president, secretary, treasurer, and vice presidents who have authority to act as president in his or her absence.

Item 31. Persons Controlled by or Under Common Control With the Depositor or the Registrant

Provide a list or diagram of all persons directly or indirectly controlled by or under common control with the Depositor or the Registrant. For any person controlled by another person, disclose the percentage of voting securities owned by the immediately controlling person or other basis of that person's control. For each company, also provide the state or other sovereign power under the laws of which the company is organized.

Instructions.

1. Include the Registrant and the Depositor in the list or diagram and show the relationship of each company to the Registrant and Depositor and to the other companies named, using cross-references if a company is controlled through direct ownership of its securities by two or more persons.

2. Indicate with appropriate symbols subsidiaries that file separate financial statements, subsidiaries included in consolidated financial statements, or unconsolidated subsidiaries included in group financial statements. Indicate for other subsidiaries why financial statements are not filed.

Item 32. Indemnification

State the general effect of any contract, arrangements, or statute under which any underwriter or affiliated person of the Registrant is insured or indemnified against any liability incurred in his or her official capacity, other than insurance provided by any underwriter or affiliated person for his or her own protection.

Item 33. Principal Underwriters

(a) *Other Activity.* State the name of each investment company (other than the Registrant) for which each principal underwriter currently distributing the Registrant's securities also acts as a principal underwriter, depositor, sponsor, or investment adviser.

(b) *Management.* Provide the information required by the following table for each director, officer, or partner of each principal underwriter named in the response to Item 24:

(1)	(2)
Name and principal business address	Positions and offices with underwriter

Instruction. If a principal underwriter is the Depositor or an affiliate of the Depositor, and is also an insurance company, the above information for officers or directors need only be provided for officers or directors who are engaged directly or indirectly in activities relating to the Registrant or the Contracts, and for executive officers including the Depositor's or its affiliate's president, secretary, treasurer, and vice presidents who have authority to act as president in his or her absence.

(c) *Compensation From the Registrant.* Provide the information required by the following table for all commissions and other compensation received, directly or indirectly, from the Registrant during the Registrant's last fiscal year by each principal underwriter:

(1)	(2)	(3)	(4)	(5)
Name of principal underwriter	Net underwriting discounts and commissions	Compensation on redemption	Brokerage commission	Other compensation

Instructions.

1. Disclose the type of services rendered in consideration for the compensation listed under column (5).

2. Information need not be given about the service of mailing proxies or periodic reports of the Registrant.

3. Exclude information about bona fide contracts with the Registrant or its Depositor for outside legal or auditing services, or bona fide contracts for personal employment entered into with the Registrant or its Depositor in the ordinary course of business.

4. Exclude information about any service for which total payments of less than $15,000 were made during each of the Registrant's last three fiscal years.

5. Exclude information about payments made under any agreement whereby another person contracts with the Registrant or its Depositor to perform as custodian or administrative or servicing agent.

Item 34. Location of Accounts and Records

State the name and address of each person maintaining physical possession of each account, book, or other document required to be maintained by section 31(a) [15 U.S.C. 80a–30(a)] and the rules under that section.

Instruction. The Registrant may omit this information to the extent it is provided in its most recent report on Form N–CEN [17 CFR 274.101].

Item 35. Management Services

Provide a summary of the substantive provisions of any management-related service contract not discussed in Part A or B, disclosing the parties to the contract and the total amount paid and by whom for the Registrant's last three fiscal years.

Instructions.

1. The instructions to Item 21 also apply to this Item.

2. Exclude information about any service provided for payments totaling less than $15,000 during each of the Registrant's last three fiscal years.

Item 36. Fee Representation

Provide a representation of the Depositor that the fees and charges deducted under the Contracts, in the aggregate, are reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the Depositor.

§ 274.127e–1 [Removed]

■ 40. Remove § 274.127e–1.

§ 274.127f–1 [Removed]

■ 41. Remove § 274.127f–1.

§ 274.302 [Removed]

■ 42. Remove § 274.302.

§ 274.303 [Removed]

■ 43. Remove § 274.303.

By the Commission.

Dated: October 30, 2018.

Brent J. Fields,

Secretary.

Appendices

Note: The Appendices will not appear in the Code of Federal Regulations.

Appendix A

Hypothetical Initial Summary Prospectus Prepared by SEC Staff—For Illustrative Purposes Only

[GRAPHIC: XYZ Insurance: a hypothetical company]

VARIABLE ANNUITY CONTRACT

Issued through: XYZ Separate Account A
Contract Classes: Class B, Class X

Summary Prospectus for New Investors
May 1, 2018

This Summary Prospectus summarizes key features of the XYZ Variable Annuity Contract. You should read this Summary Prospectus carefully, particularly the section titled Important Information You Should Consider About the Contract.

Before you invest, you should review the prospectus for the XYZ Variable Annuity Contract, which contains more information about the contract, including its features, benefits, and risks. You can find the prospectus and other information about the contract online at *XYZInsuranceCo.com/VAdocuments.* You can also obtain this information at no cost by calling 888–555–1234 or by sending an email request to *email@XYZInsuranceCo.com.*

This Summary Prospectus incorporates by reference the XYZ Variable Annuity Contract's prospectus and Statement of Additional Information (SAI), both dated May 1, 2018, as amended or supplemented. The SAI may be obtained, free of charge, in the same manner as the prospectus.

* * * * *

YOU MAY CANCEL YOUR CONTRACT WITHIN 10 DAYS OF RECEIVING IT WITHOUT PAYING FEES OR PENALTIES.

In some states, this cancellation period may be longer. Upon cancellation, you will receive either a full refund of the amount you paid with your application or your total contract value. You should review the prospectus, or consult with your investment professional, for additional information about the specific cancellation terms that apply.

* * * * *

Additional information about certain investment products, including variable annuities, has been prepared by the Securities and Exchange Commission's staff and is available at Investor.gov.

The Securities and Exchange Commission has not approved or disapproved this contract or passed upon the adequacy of this summary prospectus. Any representation to the contrary is a criminal offense.

Contents

Special Terms

Accumulation Phase	The phase of your contract where you make premium payments and invest those payments seeking to increase your contract value.
Benefit Base	If you elect certain Optional Benefits under the Contract, the Benefit Base is used to determine the amount available to withdraw under the Optional Benefit. This figure is separate from your contract value and cannot be withdrawn as a lump sum.
Contract	The legal document between you and XYZ that describes the terms of the variable annuity. The contract has two phases, the accumulation (savings) phase and the payout (annuitization or income) phase. ''Contract value'' is the total value of your investment options (your separate account value plus your fixed account value).
Death Benefit	The amount paid to your designated beneficiaries (the persons or organizations you select to receive payments) upon your death.
Fixed Account	An investment option that earns a stated amount of interest. ''Fixed account value'' is the value of your investments in your fixed account.
Investment Options	This includes the portfolio companies and the fixed account.
Optional Benefits	Provisions that you can choose to add to your contract, typically for an additional cost. These include the additional death benefits, living benefits, and other benefits such as the liquidity rider.
Payout Phase	The phase of your contract after you elect to convert your contract value into a stream of income payments.
Portfolio Company	One of many mutual funds available for investment through your contract.
Separate Account	XYZ Separate Account A, through which premium payments under the contract may be allocated to portfolio companies. ''Separate account value'' is the total value of your investments in the portfolio companies.
Surrender Charge	A charge you pay if you withdraw money from your contract during a set time period (the surrender charge period) after you contributed money to your contract.

Overview of the Variable Annuity Contract

Q. What is this contract, and what is it designed to do?

A. The XYZ Variable Annuity Contract is designed to provide long-term accumulation of assets through investments in a variety of investment options during the accumulation phase. It can supplement your retirement income by providing a stream of income payments during the payout phase. It also offers death benefits to protect your designated beneficiaries. This contract may be appropriate if you have a long investment time horizon. It is not intended for people who may need to make early or frequent withdrawals or intend to engage in frequent trading in the portfolio companies.

Q. How do I accumulate assets in this contract and receive income from the contract?

A. Your contract has two phases: (1) An accumulation (savings) phase; and (2) a payout (income) phase.

(1) Accumulation (Savings) Phase

To help you accumulate assets, you can invest your premium payments in:

• Portfolio companies (mutual funds), each of which has its own investment strategies, investment advisers, expense ratios, and returns; and

• a fixed account option, which offers a guaranteed interest rate during a selected period.

A list of portfolio companies in which you can invest is provided in the back of this Summary Prospectus. **See Appendix: Portfolio Companies Available Under the Contract**.

(2) Payout (Income) Phase

You can elect to annuitize your contract and turn your contract value into a stream of income payments (sometimes called annuity payments) from XYZ, at which time the accumulation phase of the contract ends. These payments may continue for a fixed period of years, for your entire life, or for the longer of a fixed period or your life. The payments may also be fixed or variable. Variable payments will vary based on the performance of the investment options you select.

Please note that if you annuitize, your investments will be converted to income payments and you may no longer be able to choose to withdraw money at will from your contract. All benefits (including guaranteed minimum death benefits and living benefits) terminate upon annuitization.

Q. What are the primary features and options that this contract offers?

A. Contract classes. You can purchase one of several contract classes that have different ongoing fees and surrender charges. For example, this contract offers Class B with an 8-year surrender charge period or Class X with a 9-year surrender charge period and higher ongoing fees. If you purchase a Class X contract, XYZ will add an additional lump sum amount to your premiums.

Accessing your money. Until you annuitize, you have full access to your money. You can choose to withdraw your contract value at any time (although if you withdraw early, you may have to pay a surrender charge and/or income taxes, including a tax penalty if you are younger than age 59½).

Tax treatment. You can transfer money between investment options without tax implications, and earnings (if any) on your investments are generally tax-deferred. You are taxed only when: (1) You make a withdrawal; (2) you receive an income payment from the contract; or (3) upon payment of a death benefit.

Death benefits. Your contract includes a basic death benefit that will pay your designated beneficiaries the contract value at the time of your death. You can purchase additional death benefits for an additional fee. These additional provisions may increase the amount of money payable to your designated beneficiaries upon your death.

Optional benefits that occur during your lifetime. For an additional fee, you can purchase principal guarantees to help protect your retirement income from declining markets (Principal Protection Rider) and/or income guarantees to help protect you from outliving your assets (Lifetime Minimum Payout Rider), while still maintaining access to your money.

Optional liquidity rider. For an additional fee, you can reduce the number of years that each premium payment is subject to surrender charges.

Portfolio rebalancing and dollar cost averaging. At no additional charge, you may select portfolio rebalancing, which automatically rebalances the investment options you select to maintain your chosen mix of investment options. Alternately, at no additional charge, you may select dollar cost averaging, which automatically transfers a specific amount of money from the fixed account to the investment options you have selected, at set intervals over a specific period of time.

Important Information You Should Consider About the Contract

An investment in the contract is subject to fees, risks, and other important considerations, some of which are briefly summarized in the following table. You should review the prospectus for additional information about these topics.

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<table>
<tr><th colspan="2">FEES AND EXPENSES</th><th>LOCATION IN PROSPECTUS</th></tr>
<tr><td>Surrender Charge
(charges for early withdrawal)</td><td>If you withdraw money from your contract within 9 years following your last premium payment, you will be assessed a surrender charge of up to 9% on the value of the withdrawal, declining to 0% over 9 years.

For example, if you purchased a Class X contract and were to withdraw $100,000 during the surrender charge period, you would be assessed a charge of up to $9,000 on the amount withdrawn.</td><td>Charges (Surrender Charge)</td></tr>
<tr><td>Transaction Charges
(charges for certain transactions)</td><td>In addition to surrender charges, you also may be charged for other transactions (such as when you transfer cash value between investment options, or for special requests such as wire transfers).</td><td>Charges (Transfer Fee; Surrender Charge)</td></tr>
<tr><td>Ongoing Fees and Expenses
(annual charges)</td><td>The table below describes the fees and expenses that you may pay each year, depending on the options you choose. Please refer to your contract specifications page for information about the specific fees you will pay each year based on the options you have elected.

<table>
<tr><th>ANNUAL FEE</th><th>MIN.</th><th>MAX.</th></tr>
<tr><td>1. Base contract (varies by contract class)</td><td>1.15%[1]</td><td>1.55%[1]</td></tr>
</table>
</td><td>Fee Table and Expense Examples

Charges</td></tr>
</table>

2. Investment options (Portfolio Company fees and expenses)	0.35%[2]	2.71%[2]
3. Optional benefits (if elected)	0.15%[3]	5.05%[3]

[1] As a percentage of separate account value.
[2] As a percentage of portfolio company assets.
[3] As a percentage of contract value or benefit base depending on the optional benefits selected.

Because your contract is customizable, the choices you make affect how much you will pay. To help you understand the cost of owning your contract, the following table shows the lowest and highest cost you could pay *each year*. This estimate assumes that you do not take withdrawals from the contract, **which could add surrender charges that substantially increase costs**.

LOWEST ANNUAL COST ESTIMATE: $1,518	**HIGHEST ANNUAL COST ESTIMATE: $9,134**
Assumes: • Investment of $100,000 • 5% annual appreciation • Least expensive combination of contract classes and portfolio company fees and expenses • No optional benefits • No sales charges • No additional contributions, transfers, or withdrawals	Assumes: • Investment of $100,000 • 5% annual appreciation • Most expensive combination of classes, optional benefits, and portfolio company fees and expenses • No sales charges • No additional contributions, transfers, or withdrawals

RISKS		LOCATION IN PROSPECTUS
Risk of Loss	You can lose money by investing in this contract, including loss of principal.	Principal Risks
Not a Short-Term Investment	This contract is not designed for short-term investing and is not appropriate for an investor who needs ready access to cash. Surrender charges apply for up to 9 years following your last premium payment. They will reduce the value of your contract if you withdraw money during that time. The benefits of tax deferral and living benefit protections also mean the contract is more beneficial to investors with a long time horizon.	Principal Risks
Risks Associated with Investment Options	• An investment in this contract is subject to the risk of poor investment performance of the investment options you choose. • Each investment option has its own unique risks. • You should review the prospectuses for the available portfolio companies before making an investment decision.	Principal Risks
Insurance Company Risks	Any obligations, guarantees, and benefits of the contract are subject to the claims-paying ability of XYZ. If XYZ experiences financial distress, it may not be able to meet its obligations to you. More information about XYZ, including its financial strength ratings, is available upon request from XYZ Separate Account A.	Principal Risks
RESTRICTIONS		**LOCATION IN PROSPECTUS**
Investment Options	• There is a $10 charge for each transfer when you transfer money between investment options in excess of 12 times a year.	Principal Risks

	• XYZ reserves the right to remove or substitute portfolio companies as investment options that are available under the contract.	
Optional Benefits	• Many optional benefits limit or restrict the investment options you may select under the contract. We may change these restrictions in the future. • You are required to have a certain contract value for some optional benefits. If withdrawals reduce your contract value below this value, your optional benefits may be reduced or terminated. • We may stop offering an optional benefit at any time.	Other Benefits Available Under the Contract
TAXES		**LOCATION IN PROSPECTUS**
Tax Implications	• Consult with a tax professional to determine the tax implications of an investment in and payments received under this contract. • If you purchase the contract through a tax-qualified plan or individual retirement account (IRA), you do not get any additional tax deferral. • Earnings on your contract are taxed at ordinary income tax rates when you withdraw them, and you may have to pay a penalty if you take a withdrawal before age 59 ½.	Taxes
CONFLICTS OF INTEREST		**LOCATION IN PROSPECTUS**
Investment Professional Compensation	Your investment professional may receive compensation for selling this contract to you, both in the form of commissions and because XYZ may share the revenue it earns on this contract with the professional's firm. This conflict of interest may influence your investment professional to recommend this contract over another investment.	Other Information (Distribution)
Exchanges	Some investment professionals may have a financial incentive to offer you	Other Information (Contract Provisions and

	a new contract in place of the one you own. You should only exchange your contract if you determine, after comparing the features, fees, and risks of both contracts, that it is better for you to purchase the new contract rather than continue to own your existing contract.	Limitations)

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Standard Death Benefit

Q. What happens to my money in the contract when I die?

A. Accumulation (savings) phase. Your contract includes a standard death benefit for no additional charge. The standard death benefit is equal to the value of your investment options during the asset accumulation (savings) phase of the contract. The value of the standard death benefit may increase (if you make additional purchase payments or your investment performs well) or decrease (if you take withdrawals or your investment options perform poorly). For an additional charge, you can purchase additional optional death benefits. This benefit terminates upon full surrender or annuitization of the contract.

Payout (income) phase. The amount payable upon your death is based on the payout option you select (*e.g.,* income for a guaranteed period of lifetime payments).

Other Benefits Available Under the Contract

Q. Are there other benefits I can select that will affect how much money that my designated beneficiaries or I will receive under the contract, or otherwise will affect my rights under the contract? What are the features, costs, and any limitations associated with these other benefits?

A. In addition to the standard death benefit associated with your contract, other optional benefits may also be available to you. The purposes, fees, and restrictions/limitations of these additional benefits are briefly summarized in the following tables.

OPTIONAL DEATH BENEFITS

These optional death benefits are available during the accumulation phase:

Name of benefit	Purpose	Annual fee (as a percent of separate account value)	Brief description of restrictions/limitations
Return of Premium Death Benefit.	Guarantees your beneficiaries will receive a benefit at least equal to your purchase payments.	0.15	• Available only at contract purchase. • Withdrawals could significantly reduce the benefit.
Annual Step-Up Death Benefit ..	Provides a new locked-in higher death benefit on each contract anniversary, if your investments increase in value.	0.35	• Available only at contract purchase. • Benefit limits investment options available. • Withdrawals could significantly reduce the benefit.
Earnings Enhancement Death Benefit.	Pays an additional death benefit amount to help offset any taxes due on contract earnings.	0.55	• Available only at contract purchase. • Available only to contract owners ages 0–75.

OPTIONAL LIVING BENEFITS

Name of benefit	Purpose	Annual fee (as a percentage of benefit base)	Brief description of restrictions/limitations
Principal Protection Rider	Protects your initial investment from loss. If at the time of your 10th contract anniversary your initial investment loses value due to market losses, we will make a one-time payment to erase those investment losses.	1.5	• Available only at contract purchase. • Benefit limits available investment options. • Withdrawals could significantly reduce or terminate benefit. • Protection only applies to first year's premium payments. • Protection applies only until 10th contract anniversary. • Available only to contract owners ages 0–80.
Lifetime Minimum Payout Rider	Enables you to take steady, lifetime withdrawals, no matter how markets perform or how long you live, while still maintaining access to your money.	2.5	• Benefit limits investment options available. • Withdrawals before age 60 or greater than the minimum payout amount could significantly reduce or terminate benefit. • Available only to contract owners ages 0–85.

OTHER OPTIONAL BENEFITS

Name of benefit	Purpose	Annual fee (as a percentage of contract value)	Brief description of restrictions/limitations
Liquidity Rider	Reduces the surrender period from 9 to 4 years	0.5% per year for the first 4 years.	Available only at contract purchase.
Portfolio Rebalancing	Automatically rebalances the investment options you select (either monthly, quarterly or annually) to maintain your chosen mix of investment options.	None	Cannot use with the dollar cost averaging option.
Dollar Cost Averaging	Automatically transfers a specific amount of money from the Fixed Account to the investment options you have selected, at set intervals over a specific period of time.	None	Cannot use with the portfolio rebalancing option.

Buying the Contract

Q. How do I purchase the XYZ Variable Annuity Contract?

A. Complete our application and submit it, along with your initial premium payment, to our Administrative Office, at [Purchase Payment Processing, XYZ Insurance Company, 100 F Street NE, Washington, DC 20549]. Once we approve your application, we will send you your contract and a statement confirming your investments.

Q. How much can I contribute and how are my contributions invested?

A. Your premium payments will be invested in the investment options that you choose.

	Non-qualified policies (policies purchased using after-tax dollars)	Qualified policies (policies purchased using pre-tax dollars)
Minimum Initial Premium	$10,000	$5,000
Minimum Subsequent Premiums	$50	
Maximum Subsequent Premiums (per contract year after 1st contract anniversary)	$50,000	Lesser of $50,000 or IRS contribution limit.
Maximum Total Premiums	$1,000,000 (Up to age 80) $500,000 (Over age 80)	

*We can reject any premium payments for any reason. We may also permit you to invest more than the maximum amounts list above if you obtain our prior approval.

After your initial premium payment, you are not required to make any additional premium payments under your contract.

Q. When will any premium payments that I make be credited to my account?

A. Initial contract purchase: Your financial professional must determine that the contract is suitable for you and transmit your application to XYZ. If your application and purchase payment are complete when received by XYZ, or once it becomes complete, we will issue your contract within 2 business days. If some information is missing from your application, we may delay issuing your contract and crediting your account while we obtain the missing information. However, we will not hold your initial purchase payment for more than 5 business days without your permission.

Subsequent premium payment: If we receive a payment before the close of the NYSE (typically 4:00 p.m. EST), we will credit your purchase payment that day. If we receive your subsequent purchase payment after the close of the NYSE, your payment will be applied on the next business day.

Surrendering Your Contract or Making Withdrawals: Accessing the Money in Your Contract

Q. Can I access the money in my account during the asset accumulation (savings) phase?

A. You can access the money in your contract by making a withdrawal, which will reduce the value of your contract (including the amount of the death benefit). You may withdraw all or a portion of the cash value of your contract (minus applicable charges and other adjustments, discussed below). **However, withdrawing the entire cash value of your contract will terminate your contract.**

Certain withdrawals may reduce the value of any optional living benefits you elected. Some optional living benefits provide withdrawal options.

Q. Are there any limitations associated with taking money out of my contract during the asset accumulation (savings) phase?

A. Yes. These limitations are as follows:

Limitations on withdrawal amounts	• The minimum withdrawal amount is the lesser of $500 or your entire contract value.
Surrender charges and taxes	• As described above, there may be surrender charge and tax implications when you take out money.
Negative impact of withdrawal on other benefits and guarantees of your contract.	• A partial withdrawal may have a negative impact on certain optional benefits that you may elect. It may reduce the value of or even terminate certain benefits.

Q. What is the process to request a withdrawal of money from my contract?

A. You can request to withdraw all or a portion of the cash value of your contract (that is your contract value less any surrender charges and any prorated contract fees) on any business day through your financial intermediary, through our website, or by calling us or mailing a request to [Withdrawal Processing, XYZ Insurance Company, 100 F Street NE, Washington, DC 20549]. Generally, for withdrawal or surrender requests received before the close of the New York Stock Exchange (typically 4:00 p.m. EST), we will process your request that day. If we receive your request after the close of the New York Stock Exchange, your request payment will be processed the next

business day. You will generally receive the amount withdrawn or surrendered within seven days.

Q. Can I access the money in my account during the annuity (income) phase?

A. You will receive payments under the annuity payment option you select. However, you generally may not take any other withdrawals.

Additional Information About Fees

The following tables describe the fees and expenses that you will pay when buying, owning, and surrendering the contract. Please refer to your contract specifications page for information about the specific fees you will pay each year based on the options you have elected.

ANNUAL TRANSACTION EXPENSES

The first table describes the fees and expenses that you will pay at the time that you buy the contract, surrender the contract, or transfer cash value between investment options. State premium taxes may also be deducted.

Front-End Load:	None

Surrender Charge (% of amount surrendered)

	Year since contribution received									
Contract Class	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10+**
Class B	8%	8%	7%	6%	5%	4%	3%	0%	0%	0%
Class X	9%	8%	7%	6%	5%	4%	3%	2%	1%	0%

Transfer Fee (after 12th transfer is a year)	$10
Special Service Fee (*e.g.,* overnight delivery, duplicate policies; duplicate 1099 and 5498 tax forms; check copies; and printing and mailing previously submitted forms)	50

ANNUAL CONTRACT EXPENSES

The next table describes the fees and expenses that you will pay each year during the time that you own the contract (not including portfolio company fees and expenses).

If you choose to purchase an optional benefit, you will pay additional charges, as shown below.

Base contract	Class B	Class X
Annual Administrative Charge	$50	$50
Base Contract Charge (% of average separate account value)	1.15%	1.50%
Optional benefits		**Maximum charges**
Liquidity Rider (only available with Class B) (% of separate account value)		0.50%
Death Benefits:		
Return of Premium Death Benefit (% of separate account value)		0.15
Annual Step-Up Death Benefit (% of separate account value)		0.35
Earnings Enhancement Death Benefit (% of contract value)		0.55
Minimum Accumulation Benefits:		
Principal Protection Rider (% of benefit base)		1.50
Lifetime Withdrawal Benefits:		
Lifetime Minimum Payout Rider (% of benefit base)		2.50

TOTAL ANNUAL PORTFOLIO COMPANY OPERATING EXPENSES

The next item shows the minimum and maximum total operating expenses charged by the portfolio companies that you may pay periodically during the time that you own the contract. A complete list of portfolio companies available under the contract, including their annual expenses, may be found at the back of this Summary Prospectus.

	Minimum (%)	Maximum (%)
Range of total annual portfolio operating expenses *before* any waivers or expense reimbursements	0.35	2.71
Range of total annual portfolio operating expenses *after* any waivers or expense reimbursements*	0.33	1.85

*Any expense waivers or reimbursements will remain in effect until at least April 30, 2019 and can only be terminated early with approval by the Portfolio Company's board of directors.

EXAMPLE

This example is intended to help you compare the cost of investing in the contract with the cost of investing in other variable annuity contracts. These costs include transaction expenses, annual contract expenses, and Portfolio Company operating expenses.

The example assumes that you invest $100,000 in the contract for the time periods indicated. The example also assumes that your investment has a 5% return each year and assumes the most expensive combination of portfolio company operating expenses and optional benefits available for an additional charge. Although your actual costs may be higher or lower, based on these assumptions, your costs would be:

If you surrender your contract at the end of the applicable time period:

	Class B	Class X
1 Year	$15,015	$16,776
3 Years	31,630	33,249

	Class B	Class X
5 Years	41,181	43,623
10 Years	67,585	69,466

If you annuitize at the end of the applicable time period or if you do not surrender your contract:

	Class B	Class X
1 Year	$7,651	$7,868
3 Years	23,323	22,943
5 Years	36,268	37,118
10 Years	67,585	69,466

APPENDIX: Portfolio Companies Available Under the Contract

The following is a list of portfolio companies currently available under the contract, which is subject to change, as discussed in the prospectus for the contract. Before you invest, you should review the prospectuses for the portfolio companies. These prospectuses contain more information about the portfolio companies and their risks and may be amended from time to time. You can find the prospectuses and other information about the portfolio companies online at *XYZInsuranceCo.com/VAdocuments.* You can also request this information at no cost by calling 888–555–1234 or by sending an email request to *email@XYZInsuranceCo.com.*

The performance information below reflects fees and expenses of the portfolio companies, but does not reflect the other fees and expenses that your contract may charge. Performance would be lower if these charges were included. Each portfolio company's past performance is not necessarily an indication of future performance.

Investment type	[Portfolio company and *adviser/subadviser*]	Expense ratio (expenses/ average assets) (%)	Average annual total returns *(as of 12/31/2017)*		
			1 year (%)	5 year (%)	10 year (%)
Allocation	XYZ Aggressive Allocation Portfolio	0.97	17.49	11.68	5.87
Allocation	XYZ Balanced Portfolio	0.81	14.80	10.06	5.89
Allocation	XYZ Conservative Allocation Portfolio	0.97	8.06	6.25	5.36
Allocation	XYZ Moderate Allocation Portfolio	0.97	11.77	8.28	5.73
Allocation	XYZ Target Date 2020 Portfolio	1.03	11.69	5.52	.....
Allocation	XYZ Target Date 2030 Portfolio	1.03	13.14	6.14	.....
Allocation	XYZ Target Date 2040 Portfolio	1.02	14.69	6.96	.....
Allocation	XYZ Target Date 2050 Portfolio	1.02	18.91	9.10	.....
Allocation	XYZ Target Date 2060 Portfolio	1.02	24.09	.....	.....
Allocation	XYZ Target Date Income Portfolio	1.01	4.02	5.88	.....
Alternative	Long/Short Equity Portfolio *(Subadviser: 123 Asset Management).*	2.53	10.93	.....	.....
Alternative	XYZ Alternative Growth Portfolio	2.71	1.75	3.81	1.75
Alternative	XYZ Multimanager Alternative Portfolio *(Subadvisers: 123 Asset Management; 456 Asset Management; 789 Advisers).*	2.03	2.11	.....	.....
Global Bond	QRS Global Bond Portfolio *(Subadviser: 456 Asset Management).*	1.31	.....	.....	.....
Global Bond	XYZ Unconstrained Bond Portfolio	1.27	1.81	0.62	2.91
Global Equity	ABCD Total Return Portfolio	1.05	6.02	0.43	.....
Global Equity	QRS Emerging Market Debt Portfolio *(Subadviser: 456 Asset Management).*	1.31	12.48	3.58	.....
Global Equity	QRS Emerging Markets Portfolio *(Subadviser: 456 Asset Management).*	1.29	37.87	7.24	.....
Global Equity	QRS Global Growth Portfolio *(Subadviser: 456 Asset Management).*	1.22	31.77	11.56	6.30
Money Market	XYZ Government Money Market Portfolio	0.37	0.31	0.06	0.19
Sector	XYZ Capital Appreciation Portfolio *(Subadviser: 789 Advisers).*	0.66	31.69	16.75	8.33
Sector	XYZ Consumer Products Portfolio *(Subadviser: 789 Advisers).*	0.76	8.95	11.10	8.86
Sector	XYZ Financial Services Portfolio *(Subadviser: 789 Advisers).*	0.76	23.53	6.75	7.73
Sector	XYZ Healthcare Portfolio *(Subadviser: 789 Advisers)*	0.78	22.04	19.28	11.87
Sector	XYZ Homebuilders Portfolio *(Subadviser: 789 Advisers).*	0.76	.....	.....	.....
Sector	XYZ Real Estate Portfolio *(Subadviser: 789 Advisers).*	0.75	14.60	.....	.....
Sector	XYZ Technology Portfolio *(Subadviser: 789 Advisers).*	0.84	50.16	23.51	.....
Sector	XYZ Transportation & Infrastructure Portfolio *(Subadviser: 789 Advisers).*	0.75	18.24	.....	.....
Sector	XYZ Utilities Portfolio *(Subadviser: 789 Advisers)*	0.76	7.34	10.59	.....
U.S. Bond	ABCD Aggregate Bond Index Portfolio	0.41	3.20	2.35	3.83
U.S. Bond	ABCD High Yield Bond Portfolio	0.97	6.18	4.70	7.25
U.S. Bond	ABCD Total Return Bond Portfolio	1.14	11.17	9.72	.....
U.S. Bond	ABCD U.S. Treasury Portfolio	0.38	0.76	0.22	.....
U.S. Bond	Intermediate-Term Bond Portfolio	0.41	4.14	2.81	4.58
U.S. Bond	Long-Term Bond Portfolio	0.41	9.73	4.78	.....
U.S. Bond	Short-Term Bond Portfolio	0.39	2.85	2.44	.....
U.S. Equity	ABCD Contrarian Portfolio	0.91	15.20	12.82	.....
U.S. Equity	ABCD Diversified Equity Portfolio	0.87	22.70	15.05	8.23
U.S. Equity	ABCD Equity and Income Portfolio	0.79	19.66	.....	.....

Investment type	[Portfolio company and *adviser/subadviser*]	Expense ratio (expenses/ average assets) (%)	Average annual total returns *(as of 12/31/2017)*		
			1 year (%)	5 year (%)	10 year (%)
U.S. Equity	ABCD Focused Portfolio	0.76	26.43	13.02	
U.S. Equity	ABCD Managed-Risk Equity Portfolio	1.02	14.11		
U.S. Equity	ABCD Russell 2000 Index Portfolio	0.37	14.61	14.07	
U.S. Equity	ABCD S&P 500 Index Portfolio	0.35	21.26	15.23	8.00
U.S. Equity	ABCD U.S. Large-Cap Portfolio	0.81	23.54	11.66	6.21
U.S. Equity	ABCD U.S. Micro-Cap Growth Portfolio	0.88	28.91		
U.S. Equity	ABCD U.S. Mid-Cap Portfolio	0.81	12.14	10.19	7.91
U.S. Equity	ABCD U.S. Small-Cap Growth Portfolio	0.81	13.64	13.90	18.02

The table below identifies the portfolio companies available for use with the **Annual Step-Up Death Benefit** and the **Principal Protection Rider.**

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Portfolio Company	Annual Step-Up Death Benefit	Principal Protection Rider
ABCD Aggregate Bond Index Portfolio	☑	☑
ABCD Contrarian Portfolio		
ABCD Diversified Equity Portfolio	☑	☑
ABCD Equity and Income Portfolio	☑	
ABCD Focused Portfolio		
ABCD High Yield Bond Portfolio	☑	☑
ABCD Managed-Risk Equity Portfolio	☑	☑
ABCD Russell 2000 Index Portfolio		
ABCD S&P 500 Index Portfolio	☑	☑
ABCD Total Return Bond Portfolio	☑	☑
ABCD Total Return Portfolio		
ABCD U.S. Large-Cap Portfolio	☑	
ABCD U.S. Micro-Cap Growth Portfolio		
ABCD U.S. Mid-Cap Portfolio		
ABCD U.S. Small-Cap Growth Portfolio		
ABCD U.S. Treasury Portfolio	☑	☑
Intermediate-Term Bond Portfolio	☑	☑
Long/Short Equity Portfolio		
Long-Term Bond Portfolio	☑	☑
QRS Emerging Market Debt Portfolio		
QRS Emerging Markets Portfolio		
QRS Global Bond Portfolio	☑	☑
QRS Global Growth Portfolio		
Short-Term Bond Portfolio	☑	☑
XYZ Aggressive Allocation Portfolio	☑	☑
XYZ Alternative Growth Portfolio		
XYZ Balanced Portfolio	☑	☑
XYZ Capital Appreciation Portfolio	☑	
XYZ Conservative Allocation Portfolio	☑	☑
XYZ Consumer Products Portfolio		
XYZ Financial Services Portfolio		
XYZ Government Money Market Portfolio	☑	☑
XYZ Healthcare Portfolio		
XYZ Homebuilders Portfolio		
XYZ Moderate Allocation Portfolio	☑	☑
XYZ Multimanager Alternative Portfolio		
XYZ Real Estate Portfolio		
XYZ Target Date 2020 Portfolio	☑	☑

Portfolio Company	Annual Step-Up Death Benefit	Principal Protection Rider
XYZ Target Date 2030 Portfolio	☑	☑
XYZ Target Date 2040 Portfolio	☑	☑
XYZ Target Date 2050 Portfolio	☑	☑
XYZ Target Date 2060 Portfolio	☑	☑
XYZ Target Date Income Portfolio	☑	☑
XYZ Technology Portfolio		
XYZ Transportation & Infrastructure Portfolio		
XYZ Unconstrained Bond Portfolio	☑	☑
XYZ Utilities Portfolio	☑	☑
Fixed Account	☑	☑

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The table below identifies which portfolio companies are available for use with the **Lifetime Minimum Payout Rider.**

Investment Type:	Limitation *
Alternative, Global Equity.	Up to 20% of your contract value.
U.S. Equity, Sector, Global Bond.	Up to 50% of your contract value.
Allocation, U.S. Bond, and Money Market.	No Limits.
Fixed Account	Unavailable.

*You must enroll in automatic quarterly rebalancing.

Appendix B

Hypothetical Updating Summary Prospectus Prepared by SEC Staff—For Illustrative Purposes Only

[GRAPHIC: XYZ Insurance: a hypothetical company]

VARIABLE ANNUITY CONTRACT

Issued through: XYZ Separate Account A

Contract Classes: Class B, Class X

Updating Summary Prospectus

May 1, 2018

You should read this Summary Prospectus carefully, particularly the section titled Important Information You Should Consider About the Contract.

An updated prospectus for the XYZ Variable Annuity Contract is currently available online, which contains more information about the contract, including its features, benefits, and risks. You can find the prospectus and other information about the contract online at *XYZInsuranceCo.com/VAdocuments.* You can also obtain this information at no cost by calling 888–555–1234 or by sending an email request to *email@XYZInsuranceCo.com.*

This Summary Prospectus incorporates by reference the XYZ Variable Annuity Contract's prospectus and Statement of Additional Information (SAI), both dated May 1, 2018, as amended or supplemented. The SAI may be obtained, free of charge, in the same manner as the prospectus.

Additional information about certain investment products, including variable annuities, has been prepared by the Securities and Exchange Commission's staff and is available at *Investor.gov.*

The Securities and Exchange Commission has not approved or disapproved this contract or passed upon the adequacy of this summary prospectus. Any representation to the contrary is a criminal offense.

Contents

Special Terms

Accumulation Phase	The phase of your contract where you make premium payments and invest those payments seeking to increase your contract value.
Benefit Base	If you elect certain Optional Benefits under the Contract, the Benefit Base is used to determine the amount available to withdraw under the Optional Benefit. This figure is separate from your contract value and cannot be withdrawn as a lump sum.
Contract	The legal document between you and XYZ that describes the terms of the variable annuity. The contract has two phases, the accumulation (savings) phase and the payout (annuitization or income) phase. ''Contract value'' is the total value of your investment options (your separate account value plus your fixed account value).
Death Benefit	The amount paid to your designated beneficiaries (the persons or organizations you select to receive payments) upon your death.
Fixed Account	An investment option that earns a stated amount of interest. ''Fixed account value'' is the value of your investments in your fixed account.
Investment Options	This includes the portfolio companies and the fixed account.
Optional Benefits	Provisions that you can choose to add to your contract, typically for an additional cost. These include the additional death benefits, living benefits, and other benefits such as the liquidity rider.
Payout Phase	The phase of your contract after you elect to convert your contract value into a stream of income payments.
Portfolio Company	One of many mutual funds available for investment through your contract.
Separate Account	XYZ Separate Account A, through which premium payments under the contract may be allocated to portfolio companies. ''Separate account value'' is the total value of your investments in the portfolio companies.
Surrender Charge	A charge you pay if you withdraw money from your contract during a set time period (the surrender charge period) after you contributed money to your contract.

Updated Information About Your Contract

Q. Have my contract features changed during the previous year?

A. Yes. Please see below for a summary of changes that have been made to the contract. As described below, these changes may or may not affect you, depending on when you purchased your contract.

The information in this updating summary prospectus is a summary of certain contract features that have changed since the Updating Summary Prospectus dated May 1, 2017. This may not reflect all of the changes that have occurred since you entered into your Contract.

- Fee Table
  - Only for contracts purchased before Jan. 1, 2014: we have increased the transfer fee from $10 to $15.
- Standard Death Benefit
  - We have changed the terms associated with the standard death benefit to clarify that a surviving spouse may include a surviving domestic partner.
- Optional Benefits
  - We have changed the investment restrictions associated with the Annual Step-Up Death Benefit, Principal Protection Rider, and Lifetime Minimum Income Rider. Current investors that were previously in compliance with the restrictions do not need to update their allocation. However, future allocation instructions must comply with the new restrictions. *See* Appendix: Portfolio Companies Available Under the Contract.
  - We have changed the withdrawal rates for new purchases of the Lifetime Minimum Payout Rider. Current contract owners will be subject to the rate in effect when you elected the Riders.
  - **Only for contracts purchased before Jan. 1, 2014:** We have changed the current fee associated with the Lifetime Minimum Income Rider. In no case will the fees exceed the maximum amount shown in the fee table in the contract prospectus.
  - The Lifetime Minimum Payout Rider is now available to new contract owners and existing contract owners that do not own any other living benefits. The Lifetime Minimum Payout Rider provides longevity protection through lifetime benefit payments.
- Portfolio Companies
  - The XYZ Blue Chip Portfolio has liquidated.
  - The ABCD Equity Portfolio has been renamed the ABCD Equity and Income Portfolio.
  - The ABCD U.S. Mid-Cap Value Portfolio and ABCD U.S. Mid-Cap Growth Portfolio merged into the ABCD U.S. Mid-Cap Portfolio.

Important Information You Should Consider About the Contract

An investment in the contract is subject to fees, risks, and other important considerations, some of which are briefly summarized in the following table. You should review the prospectus for additional information about these topics.

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<table>
<tr><th colspan="2">FEES AND EXPENSES</th><th>LOCATION IN PROSPECTUS</th></tr>
<tr><td>Surrender Charge
(charges for early withdrawal)</td><td>If you withdraw money from your contract within 9 years following your last premium payment, you will be assessed a surrender charge of up to 9% on the value of the withdrawal, declining to 0% over 9 years.

For example, if you purchased a Class X contract and were to withdraw $100,000 during the surrender charge period, you would be assessed a charge of up to $9,000 on the amount withdrawn.</td><td>Charges (Surrender Charge)</td></tr>
<tr><td>Transaction Charges
(charges for certain transactions)</td><td>In addition to surrender charges, you also may be charged for other transactions (such as when you transfer cash value between investment options, or for special requests such as wire transfers).</td><td>Charges (Transfer Fee; Surrender Charge)</td></tr>
<tr><td>Ongoing Fees and Expenses
(annual charges)</td><td>The table below describes the fees and expenses that you may pay each year, depending on the options you choose. Please refer to your contract specifications page for information about the specific fees you will pay each year based on the options you have elected.

<table>
<tr><th>ANNUAL FEE</th><th>MIN.</th><th>MAX.</th></tr>
<tr><td>1. Base contract (varies by contract class)</td><td>1.15%[1]</td><td>1.55%[1]</td></tr>
<tr><td>2. Investment options (Portfolio Company fees and expenses)</td><td>0.35%[2]</td><td>2.71%[2]</td></tr>
<tr><td>3.</td><td>0.15%[3]</td><td>5.05%[3]</td></tr>
</table>
</td><td>Fee Table and Expense Examples

Charges</td></tr>
</table>

	Optional benefits (if elected)		

[1] As a percentage of separate account value.
[2] As a percentage of portfolio company assets.
[3] As a percentage of contract value or benefit base depending on the optional benefits selected.

Because your contract is customizable, the choices you make affect how much you will pay. To help you understand the cost of owning your contract, the following table shows the lowest and highest cost you could pay *each year*. This estimate assumes that you do not take withdrawals from the contract, **which could add surrender charges that substantially increase costs**.

LOWEST ANNUAL COST ESTIMATE: $1,518	**HIGHEST ANNUAL COST ESTIMATE: $9,134**
Assumes: • Investment of $100,000 • 5% annual appreciation • Least expensive combination of contract classes and portfolio company fees and expenses • No optional benefits • No sales charges • No additional contributions, transfers, or withdrawals	Assumes: • Investment of $100,000 • 5% annual appreciation • Most expensive combination of classes, optional benefits, and portfolio company fees and expenses • No sales charges • No additional contributions, transfers, or withdrawals

RISKS		**LOCATION IN PROSPECTUS**
Risk of Loss	You can lose money by investing in this contract, including loss of principal.	**Principal Risks**
Not a Short-Term Investment	This contract is not designed for short-term investing and is not appropriate	**Principal Risks**

	for an investor who needs ready access to cash. Surrender charges apply for up to 9 years following your last premium payment. They will reduce the value of your contract if you withdraw money during that time. The benefits of tax deferral and living benefit protections also mean the contract is more beneficial to investors with a long time horizon.	
Risks Associated with Investment Options	• An investment in this contract is subject to the risk of poor investment performance of the investment options you choose. • Each investment option has its own unique risks. • You should review the prospectuses for the available portfolio companies before making an investment decision.	**Principal Risks**
Insurance Company Risks	Any obligations, guarantees, and benefits of the contract are subject to the claims-paying ability of XYZ. If XYZ experiences financial distress, it may not be able to meet its obligations to you. More information about XYZ, including its financial strength ratings, is available upon request from XYZ Separate Account A.	**Principal Risks**
RESTRICTIONS		**LOCATION IN PROSPECTUS**
Investment Options	• There is a $10 charge for each transfer when you transfer money between investment options in excess of 12 times a year. • XYZ reserves the right to remove or substitute portfolio companies as investment options that are available under the contract.	**Principal Risks**
Optional Benefits	• Many optional benefits limit or restrict the investment options you may select under the contract. We may change these restrictions in the	**Other Benefits Available Under the Contract**

	future. • You are required to have a certain contract value for some optional benefits. If withdrawals reduce your contract value below this value, your optional benefits may be reduced or terminated. • We may stop offering an optional benefit at any time.	
TAXES		**LOCATION IN PROSPECTUS**
Tax Implications	• Consult with a tax professional to determine the tax implications of an investment in and payments received under this contract. • If you purchase the contract through a tax-qualified plan or individual retirement account (IRA), you do not get any additional tax deferral. • Earnings on your contract are taxed at ordinary income tax rates when you withdraw them, and you may have to pay a penalty if you take a withdrawal before age 59 ½.	**Taxes**
CONFLICTS OF INTEREST		**LOCATION IN PROSPECTUS**
Investment Professional Compensation	Your investment professional may receive compensation for selling this contract to you, both in the form of commissions and because XYZ may share the revenue it earns on this contract with the professional's firm. This conflict of interest may influence your investment professional to recommend this contract over another investment.	**Other Information (Distribution)**
Exchanges	Some investment professionals may have a financial incentive to offer you a new contract in place of the one you own. You should only exchange your contract if you determine, after comparing the features, fees, and risks of both contracts, that it is better for you to purchase the new contract rather than continue to own your existing contract.	**Other Information (Contract Provisions and Limitations)**

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Appendix: Portfolio Companies Available Under the Contract

The following is a list of portfolio companies currently available under the contract, which is subject to change, as discussed in the prospectus for the contract. Before you invest, you should review the prospectuses for the portfolio companies. These prospectuses contain more information about the portfolio companies and their risks and may be amended from time to time. You can find the prospectuses and other information about the portfolio companies online at *XYZInsuranceCo.com/VAdocuments.* You can also request this information at no cost by calling 888–555–1234 or by sending an email request to *email@XYZInsuranceCo.com.*

The performance information below reflects fees and expenses of the portfolio companies, but does not reflect the other fees and expenses that your contract may charge. Performance would be lower if these charges were included. Each portfolio company's past performance is not necessarily an indication of future performance.

Investment type	[Portfolio company and *adviser/subadviser*]	Expense ratio (expenses/ average assets) (%)	Average annual total returns *(as of 12/31/2017)*		
			1 year (%)	5 year (%)	10 year (%)
Allocation	XYZ Aggressive Allocation Portfolio	0.97	17.49	11.68	5.87
Allocation	XYZ Balanced Portfolio	0.81	14.80	10.06	5.89
Allocation	XYZ Conservative Allocation Portfolio	0.97	8.06	6.25	5.36
Allocation	XYZ Moderate Allocation Portfolio	0.97	11.77	8.28	5.73
Allocation	XYZ Target Date 2020 Portfolio	1.03	11.69	5.52	.....
Allocation	XYZ Target Date 2030 Portfolio	1.03	13.14	6.14	.....
Allocation	XYZ Target Date 2040 Portfolio	1.02	14.69	6.96	.....
Allocation	XYZ Target Date 2050 Portfolio	1.02	18.91	9.10	.....
Allocation	XYZ Target Date 2060 Portfolio	1.02	24.09	.....	.....
Allocation	XYZ Target Date Income Portfolio	1.01	4.02	5.88	.....
Alternative	Long/Short Equity Portfolio *(Subadviser: 123 Asset Management).*	2.53	10.93	.....	.....
Alternative	XYZ Alternative Growth Portfolio	2.71	1.75	3.81	1.75
Alternative	XYZ Multimanager Alternative Portfolio *(Subadvisers: 123 Asset Management; 456 Asset Management; 789 Advisers*).	2.03	2.11	.....	.....
Global Bond	QRS Global Bond Portfolio *(Subadviser: 456 Asset Management).*	1.31	.....	.....	.....
Global Bond	XYZ Unconstrained Bond Portfolio	1.27	1.81	0.62	2.91
Global Equity	ABCD Total Return Portfolio	1.05	6.02	0.43	.....
Global Equity	QRS Emerging Market Debt Portfolio *(Subadviser: 456 Asset Management).*	1.31	12.48	3.58	.....
Global Equity	QRS Emerging Markets Portfolio *(Subadviser: 456 Asset Management).*	1.29	37.87	7.24	.....
Global Equity	QRS Global Growth Portfolio *(Subadviser: 456 Asset Management).*	1.22	31.77	11.56	6.30
Money Market	XYZ Government Money Market Portfolio	0.37	0.31	0.06	0.19
Sector	XYZ Capital Appreciation Portfolio *(Subadviser: 789 Advisers).*	0.66	31.69	16.75	8.33
Sector	XYZ Consumer Products Portfolio *(Subadviser: 789 Advisers).*	0.76	8.95	11.10	8.86
Sector	XYZ Financial Services Portfolio *(Subadviser: 789 Advisers).*	0.76	23.53	6.75	7.73
Sector	XYZ Healthcare Portfolio *(Subadviser: 789 Advisers)*	0.78	22.04	19.28	11.87
Sector	XYZ Homebuilders Portfolio *(Subadviser: 789 Advisers).*	0.76	.....	.....	.....
Sector	XYZ Real Estate Portfolio *(Subadviser: 789 Advisers).*	0.75	14.60	.....	.....
Sector	XYZ Technology Portfolio *(Subadviser: 789 Advisers).*	0.84	50.16	23.51	.....
Sector	XYZ Transportation & Infrastructure Portfolio *(Subadviser: 789 Advisers).*	0.75	18.24	.....	.....
Sector	XYZ Utilities Portfolio *(Subadviser: 789 Advisers)*	0.76	7.34	10.59	.....
U.S. Bond	ABCD Aggregate Bond Index Portfolio	0.41	3.20	2.35	3.83
U.S. Bond	ABCD High Yield Bond Portfolio	0.97	6.18	4.70	7.25
U.S. Bond	ABCD Total Return Bond Portfolio	1.14	11.17	9.72	.....
U.S. Bond	ABCD U.S. Treasury Portfolio	0.38	0.76	0.22	.....
U.S. Bond	Intermediate-Term Bond Portfolio	0.41	4.14	2.81	4.58
U.S. Bond	Long-Term Bond Portfolio	0.41	9.73	4.78	.....
U.S. Bond	Short-Term Bond Portfolio	0.39	2.85	2.44	.....
U.S. Equity	ABCD Contrarian Portfolio	0.91	15.20	12.82	.....
U.S. Equity	ABCD Diversified Equity Portfolio	0.87	22.70	15.05	8.23
U.S. Equity	ABCD Equity and Income Portfolio	0.79	19.66	.....	.....
U.S. Equity	ABCD Focused Portfolio	0.76	26.43	13.02	.....
U.S. Equity	ABCD Managed-Risk Equity Portfolio	1.02	14.11	.....	.....
U.S. Equity	ABCD Russell 2000 Index Portfolio	0.37	14.61	14.07	.....
U.S. Equity	ABCD S&P 500 Index Portfolio	0.35	21.26	15.23	8.00
U.S. Equity	ABCD U.S. Large-Cap Portfolio	0.81	23.54	11.66	6.21
U.S. Equity	ABCD U.S. Micro-Cap Growth Portfolio	0.88	28.91	.....	.....

Investment type	[Portfolio company and *adviser/subadviser*]	Expense ratio (expenses/ average assets) (%)	Average annual total returns *(as of 12/31/2017)*		
			1 year (%)	5 year (%)	10 year (%)
U.S. Equity	ABCD U.S. Mid-Cap Portfolio	0.81	12.14	10.19	7.91
U.S. Equity	ABCD U.S. Small-Cap Growth Portfolio	0.81	13.64	13.90	18.02

The table below identifies the portfolio companies available for use with the **Annual Step-Up Death Benefit, the Principal Protection Rider, and the Lifetime Minimum Income Rider.**

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Portfolio Company	Annual Step-Up Death Benefit	Principal Protection Rider	Lifetime Minimum Income Rider
ABCD Aggregate Bond Index Portfolio	☑	☑	☑
ABCD Contrarian Portfolio			
ABCD Diversified Equity Portfolio	☑	☑	
ABCD Equity and Income Portfolio	☑		
ABCD Focused Portfolio			
ABCD High Yield Bond Portfolio	☑	☑	☑
ABCD Managed-Risk Equity Portfolio	☑	☑	☑
ABCD Russell 2000 Index Portfolio			
ABCD S&P 500 Index Portfolio	☑	☑	
ABCD Total Return Bond Portfolio	☑	☑	☑
ABCD Total Return Portfolio			
ABCD U.S. Large-Cap Portfolio	☑		
ABCD U.S. Micro-Cap Growth Portfolio			
ABCD U.S. Mid-Cap Portfolio			
ABCD U.S. Small-Cap Growth Portfolio			
ABCD U.S. Treasury Portfolio	☑	☑	☑
Intermediate-Term Bond Portfolio	☑	☑	☑
Long/Short Equity Portfolio			
Long-Term Bond Portfolio	☑	☑	☑
QRS Emerging Market Debt Portfolio			
QRS Emerging Markets Portfolio			
QRS Global Bond Portfolio	☑	☑	☑
QRS Global Growth Portfolio			
Short-Term Bond Portfolio	☑	☑	☑
XYZ Aggressive Allocation Portfolio	☑	☑	☑
XYZ Alternative Growth Portfolio			
XYZ Balanced Portfolio	☑	☑	☑
XYZ Capital Appreciation Portfolio	☑		
XYZ Conservative Allocation Portfolio	☑	☑	☑
XYZ Consumer Products Portfolio			
XYZ Financial Services Portfolio			
XYZ Government Money Market Portfolio	☑	☑	☑
XYZ Healthcare Portfolio			
XYZ Homebuilders Portfolio			
XYZ Moderate Allocation Portfolio	☑	☑	☑
XYZ Multimanager Alternative Portfolio			
XYZ Real Estate Portfolio			
XYZ Target Date 2020 Portfolio	☑	☑	☑

Portfolio Company	Annual Step-Up Death Benefit	Principal Protection Rider	Lifetime Minimum Income Rider
XYZ Target Date 2030 Portfolio	☑	☑	☑
XYZ Target Date 2040 Portfolio	☑	☑	☑
XYZ Target Date 2050 Portfolio	☑	☑	☑
XYZ Target Date 2060 Portfolio	☑	☑	☑
XYZ Target Date Income Portfolio	☑	☑	☑
XYZ Technology Portfolio			
XYZ Transportation & Infrastructure Portfolio			
XYZ Unconstrained Bond Portfolio	☑	☑	☑
XYZ Utilities Portfolio	☑	☑	
Fixed Account	☑	☑	☑

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The table below identifies which portfolio companies are available for use with the **Lifetime Minimum Payout Rider.**

Investment type:	Limitation *
Alternative, Global Equity.	Up to 20% of your contract value.
U.S. Equity, Sector, Global Bond.	Up to 50% of your contract value.
Allocation, U.S. Bond, and Money Market.	No Limits.
Fixed Account	Unavailable.

* You must enroll in automatic quarterly rebalancing.

Appendix C

[GRAPHIC: ''VARIABLE ANNUITY SUMMARY PROSPECTUS: Tell us what you think'']

We require insurance companies to give you—in one long document called a *prospectus*—a lot of information when you purchase a variable annuity. We are now proposing a different approach. Under the proposed approach, insurance companies may instead choose to give you a short summary document. The longer document would still be available online (and you could receive a paper copy of it at no charge if you ask for it). We call the short summary document a *summary prospectus.*

We would like to know what you think about the summary prospectus. Please take a few minutes to review this sample summary prospectus, which is available at *https://www.sec.gov/rules/proposed/2018/33-10569-appendix-a.pdf* and answer any or all of these questions. Thank you for your feedback!

Questions

1. Have you ever considered purchasing a variable annuity? [ ] Yes [ ] No [ ] Don't know

2. The sample summary prospectus is divided into eight sections. Please indicate which two sections you found to be the **most** useful, and which two sections you found to be the **least** useful, in describing the variable annuity.

Name of the section	Most useful	Least useful	Why?
a. Overview of the Variable Annuity Contract.	[ ]	[ ]	
b. Important Information You Should Consider About the Contract.	[ ]	[ ]	
c. Standard Death Benefit	[ ]	[ ]	
d. Other Benefits Available Under the Contract.	[ ]	[ ]	
e. Buying Your Contract	[ ]	[ ]	
f. Surrendering Your Contract or Making Withdrawals: Accessing the Money in Your Contract.	[ ]	[ ]	
g. Additional Information About Fees.	[ ]	[ ]	
h. Portfolio Companies Available Under Your Contract.	[ ]	[ ]	

3. The sample summary prospectus includes a section named ''Overview of the Variable Annuity Contract.'' Does that section provide clear information? [ ] Yes [ ] No

If no, what other information would make this clearer?

4. The section named ''Important Information You Should Consider About the Contract'' includes a table. Do you think the table is clear? [ ] Yes [ ] No

If no, what other information would make this clearer? Would you prefer to see the information in a different format (other than a table)?

5. The sample summary prospectus describes what you would pay for the variable annuity, including upfront fees and future fees. Was this description clear? [ ] Yes [ ] No

If no, what other information would make this clearer?

6. Variable annuities may offer optional insurance benefits that you can purchase for extra fees. The sample summary prospectus describes these optional benefits.

A. Does the sample summary prospectus describe these optional benefits clearly? [ ] Yes [ ] No

If no, what other information would make this clearer?

B. Does the sample summary prospectus describe the extra fees associated with these optional benefits clearly? [ ] Yes [ ] No

If no, how could we make this clearer?

7. When you purchase a variable annuity, you decide how to invest your money by selecting one or more available mutual funds. The sample summary prospectus includes a table of mutual funds that are available as investment options. Does this table provide the information that you would want to consider when choosing mutual funds? [ ] Yes [ ] No

If no, what other information would be helpful to include?

8. After reading the sample summary prospectus, how likely would you be to request the full prospectus for more information on the following topics?

	Very likely	Likely	Neither likely nor unlikely	Unlikely	Very unlikely
Investment options (mutual funds) offered under the variable annuity	[ ]	[ ]	[ ]	[ ]	[ ]
Standard death benefit	[ ]	[ ]	[ ]	[ ]	[ ]
Optional insurance features (also called optional benefits or riders)	[ ]	[ ]	[ ]	[ ]	[ ]
Fees (how much the variable annuity costs)	[ ]	[ ]	[ ]	[ ]	[ ]
Mechanics of how a variable annuity works (how to purchase, accessing money, annuitization, etc.)	[ ]	[ ]	[ ]	[ ]	[ ]

9. Is the length of the document: [ ] Too short [ ] Too long [ ] About right

If the length is not appropriate, why not?

10. How would you prefer to receive/read a document like the sample summary prospectus?

[ ] On paper
[ ] In an email
[ ] On a website
[ ] A combination of paper and digital
[ ] Other (explain)

11. Do you have any additional suggestions for improving the summary prospectus? Is there anything else you would like to tell us about your experience with variable annuities?

If you are interested in background information on the proposed variable annuity summary prospectus, or want to provide feedback on additional questions, visit *https://www.sec.gov/news/press-release/2018-246.*

* * * * *

How To Provide Feedback

Your Name: _____

email: _____

(your email address will not be published on the website)

You can send us feedback in the following ways (include the file number S7–23–18 in your response):

MAIL

Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

EMAIL

rule-comments@sec.gov.

SEC WEBSITE

www.sec.gov/rules/proposed.shtml.

We will post your feedback on our website. Your submission will be posted without change; we do not redact or edit personal identifying information from submissions. You should only make submissions that you wish to make available publicly. Please provide your comments by February 15, 2019.

Thank you!

[QR Code]

[FR Doc. 2018–24376 Filed 11–29–18; 8:45 am]

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Part III

Commodity Futures Trading Commission

17 CFR Parts 9, 36, et al.
Swap Execution Facilities and Trade Execution Requirement; Proposed Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 9, 36, 37, 38, 39, and 43

RIN 3038–AE25

Swap Execution Facilities and Trade Execution Requirement

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rule.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is proposing amendments to regulations relating to the trade execution requirement under the Commodity Exchange Act (''CEA'' or ''Act'') and amendments to existing regulations relating to swap execution facilities (''SEFs'') and designated contract markets (''DCMs''). Among other amendments, the proposed rules apply the SEF registration requirement to certain swaps broking entities and aggregators of single-dealer platforms; broaden the scope of the trade execution requirement to include all swaps subject to the clearing requirement under the Act that a SEF or a DCM lists for trading; allow SEFs to offer flexible execution methods for all swaps that they list for trading; amend straight-through processing requirements; and amend the block trade definition. The proposed rules, which also include non-substantive amendments and various conforming changes to other Commission regulations, reflect the Commission's enhanced knowledge and experience with swaps trading characteristics and would further the Dodd-Frank Act's statutory goals for SEFs, *i.e.,* promote more SEF trading and pre-trade price transparency in the swaps market. Further, the proposed rules are intended to strengthen the existing swaps regulatory framework by reducing unnecessary complexity, costs, and other burdens that impede SEF development, innovation, and growth.

DATES: Comments must be received on or before February 13, 2019.

ADDRESSES: You may submit comments, identified by ''Swap Execution Facilities and Trade Execution Requirement'' and RIN 3038–AE25, by any of the following methods:

- *CFTC Comments Portal: https://comments.cftc.gov.* Select the ''Submit Comments'' link for this rulemaking and follow the instructions on the Public Comment Form.
- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. To avoid possible delays with mail or in-person deliveries, submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, be accompanied by an English translation. Comments will be posted as received to *https://comments.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (''FOIA''), a petition for confidential treatment of the exempt information may be submitted according to the procedures established under § 145.9 of the Commission's regulations.[1]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all submissions from *https://comments.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the FOIA.

FOR FURTHER INFORMATION CONTACT: Nhan Nguyen, Special Counsel, (202) 418–5932, *nnguyen@cftc.gov*; Roger Smith, Special Counsel, (202) 418–5344, *rsmith@cftc.gov*; or David Van Wagner, Chief Counsel, (202) 418–5481, *dvanwagner@cftc.gov*, Division of Market Oversight; Michael Penick, Senior Economist, (202) 418–5279, *mpenick@cftc.gov*, Office of the Chief Economist, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Table of Contents

[1] 17 CFR 145.9.

I. Background and Introduction

A. Statutory Background: The Dodd-Frank Act

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') [2] amended the Commodity Exchange Act (''CEA'' or ''Act'') [3] to establish a comprehensive new swaps regulatory framework that includes the registration and the oversight of swap execution facilities (''SEFs'').[4] As amended, CEA section 1a(50) defines a SEF as a trading system or platform that allows multiple participants to execute or trade swaps with multiple participants through any means of interstate commerce.[5] CEA section 5h(a)(1) establishes the SEF registration requirement, which requires an entity to register as a SEF prior to operating a facility for the trading or processing of swaps.[6] CEA section 5h(f) requires registered SEFs to comply with fifteen core principles.[7] Further, the trade execution requirement in CEA section 2(h)(8) provides that swap transactions that are subject to the clearing requirement in CEA section 2(h)(1)(A) [8] must be executed on a DCM, SEF, or a SEF that is exempt from registration pursuant to CEA section 5h(g) (''Exempt SEF''),[9] unless no DCM or SEF [10] ''makes the swap available to trade'' or the related transaction is subject to a clearing requirement exception pursuant to CEA section 2(h)(7).

B. Regulatory History: The Part 37 Rules

Pursuant to its discretionary rulemaking authority in CEA sections 5h(f)(1) and 8a(5), the Commission identified the relevant areas in which the statutory SEF framework would benefit from additional rules or regulations.[11] Accordingly, the Commission adopted the part 37 rules to implement a regulatory framework for SEFs and for the trading and execution of swaps [12] on such facilities.[13] Among other provisions, subpart A to part 37 applies the SEF registration requirement to facilities that meet the statutory SEF definition; specifies a minimum trading functionality that a SEF must offer to participants for all listed swaps, *i.e.,* an ''Order Book''; [14] and specifies the process for a SEF to make a swap ''available to trade'' (''MAT''), *i.e.,* required to be executed on a SEF or DCM pursuant to the trade execution requirement.[15] Subpart A also defines swaps subject to the trade execution requirement as ''Required Transactions'' and requires a SEF to offer either (i) an Order Book or (ii) a request-for-quote system that sends a request-for-quote to no less than three unaffiliated market participants and operates in conjunction with an Order Book (''RFQ System'') for the execution of these transactions.[16] Swaps that are not subject to the trade execution requirement are defined as ''Permitted Transactions,'' for which a SEF may offer any execution method and for which market participants may voluntarily trade on a SEF.[17] The Commission's regulations specify additional requirements that correspond to the use of an Order Book or RFQ System to execute Required Transactions.[18] Subparts B through O

[2] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, tit. VII, 124 Stat. 1376 (2010) (codified as amended in various sections of 7 U.S.C.), *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2013-12242a.pdf.*

[3] 7 U.S.C. 1 *et seq.*

[4] 7 U.S.C. 7b–3 (adding a new CEA section 5h to establish a registration requirement and regulatory regime for SEFs).

[5] As amended by the Dodd-Frank Act, CEA section 1a(50) specifically defines a ''swap execution facility'' as a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that facilitates the execution of swaps between persons; and is not a designated contract market. 7 U.S.C. 1a(50).

[6] CEA section 5h(a)(1) states that no person may operate a facility for the trading or processing of swaps unless the facility is registered as a SEF or as a DCM under section 5h. 7 U.S.C. 7b–3(a)(1).

[7] 7 U.S.C. 7b–3(f).

[8] Section 723(a)(3) of the Dodd-Frank Act added a new CEA section 2(h) to establish the clearing requirement for swaps. 7 U.S.C. 2(h). CEA section 2(h)(1)(A) provides that it is unlawful for any person to engage in a swap unless that person submits such swap for clearing to a derivatives clearing organization that is registered under the Act or a derivatives clearing organization that is exempt from registration under this Act if the swap is required to be cleared. 7 U.S.C. 2(h)(1)(A). CEA section 2(h)(2) specifies the process for the Commission to review and determine whether a swap, group, category, type or class of swap should be subject to the clearing requirement. 7 U.S.C. 2(h)(2). The Commission further implemented the clearing determination process under part 50, which also specifies the swaps that are currently subject to the requirement. 17 CFR part 50.

[9] The Commission notes that CEA section 2(h)(8)(A)(ii) contains a typographical error that specifies CEA section 5h(f), rather than CEA section 5h(g), as the provision that allows the Commission to exempt a SEF from registration. Where appropriate, the Commission corrects this reference in the discussion herein.

[10] CEA sections 2(h)(8)(A)(i)–(ii) provide that with respect to transactions involving swaps subject to the clearing requirement, counterparties shall execute the transaction on a board of trade designated as a contract market under section 5; or execute the transaction on a swap execution facility registered under 5h or a swap execution facility that is exempt from registration under section 5h(g) of the Act. Given this reference in CEA section 2(h)(8)(A)(ii), the Commission accordingly interprets ''swap execution facility'' in CEA section 2(h)(8)(B) to include a swap execution facility that is exempt from registration pursuant to CEA section 5h(g).

[11] To implement the SEF core principles, Core Principle 1 provides that the Commission may, in its discretion, determine by rule or regulation the manner in which SEFs comply with the core principles. 7 U.S.C. 7b–3(f)(1)(B).

[12] The Commission notes that, unless otherwise stated, the terms ''trades,'' ''transactions,'' and ''swaps'' are used interchangeably in the discussion herein.

[13] Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476 (Jun. 4, 2013) (''SEF Core Principles Final Rule''); Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 FR 33606 (Jun. 4, 2013) (''MAT Final Rule'').

[14] 17 CFR 37.3(a)(2). An Order Book is defined as (i) an ''electronic trading facility,'' as that term is defined in CEA section 1a(16); (ii) a ''trading facility,'' as that term is defined in CEA section 1a(51); or (iii) a trading system or platform in which all market participants have the ability to enter multiple bids and offers, observe or receive bids and offers entered by other market participants, and transact on such bids and offers. 17 CFR 37.3(a)(3).

[15] 17 CFR 37.10. Given that swaps subject to the trade execution requirement may also be executed on a DCM, the Commission adopted the same process for a registered DCM to make a swap ''available to trade'' in part 38. 17 CFR 38.12. Accordingly, discussion in this notice with respect to the application of the trade execution requirement or the MAT process to SEFs should be interpreted to also apply to DCMs.

[16] 17 CFR 37.9(a). With the exception of block trades, as defined under § 43.2, Required Transactions must be executed on a SEF's Order Book or RFQ System. 17 CFR 37.9(a)(2)(i).

[17] 17 CFR 37.9(c).

[18] *See infra* notes 85 (15-second time delay for the entry of pre-arranged or pre-negotiated transactions

Continued

set forth regulations that further implement each of the fifteen SEF core principles in CEA section 5h(f). Appendix B provides further guidance and acceptable practices associated with the SEF core principles.[19]

These rules reflect a more limited and prescriptive regulatory approach to implementing the statutory provisions and promoting the statutory goals of section 5h of the Act, *i.e.,* promoting the trading of swaps on SEFs and promoting pre-trade price transparency in the swaps market.[20] In particular, the Commission focused on achieving pre-trade price transparency by mandating a minimum trading functionality requirement for all swaps listed on a SEF and two specific, limited execution methods for Required Transactions. The Commission adopted the Order Book requirement both as a minimum trading functionality for SEF registration and as an execution method for Required Transactions.[21] To provide some execution flexibility for Required Transactions,[22] the Commission also allowed SEFs to offer an RFQ System, as described above.[23] To further the goal of pre-trade price transparency with respect to trading via an RFQ System, however, the Commission required that an RFQ must be submitted to three unaffiliated market participants and that a requester receive applicable firm bids and offers from the Order Book in addition to any RFQ responses.[24] Recognizing that only certain swaps are well-suited to be traded and executed through an Order Book or RFQ System, the Commission interpreted the trade execution requirement in CEA section 2(h)(8), in particular the phrase ''makes the swap available to trade,'' to have a scope of application that is consistent with the use of these methods. Accordingly, the Commission interpreted the phrase, which the Act does not otherwise define, to implement a voluntary MAT process for determining the swaps that must be executed on a SEF; this process primarily focuses on whether a swap has ''sufficient trading liquidity'' to be executed via an Order Book or RFQ System.[25]

The Commission noted that the prescribed trading methods, such as the Order Book, are consistent with the SEF definition in CEA section 1a(50) of the Act as they allow multiple market participants to post bids or offers and accept bids and offers that are transparent to multiple market participants.[26] The Commission stated that the RFQ System is consistent with the SEF definition because it requires market participants to be able to access multiple market participants, but not necessarily the entire market.[27] Further, in response to commenters' feedback that the Commission's approach is inconsistent with the Act, the Commission stated that the limited execution methods for Required Transactions are consistent with the phrase ''through any means of interstate commerce'' in the SEF definition because a SEF ''may for purposes of execution and communication use 'any means of interstate commerce,' including, but not limited to, the mail, internet, email, and telephone, provided that the chosen execution method satisfies the requirements . . . for Order Books or . . . for [RFQ Systems].'' [28] The Commission also noted that a SEF may provide any method of execution for Permitted Transactions as further justification for its approach under the Act.[29]

In adopting a regulatory framework that would effectuate the statutory SEF provisions and goals, the Commission relied in part upon its experience with the futures market, including DCM oversight and DCM core principles implementation.[30] While the Commission did provide flexibility for certain swap requirements relative to the DCM rules,[31] the Commission sought, where possible, to harmonize SEF regulations with DCM regulations based on the similarities in the statutory core principles between SEFs and DCMs, and the ability of both types of entities to offer swaps for trading and execution.[32]

1. Challenges of Existing Regulatory Approach

The Commission's existing regulatory approach has transitioned some degree of swaps trading and market participants to SEFs, but has also created several challenges for swaps trading on SEFs, as described below.

a. Lack of MAT Determinations

The voluntary, SEF-driven MAT determination process has resulted in a limited set of products that are required to be executed on SEFs. Since 2014, SEFs have submitted a limited number of swaps, relative to the scope of swaps subject to the clearing requirement, as ''available to trade'' to the Commission.[33] The swaps that SEFs have submitted—''on-the-run'' index credit default swaps (''CDS'') and fixed-to-floating interest rate swaps (''IRS'') in benchmark tenors—are generally the most standardized and liquid swaps contracts.[34] Beyond this initial set of MAT determinations, the Commission has not received any filings for additional swaps despite the subsequent expansion of the clearing requirement.[35]

to an Order Book) and 242 (additional requirements for RFQ Systems) and accompanying discussion.

[19] 17 CFR part 37 app. B.

[20] 7 U.S.C. 7b–3(e) (specifying the rule of construction for CEA section 5h).

[21] 17 CFR 37.3(a)(2) (minimum trading functionality requirement); 17 CFR 37.9(a)(2)(i)(A) (Required Transactions requirement).

[22] SEF Core Principles Final Rule at 33564–65.

[23] 17 CFR 37.9(a)(3).

[24] SEF Core Principles Final Rule at 33497, 33499.

[25] MAT Final Rule at 33609 (noting that a MAT determination may focus on whether a swap is sufficiently liquid to be subject to the trade execution requirement).

[26] SEF Core Principles Final Rule at 33501.

[27] *Id.* at 33496.

[28] *Id.* at 33501.

[29] *Id.* at 33484.

[30] *Id.* at 33477.

[31] For example, the RFQ System requirement for Required Transactions on SEFs is less restrictive than the RFQ-to-all approach that is used by some DCMs. The Commission decided that the former approach was more appropriate for SEFs due to the less standardized nature of the swaps market. SEF Core Principles Final Rule at 33497 n.270.

[32] *Id.* at 33478, 33553 (noting the similarities between the statutory requirements for SEFs and DCMs).

[33] For a list of MAT determinations that have been submitted to the Commission, *see* CFTC, Industry Oversight, Industry Filings, Swaps Made Available to Trade Determination, *https://sirt.cftc.gov/sirt/sirt.aspx?Topic=%20SwapsMadeAvailableToTradeDetermination.* For a current list of swaps that have been made ''available to trade'' and are subject to the trade execution requirement, *see* CFTC, Industry Oversight, Industry Filings, Swaps Made Available to Trade, *https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/file/swapsmadeavailablechart.pdf.* For a list of swaps subject to the clearing requirement, *see* 17 CFR 50.4; *see also* CFTC, Industry Oversight, Industry Filings, Swaps Subject to Clearing Requirement, *https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/clearingrequirementcharts9-16.pdf.*

[34] *See, e.g.,* Bloomberg SEF, Submission No. 2013–R–9, Bloomberg SEF LLC—Made Available to Trade (''MAT'') Submission of Certain Credit Default Swaps (''CDS'') and Interest Rate Swaps (''IRS'') pursuant to [CFTC] Regulation 40.6 at 3 (Dec. 5, 2013) (stating that its MAT determination consists of only the most standardized and liquid swaps, which represent a majority of market traded volume), *https://www.cftc.gov/sites/default/files/stellent/groups/public/@otherif/documents/ifdocs/bsefmatdetermltr120513.pdf*; ''TW SEF,TW SEF LLC—Clarification and Amendment to Self-Certification for Swaps to be Made Available to Trade'' at 8 (Nov. 29, 2013) (stating that its MAT determinations with respect to IRS represent the ''standard benchmarks, which are the most standard, liquid, and transparent of the IRS market, and trade with market-accepted, standard, plain vanilla dates), *https://www.cftc.gov/sites/default/files/stellent/groups/public/@otherif/documents/ifdocs/twsefamendmatltr112913.pdf.*

[35] In 2016, the Commission expanded the clearing requirement for IRS in the four classes (fixed-to-floating swaps, basis swaps, forward rate agreements, overnight index swaps) to additional currencies. CFTC, Press Releases, Release No. 7457–16, CFTC Expands Interest Rate Swap Clearing Requirement, *https://www.cftc.gov/PressRoom/*

The lack of additional determinations is partly attributable to market participants' concerns over the Commission's required methods of execution for Required Transactions.[36] Based on those concerns, SEFs have not pursued making additional swaps subject to the trade execution requirement. This lack of additional submissions has effectively limited the number of swaps that must be executed on SEFs which has limited the amount of trading and liquidity formation occurring on SEFs.

b. Swaps Market Characteristics

Over the course of the part 37 implementation process, the Commission has gained greater familiarity with the swaps markets, in particular the nature of the products and how market participants trade and execute those products. Based on what it has learned, the Commission believes that the existing regulatory framework has contributed to the limited amount of swaps that are subject to the trade execution requirement, and therefore, the limited scope of swaps trading that occurs on SEFs.

Swaps consist of many highly variable terms and conditions beyond price and size that can be negotiated and tailored to suit a market participant's specific and unique needs. While some swaps are relatively standardized, others are customized and consist of innumerable permutations, making them generally less standardized and more bespoke than futures contracts. Given the ability to customize swaps to address specific and often large risks that cannot be offset through more standardized instruments, the swaps market is generally comprised of a relatively concentrated number of sophisticated market participants in contrast to the futures market. In this regard, the Commission notes that CEA section 2(e) limits swaps trading on SEFs to ''eligible contract participants'' (''ECPs''), as defined by CEA section 1a(18).[37] These swaps market characteristics contribute to varying liquidity profiles for swaps that range from relatively illiquid to episodic to relatively liquid.

Historically, these particular characteristics have contributed to the use of a variety of execution methods—electronic, voice-based, or a hybrid of both (''voice-assisted'')—by market participants. Utilizing one execution method or another depends on considerations such as the type of swap, transaction size, complexity, the swap's liquidity at a given time, the number of potential liquidity providers, and the associated desire to minimize potential information leakage and front-running risks. For swaps with standard tenors that are relatively liquid, market participants may utilize a method of trading and execution, such as an electronic order book platform, that disseminates trading interests to all other market participants on the platform. Trading and execution in less standardized products, however, generally occur on systems or platforms that are more discreet in disseminating trading interests, such as auction platforms. The Commission's existing approach to required execution methods, as described above, creates a tension with swaps market characteristics that necessitate flexible execution methods. This tension has otherwise hindered the expansion of the trade execution requirement.

c. Operational Complexities and Costs

The Commission has learned that its approach to other part 37 rules may have imposed certain burdens on SEFs, including operating complexities and costs that have impeded development, innovation, and growth in the swaps market. SEFs have indicated that they are unable to comply with some of these requirements because they are impractical or unachievable due to technology limitations or incompatible with existing market practices. For example, as discussed further below, SEFs have informed the Commission that the confirmation requirement for uncleared swaps under § 37.6(b) and the electronic analysis capability requirements with respect to audit trail data for voice orders under § 37.205 have been operationally difficult and impractical to implement.[38] Even where SEFs have been able to comply with some of the requirements, they have asserted that the compliance costs are high and compliance is unnecessary in helping them satisfy their self-regulatory obligations and the SEF core principles. For example, SEFs have noted the high costs of the financial resources requirements imposed by the Core Principle 13 regulations.[39] SEFs and market participants have attributed the limited development, innovation, and growth of SEFs to these ongoing burdens.

As a result of these burdens, the Commission believes that a significant amount of swaps liquidity formation activity occurs away from registered SEFs in a manner similar to the pre-Dodd-Frank Act swaps trading environment. These examples include (i) entities that aggregate single-dealer platforms to allow market participants to obtain indicative or firm pricing and execute swaps with multiple single-dealer liquidity providers away from SEFs; and (ii) swaps broking entities, including interdealer brokers[40] that facilitate swaps trading between multiple market participants through non-registered voice or electronic platforms. While some of these interdealer brokers are affiliated with registered SEFs, the Commission understands that they have nevertheless maintained a bifurcated operating structure under which a SEF primarily executes and processes orders that have already been negotiated or arranged on an affiliated broker platform, in effect limiting a SEF's role to a swaps transaction booking and processing engine.[41] By operating in this manner, the Commission believes that many entities have been able to avoid the burdens arising from SEF registration and compliance under part 37.

When necessary or appropriate to mitigate these burdens in the course of implementing part 37, Commission staff has issued various guidance and time-limited no-action relief to SEFs and market participants. The no-action relief has afforded additional time for compliance with certain part 37 regulations and related procedures or has provided an opportunity to

PressReleases/pr7457-16 (Sept. 28, 2016). *See also* Clearing Requirement Determination Under Section 2(h) of the Commodity Exchange Act for Interest Rate Swaps, 81 FR 71202 (Oct. 14, 2016) (''Second Clearing Determination Final Rule'').

[36] *See* CFTC Public Roundtable: The Made Available to Trade Process, 151–152, 192–193 (July 15, 2015), *https://www.cftc.gov/idc/groups/public/%40newsroom/documents/file/transcript071515.pdf* (''2015 MAT Roundtable'') (discussing the prescriptive nature of the required methods of execution and noting the relationship to the MAT determination process).

[37] 7 U.S.C. 2(e); 7 U.S.C. 1a(18).

[38] *See infra* Section IV.F.—§ 37.6—Enforceability (discussion of SEF confirmation requirements); Section VII.D.—§ 37.205—Audit Trail (discussion of SEF audit trail requirements).

[39] *See* Letter from Wholesale Markets Brokers' Association, Americas (''WMBAA''), Swap Execution Facility Regulations, Made Available to Trade Determinations, and Swap Trading Requirements at 5 (Mar. 11, 2016) (''2016 WMBAA Letter''); *see also* CFTC Letter No. 17–25, Division of Market Oversight Guidance on Calculating Projected Operating Costs By Designated Contract Markets and Swap Execution Facilities (Apr. 28, 2017) (''CFTC Letter No. 17–25'').

[40] The Commission believes that most of these swaps broking entities are currently registered with the Commission as introducing brokers (''IBs''). *See infra* note 340 and accompanying discussion.

[41] The Commission notes that these swaps broking entities and their affiliated SEFs primarily operate as part the ''dealer-to-dealer'' segment of the swaps market, which primarily facilitates swaps trading between swap dealers. *See infra* Section VII.A.1.a.(1)(i).—Eligibility and Onboarding Criteria (discussion of impartial access requirements).

determine whether a longer-term regulatory solution—such as those proposed in this notice—is warranted.[42] Where compliance could not be achieved or impractical compliance burdens arose from the existing part 37 rules, SEFs may have been impeded from pursuing beneficial market initiatives, such as developing new trading systems and protocols to attract greater swaps liquidity. The Commission believes that it is appropriate to address these issues as part of the changes to the existing regulations proposed in this notice.

C. Proposed Approach

Given the challenges described above and the Commission's enhanced knowledge and experience from implementing part 37, the Commission is proposing to strengthen its swaps trading regulatory framework, while still effectuating the statutory SEF provisions and better promoting the statutory SEF goals. The Commission's proposed approach also more appropriately accounts for swaps market characteristics and should reduce certain complexities and costs that have contributed to a significant amount of swaps liquidity formation occurring away from SEFs; limited the scope of swaps that are subject to the trade execution requirement; and impeded SEF development, innovation, and growth. In this regard, the Commission proposes a simple but comprehensive approach that provides SEFs with flexibility, where appropriate, to calibrate their trading and compliance functions based on their respective trading operations and markets. The Commission believes that this proposed approach will attract greater liquidity formation on SEFs.

First, the Commission aims to effectuate the SEF registration requirement to ensure that multiple-to-multiple *trading* of swaps occurs on a SEF by requiring that swaps broking entities and certain single-dealer aggregator platforms register as SEFs (emphasis added). In particular, consistent with the statutory SEF provisions and goals, this proposed rulemaking would apply the SEF registration requirement in CEA section 5h(a)(1) and § 37.3(a) to swaps broking entities, including interdealer brokers, that are currently registered with the Commission as IBs, and their personnel currently facilitating swaps trading away from SEFs. Based on its experience and observation of market developments since the adoption of part 37, the Commission has witnessed the various ways in which swaps broking entities, including interdealer brokers, have structured themselves to facilitate swaps trading, and therefore liquidity formation, outside of the existing SEF regulatory framework.

Second, the Commission aims to facilitate increased trading and liquidity on SEFs by proposing a revised interpretation of the trade execution requirement that is consistent with CEA section 2(h)(8). The Commission's proposed interpretation would apply the trade execution requirement to all swaps that are both subject to the clearing requirement under section 2(h)(1) of the Act and listed for trading on a SEF. As a result of this approach, the Commission would also withdraw the existing voluntary MAT process.

The proposed expansion of the trade execution requirement is expected to capture a greater number of swaps with different liquidity profiles, thereby reinforcing the need to establish a more flexible regulatory approach to swaps trading and execution that would help foster customer choice, promote competition between and innovation by SEFs, and better account for fundamental swaps market characteristics. Accordingly, the Commission also proposes to allow a SEF to offer any method of execution for all swaps trading and execution, rather than only an Order Book or RFQ System.

Rather than dictating certain execution methods for Required Transactions, the Commission's proposed flexible approach would enable SEFs to provide, and ultimately allow market participants to choose, execution methods that are appropriate for the liquidity and other characteristics of particular swaps. The Commission's approach should also promote pre-trade price transparency in the swaps market by allowing execution methods that maximize participation and concentrate liquidity during times of episodic liquidity. The Commission believes that providing flexibility in execution methods will allow the swaps market to continue to naturally evolve and allow SEFs to innovate and provide more efficient, transparent, and cost-effective means of trading and execution. The Commission also proposes to eliminate the minimum trading functionality requirement, which should reduce the costs incurred by SEFs to operate and maintain order books that have not attracted significant volumes. In lieu of specific execution method requirements, the Commission is proposing general disclosure-based trading and execution rules that would apply to any execution method offered by a SEF.

In conjunction with allowing SEFs to offer more flexible execution methods, the Commission is proposing new rules for certain SEF personnel—''SEF trading specialists''—that constitute part of a SEF's trading system or platform. The proposed rules require SEFs to adopt minimum proficiency testing and ethics training requirements to ensure that their trading specialists possess and maintain an adequate level of technical knowledge and understand their ethical responsibilities in customer trading or execution and fostering liquidity formation. The proposed rules would also require SEFs to adopt trading conduct standards and a duty of supervision. With the ability to offer more flexible execution methods for all swaps, in particular those that involve discretion by trading specialists in handling trading or execution, the Commission believes that these proposed requirements are necessary to enhance professionalism in the swaps market and to promote market integrity and fairness. Further, the proposed requirements would mandate requisite levels of knowledge and competence that are commensurate to other similar requirements established for personnel in major trading markets, such as futures and equities.[43]

The Commission is also proposing a series of amendments to additional part 37 regulations that implement the SEF core principles. These proposed amendments would allow a SEF to better tailor its compliance and regulatory oversight programs to its trading operations and markets. The Commission believes that these proposed revisions are critical to the ability of SEFs to offer the diverse types of execution methods that would be available to them under this proposal. Further, the proposed rules would streamline and refine some of the existing prescriptive requirements applicable to SEFs to better reflect technological capabilities and existing market practices in the swaps market. The proposed rules would also seek to reduce unnecessary compliance costs while still maintaining robust

[42] *See infra* notes 223 (no-action relief from existing § 37.6(b) confirmation requirements for uncleared swap transactions executed on a SEF), 433 (no-action relief from existing § 37.9 and § 37.203(a) with respect to the correction of error trades on SEFs), 474 (no-action relief from existing § 37.205(a) with respect to capturing of trade allocation information in a SEF transaction history database), 822 (no-action relief from existing § 37.1501(f) with respect to SEF annual compliance report filing requirements), 898 (no-action relief from certain ''block trade'' definitional requirements under existing § 43.2) and accompanying discussion.

[43] *See infra* note 355.

compliance programs and consistency with the SEF core principles. The ability to tailor compliance and oversight programs is consistent with the ''reasonable discretion'' that Core Principle 1 provides SEFs to comply with the core principles and mitigates compliance challenges that SEFs have encountered in implementing part 37.[44]

With respect to existing staff guidance and staff no-action relief, the Commission would adopt or codify such guidance or relief where appropriate. Providing a simple, but more comprehensive regulatory approach would help mitigate barriers for market participants to trade and execute further on SEFs, which would in turn better promote the statutory SEF goals.

Finally, the proposed rules include non-substantive amendments and various conforming changes to relevant provisions in the Commission's regulations.

The Commission believes that the proposed revisions to the part 37 framework are consistent with the statutory SEF provisions and should serve to advance swaps trading on SEFs. The proposed rules are designed to more appropriately account for swaps market characteristics, especially with respect to the use of a wider array of different execution methods to trade and execute a broad scope of swaps with varying liquidity characteristics. Accordingly, the proposed rules are expected to better promote the development, innovation, and growth of the swaps market, with the intent of attracting liquidity formation onto SEFs.

D. Summary of Proposed Revisions

As a general overview of the major changes described in this notice, the Commission is proposing:

- *Registration:* A proposed interpretation to apply the statutory SEF registration requirement and the definition of ''swap execution facility'' in CEA sections 5h(a)(1) and 1a(50), respectively, to certain swaps broking entities, including interdealer brokers, as well as aggregators of single-dealer platforms. The proposed rules also include revisions to simplify the registration process by streamlining Form SEF.
- *Trade Execution Requirement:* A revised interpretation of the trade execution requirement in CEA section 2(h)(8) and new rules based upon that interpretation that (i) broaden the scope of the trade execution requirement; (ii) create a compliance schedule for the expanded requirement; and (iii) provide exemptions from the requirement for certain types of swap transactions pursuant to CEA section 4(c). Further, the Commission is proposing to require each SEF to submit a Form TER that specifies those swaps that it lists for trading that are subject to the clearing requirement.
- *Execution Methods:* New general, disclosure-based trading and execution rules under Core Principle 2 that apply to any execution method offered by a SEF. These proposed rules would replace the § 37.3(a)(2) minimum trading functionality requirement and the execution methods prescribed under § 37.9 for Required Transactions, thereby allowing a SEF to offer flexible methods of execution for swaps subject to the trade execution requirement. Further, the Commission is also proposing to limit the scope of trading-related communications that SEF participants may conduct away from a SEF's trading system or platform.
- *Proficiency:* In conjunction with allowing SEFs to offer more flexible methods of execution for swaps subject to the trade execution requirement, the Commission is also proposing new rules under Core Principle 2 for SEF trading specialists. The proposed rules would benefit SEF participants by strengthening market integrity and fairness through requirements for SEFs to establish proficiency testing and ethics training, trading conduct standards, and a duty of supervision.
- *Swap Documentation:* Amendments to the existing § 37.6(b) confirmation requirement that would allow a SEF to provide a ''trade evidence'' record for an uncleared swap that serves as evidence of a legally binding swap transaction, but may be supplemented by counterparties with additional terms based on previously negotiated underlying agreements.
- *Impartial Access:* Modifications to the existing impartial access rules under § 37.202 that would allow a SEF to structure participation criteria and trading practices in a manner that aligns with the current swaps market structure.
- *Self-Regulatory Oversight:* Amendments to §§ 37.203–206 under Core Principle 2 that provide a SEF with the ability to, among other things, (i) tailor its rule enforcement program and disciplinary procedures and sanctions to the characteristics of its trading operations and market; (ii) develop an audit trail surveillance system that is appropriate to the types of available execution methods it offers; and (iii) choose other additional types of regulatory service providers to assist with fulfilling its oversight duties.
- *Product Guidance:* Additional guidance, pursuant to Core Principle 3, for a SEF to demonstrate that the swaps that it lists for trading are not readily susceptible to manipulation.
- *Straight-Through Processing:* Amendments and clarifications to the SEF straight-through processing requirements that better reflect existing swaps market practices.
- *Financial Resources:* Amendments to apply the existing Core Principle 13 financial resource requirements in a more practical manner to SEF operations. The proposed rule changes include amendments to the existing six-month liquidity requirement and the addition of new acceptable practices that provide further guidelines to SEFs for making a reasonable calculation of their projected operating costs.
- *Chief Compliance Officer:* Amendments to Core Principle 15 regulations that streamline existing requirements for the chief compliance officer (''CCO'') position; allow SEF management to exercise discretion in CCO oversight; and simplify the preparation and submission of the required annual compliance report.

E. Consultation With Other U.S. Financial Regulators

In developing these rules, the Commission has consulted with the Securities and Exchange Commission, pursuant to section 712(a)(1) of the Dodd-Frank Act.[45]

II. Part 9—Rules Relating To Review of Exchange Disciplinary, Access Denial or Other Adverse Actions

The Commission is proposing non-substantive amendments to part 9 of the Commission's regulations that conform to proposed amendments to § 37.206—Disciplinary procedures and sanctions. Accordingly, the Commission discusses those proposed amendments to part 9 in Section VII.F. of this notice in conjunction with its discussion of the proposed amendments to § 37.206.

III. Part 36—Trade Execution Requirement

The Commission is proposing new rules under part 36 of the Commission's regulations to implement a proposed revised interpretation of the trade execution requirement in CEA section 2(h)(8), which would broaden the scope of the requirement to include additional swaps. The Commission discusses the proposed implementing rules in Section IV.I.4.a. of this notice in conjunction with its discussion of (i) the proposed adoption of flexible means of execution and elimination of the minimum trading functionality under § 37.3(a)(2); (ii) the prescribed execution methods under § 37.9; and (iii) the MAT process (and corresponding trade execution compliance schedule) under § 37.10, § 37.12, and §§ 38.11–12.[46] Further, the Commission discusses the proposed Form TER submission, the proposed compliance schedule for the expanded requirement, and proposed exemptions from the requirement in Section XXI. of this notice.

[44] Core Principle 1 states that, unless otherwise determined by the Commission by rule or regulation, a SEF shall have reasonable discretion in establishing the manner in which it complies with the SEF core principles.'' 7 U.S.C. 7b–3(f)(1)(B).

[45] Dodd-Frank Act, Public Law 111–203, tit. VII, § 712(a)(1), 124 Stat. 1376 (2010).

[46] *See infra* Section IV.I.4.a.—§ 36.1(a)—Trade Execution Requirement.

IV. Part 37—Subpart A: General Provisions

A. § 37.1—Scope

Section 37.1 currently clarifies that part 37 applies to every SEF that is registered or is applying to become registered as a SEF with the Commission. Section 37.1 also clarifies that part 37's applicability does not affect the eligibility of a registered SEF or a SEF applicant to operate as either a DCM under part 38 of the Commission regulations or a swap data repository (''SDR'') under part 49 of the Commission's regulations.

The Commission proposes a non-substantive amendment to § 37.1. The Commission has not identified any provisions in part 37 that would preclude a registered SEF from being eligible to operate as a DCM or an SDR; accordingly, the clarifying language may create unnecessary ambiguity. Therefore, the Commission proposes a non-substantive amendment to eliminate the existing language to avoid any potential confusion.

B. § 37.2—Applicable Provisions and Definitions[47]

1. § 37.2(a)—Applicable Provisions

Section 37.2 states that a SEF must comply with part 37 and all other applicable Commission regulations, including any related definitions and cross-referenced sections. Section 37.2 also identifies certain specific pre-Dodd-Frank Act provisions whose applicability to SEFs may otherwise not be apparent—in particular, § 1.60 and part 9 of the Commission's regulations.[48] The Commission proposes to adopt a non-substantive amendment to eliminate the reference to part 9; the Commission notes that it has since adopted amendments to part 9 to conform to the relevant part 37 regulations.[49]

2. § 37.2(b)—Definition of ''Market Participant''

The Commission proposes a new provision under § 37.2(b) to define ''market participant,'' as the term is currently used in part 37, to clarify a SEF's jurisdiction over the various participants that may be involved in trading or executing swaps on its facility. In the preamble to the SEF Core Principles Final Rule, the Commission specified that a ''market participant'' includes any ''person that directly or indirectly effects transactions on the SEF. [The definition] includes persons with trading privileges on the SEF and persons whose trades are intermediated.'' [50] This term applies to several part 37 rules and triggers certain obligations under the Core Principle 2 regulations, which set forth a SEF's self-regulatory responsibilities. For example, § 37.206 requires a SEF to establish participation rules that broadly impose a SEF's disciplinary authority across different categories of participants, including market participants.[51]

In practice, SEFs have created various participation categories, including ''direct access,'' ''direct market access,'' and ''sponsored access'' to describe how persons connect to their trading systems or platforms. For example, the Commission understands that ''direct access'' generally refers to participants who have been granted trading privileges by a SEF and utilize their own proprietary means, *e.g.,* trading credentials and/or front-end interface, to participate directly on the SEF.[52] In contrast, ''direct market access'' or ''sponsored access'' generally describe arrangements in which a person uses a SEF participant's means, including trading credentials and/or front-end systems, to participate directly on the SEF. For example, many SEFs allow persons to access their systems or platforms by using the credentials and/or front-end functionality provided by a SEF participant, such as a futures commission merchant (''FCM'') serving as a clearing member on the SEF or an IB.[53] Finally, some persons may participate on a SEF via an agency execution model by directing an intermediary, *e.g.,* an FCM or an IB, to submit orders or request quotes on their behalf.

Notwithstanding these categories, SEFs have generally relied on the existing description of ''market participant'' in the SEF Core Principles Final Rule preamble to establish jurisdiction over all of these participants that access the SEF and trade swaps on a direct or indirect basis. Given this established reliance and the continued use of this term under the proposed rules, the Commission seeks to codify the definition of ''market participant'' in part 37. The Commission proposes to define ''market participant'' as any person who accesses a SEF (i) through direct access provided by a SEF; (ii) through access or functionality provided by a third-party; or (iii) through directing an intermediary that accesses a SEF on behalf of such person to trade on its behalf. As a threshold matter, the Commission notes that since these persons are currently considered ''market participants,'' they are already subject to a SEF's jurisdiction. The Commission believes that persons accessing a SEF through the various means described above interact with other market participants on the SEF and have the ability to engage in abusive trading practices. Therefore, they should continue to be subject to a SEF's jurisdiction, including disciplinary procedures and recordkeeping obligations.[54]

a. Applicability of § 37.404(b) to Market Participants

The Commission notes in particular that this proposed definition of ''market participant'' would apply to the recordkeeping requirements under § 37.404(b). Section 37.404(b) requires a SEF to adopt rules that require its market participants to keep records of their trading, including records of their activity in any index or instrument used as a reference price, the underlying

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[47] The Commission proposes to retitle § 37.2 to ''Applicable provisions and definitions'' from ''Applicable provisions'' based on the proposed addition of § 37.2(b) described below.

[48] Section 1.60 sets forth requirements for futures commission merchants (''FCMs'') and DCMs to submit documents requested by the Commission that have been filed in any material legal proceeding in which the FCM or DCM is a party. 17 CFR 1.60. For a description of the Commission's part 9 regulations, *see infra* Section VII.F.—Part 9—Rules Relating to Review of Exchange Disciplinary, Access Denial or Other Adverse Actions.

[49] Technical Amendments to Rules on Registration and Review of Exchange Disciplinary, Access Denial, or Other Adverse Actions, 83 FR 1538 (Jan. 12, 2018). The Commission notes that it is also proposing additional amendments to part 9 in this notice that conform to the proposed amendments to the Core Principle 2 regulations discussed herein. The Commission also proposes to renumber this provision to subsection (a) based on the proposed addition of § 37.2(b) described below.

[50] SEF Core Principles Final Rule at 33506. *See also* Division of Market Oversight Guidance on Swap Execution Facility Jurisdiction (Feb. 10, 2014) (''2014 Staff Jurisdiction Guidance'').

[51] 17 CFR 37.206.

[52] The Commission notes that ''direct access'' also refers to participants who may onboard and utilize a SEF's own front-end application to trade swaps on the SEF's systems or platforms.

[53] The Commission notes that some SEFs refer to such persons as ''customers'' of a SEF trading participant.

[54] Although a person who directs an intermediary to trade on its behalf does not interact with other market participants in the same manner, the Commission believes that such a person could engage in abusive trading activity by using more than one intermediary to place orders that result in an abusive trading practice. For example, a person seeking to achieve a wash result could structure a transaction or a series of transactions through separate intermediaries, which may give the appearance of bona fide purchases and sales, but where the trades have been entered into without the intent to take a bona fide market position. While persons do not typically access a SEF in this manner, the Commission is mindful that the part 37 rules do not preclude this access method and notes that some SEFs currently facilitate agency-based trading. Accordingly, the Commission believes that a SEF must continue to have jurisdiction and disciplinary authority over these persons in order to effectively investigate misconduct and prosecute rule violations that occur on the SEF.

commodity, and related derivatives markets.[55] Participants who trade on a SEF via direct access and participants who use the access or functionality of another participant to trade on a SEF have primary access to these types of records of their own trading. Further, the Commission believes persons who direct an intermediary to trade on their behalf are best situated to maintain the records required by § 37.404(b). The Commission understands that such intermediaries would likely only have access to records of swaps activity occurring on the SEF, not necessarily activity by their customers in the index or instruments used as a reference price, the underlying commodity, and related derivatives markets. Consequently, the Commission believes that as ''market participants'' under the proposed definition, they should be subject to the recordkeeping requirements under § 37.404(b).[56]

b. SEF Jurisdiction Over Clients of Market Participants

The proposed ''market participant'' definition would not capture clients of asset managers who, as market participants of a SEF, trade on a SEF on their clients' behalf.[57] The Commission recognizes that based on general industry practice, these clients have given their respective asset managers broad discretion to execute transactions in various financial products in different markets, including swaps. When asset managers trade on a client's behalf based on that discretion, such trading typically occurs without specific knowledge by the client as to whether such transactions are occurring on a SEF or the identity of the SEFs involved. While the clients themselves ultimately are the named counterparties to any transactions executed on their behalf, the asset managers are the participants accessing the SEF, and as such, are subject to the ''market participant'' definition and the obligations thereunder, including the SEF's jurisdiction. The Commission notes that asset managers—not their clients—access the SEF and sign onboarding documentation subjecting them to the SEF's jurisdiction. Since clients of asset managers would not be captured under the proposed market participant definition, a SEF would not be required to subject these clients to jurisdiction under proposed § 37.202(d).

Given that these clients give broad trading discretion to their asset managers, the Commission believes that requiring an asset manager who accesses and conducts actual trading on a SEF to submit to the SEF's jurisdiction is sufficient. This approach ensures that SEFs have the ability to take disciplinary action against the individual or entity—the asset manager—that could actually engage in potentially abusive trading practices on the SEF. The Commission notes that this logic would apply in other circumstances where a client gives broad trading discretion to another person to trade and execute swap transactions on the client's behalf. Therefore, these situations would not fall within the third prong of the ''market participant'' definition as described above because the client is not ''directing'' the intermediary to trade on its behalf.

With respect to recordkeeping, the Commission understands that asset managers typically maintain records of swap transactions on SEFs to which their clients are named counterparties. Although asset managers would likely not have complete records of their clients' trading activity in the index or instruments used as a reference price, the underlying commodity, and related derivatives markets under § 37.404(b), the Commission does not believe that SEFs would need these client records for regulatory purposes to the extent that the client is not directing the asset manager to trade on its behalf, but rather allowing the asset manager to exercise discretion in trading swaps. Therefore, the potential risks of manipulation, price distortion, and disruptions of the delivery or cash settlement process, which a SEF is required to prevent through trade monitoring under Core Principle 4, may be less attributable to such clients. To the extent that such risks may exist, however, the Commission believes it is sufficient for SEFs to have access to records that relate to the asset manager, who is conducting the actual swaps trading activity.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.2(b). The Commission is particularly interested in the impact of the scope of the proposed ''market participant'' definition on various constituencies and, therefore, requests comment on the following questions:

(1) Is the Commission's proposed definition of ''market participant'' clear and complete? Please comment on any aspect of the definition that you believe is not clear or adequately addressed.

(2) Should the proposed definition of ''market participant'' distinguish between clients that give up complete trading discretion to an asset manager or another SEF participant and clients that do not so give up discretion or only give up partial discretion? If so, on what basis should the definition establish such a distinction?

(3) Do customers currently access a SEF through an intermediary, *e.g.,* an FCM or IB, and direct that intermediary to trade on their behalf through an agency-based approach? If this is not common, could this method of accessing a SEF become more common in the future? If so, under what circumstances would this occur? Is the third prong of the proposed ''market participant'' definition appropriate, which would include a person who directs an intermediary that accesses a SEF to trade on its behalf? If not, then why?

(4) Are there any other methods that are either currently being used or could be used to access a SEF? Are there any other examples of how a person could access a SEF through access or functionality provided by a third party? What type of abusive trading practices, if any, could a customer attempt to conduct if the customer directs its trading through an intermediary such as an FCM or an IB? Please provide examples.

(5) What type of abusive trading practices, if any, could a client of an asset manager conduct if the client gives up complete trading discretion to the asset manager? Please provide examples. If the client allows an asset manager to exercise discretion in trading swaps, what are the risks of manipulation, price distortion, and disruptions of the delivery or cash settlement process that may be attributable to the client?

(6) Does a SEF's ability to monitor trading to prevent such risks require it to have access to client trading records that include activity in the index or instrument used as a reference price, the underlying commodity, and related derivatives markets? Are there any trading records that are currently created and maintained by clients of asset managers that would not also be retained by the asset managers? If so, please describe such records. Should SEFs receive such records for regulatory purposes?

[55] 17 CFR 37.404(b).

[56] The Commission notes that the proposed ''market participant'' definition, or the discussion herein, does not alter any person's obligations under § 1.35. 17 CFR 1.35.

[57] The Commission notes that in the SEF Core Principles Final Rule, one commenter expressed concern that the vague use of the term ''market participant'' could potentially subject dealers' customers, and thus asset managers and their clients, to onerous requirements. SEF Core Principles Final Rule at 33506.

C. § 37.3—Requirements and Procedures for Registration

1. § 37.3(a)—Requirements for Registration [58]

CEA section 5h(a)(1) establishes the SEF registration requirement and specifies that no person may operate a facility for the trading or processing of swaps unless the facility is registered as a SEF or as a DCM.[59] In adopting the SEF Core Principles Final Rule, the Commission affirmed its view under existing § 37.3(a)(1) that the broad registration requirement in CEA section 5h(a)(1) applies only to facilities that meet the SEF definition in CEA section 1a(50).[60] In furtherance of CEA section 5h(a)(1), existing § 37.3(a)(1) states that any person operating a facility that offers a trading system or platform in which more than one market participant has the ability to execute or trade swaps with more than one other market participant on the system or platform shall register the facility as a SEF or as a DCM.[61] The Commission believed that this interpretation of the statutory SEF registration requirement would help further the statutory SEF goals of promoting swaps trading on SEFs and promoting pre-trade price transparency in the swaps market.[62]

As discussed further below, the Commission is proposing to apply the SEF registration requirement to several types of entities. The Commission does not intend for the discussion in this notice to exhaustively address which entities must register as a SEF. Rather, a determination of whether an entity must register as a SEF pursuant to CEA section 5h(a)(1) would depend on an evaluation of the operations of the entity, in particular whether it meets the SEF definition under CEA section 1a(50).[63]

a. Footnote 88

As noted above, the Commission has stated that the SEF registration requirement in CEA section 5h(a)(1) [64] only applies to facilities that meet the statutory SEF definition in CEA section 1a(50).[65] In footnote 88 of the preamble to the SEF Core Principles Final Rule, the Commission specifically stated that the SEF registration requirement is not limited by the trade execution requirement in CEA section 2(h)(8), ''such that only facilities trading swaps subject to the trade execution requirement would be required to register as a SEF.[66] Therefore, a facility is required to register as a SEF if it operates in a manner that meets the statutory SEF definition even though it only executes or trades swaps that are not subject to the trade execution [requirement].'' [67] The Commission adopted this approach despite several comments to the proposed part 37 regulations, stating that registration as a SEF should only be required if an entity both met the SEF definition and offered swaps subject to the trade execution requirement.[68] The Commission stated that its approach to this issue is consistent with the statutory SEF registration requirement, the statutory SEF definition, and the trade execution requirement; the Commission also held that its approach promotes the statutory SEF goals.[69]

The Commission proposes to codify this existing approach to the SEF registration requirement by amending § 37.3(a)(1) to state that a person operating a facility that meets the statutory SEF definition must register as a SEF without regard to whether the swaps that it lists for trading are subject to the trade execution requirement. This proposed amendment is intended to clarify that the trade execution requirement is not a determinant of whether an entity must register as a SEF by codifying the requirement that an entity must register as a SEF if it permits trading or execution of any swap, including swaps that are not subject to the trade execution requirement, in a manner consistent with the statutory SEF definition, *i.e.,* trading or execution on a ''multiple-to-multiple'' basis among market participants.

Request for Comment

The Commission requests comment on all aspects of the proposed amendment to § 37.3(a).

b. Single-Dealer Aggregator Platforms

In the preamble to the SEF Core Principles Final Rule, the Commission evaluated the application of the statutory SEF registration requirement to various swaps market entities, including ''aggregation services or portals'' (''SEF Aggregator Portals'') and ''one-to-many systems or platforms'' (''Single-Dealer Platforms'').[70] The Commission generally determined that SEF Aggregator Portals and Single-Dealer Platforms do not meet the statutory SEF definition and therefore are not required to register as SEFs.[71]

As the Commission has gained greater knowledge and experience with the swaps market, however, it has become aware of a different type of a trading system or platform that implicates the SEF registration requirement—trading systems or platforms that aggregate Single-Dealer Platforms (''Single-Dealer Aggregator Platforms''). Specifically, a Single-Dealer Aggregator Platform typically operates a trading system or platform that aggregates multiple Single-Dealer Platforms and, thus, enables multiple dealer participants to provide executable bids and offers, often via two-way quotes, to multiple non-dealer participants on the system or platform. Those non-dealer participants are thus able to view, execute, or trade swaps posted to the Single-Dealer Aggregator Platform's system or platform from multiple dealer participants. These types of systems or platforms, however, have not registered their operations as SEFs.

The Commission believes that the type of trading system or platform provided by Single-Dealer Aggregator Platforms should be subject to the SEF registration requirement because it meets the SEF definition in CEA section 1a(50) by allowing multiple participants to trade swaps by accepting bids and offers made by multiple participants in the facility or system.[72]

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[58] The Commission proposes to renumber paragraph (a)(1) to subsection (a) based on the proposed elimination of the minimum trading functionality requirement under § 37.3(a)(2) and the Order Book definition under § 37.3(a)(3) described below.

[59] CEA section 5h(a)(1) states that no person may operate a facility for the trading or processing of swaps unless the facility is registered as a swap execution facility or as a designated contract market. 7 U.S.C. 7b–3(a)(1).

[60] SEF Core Principles Final Rule at 33481. The statutory SEF definition in CEA section 1a(50) provides that a SEF is a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that facilitates the execution of swaps between persons; and is not a designated contract market. 7 U.S.C. 1a(50).

[61] 17 CFR 37.3(a)(1). In addition to SEFs, existing § 37.3(a)(1) also references registration as a DCM. While the trading of swaps may occur through either a SEF or a DCM, CEA section 2(e) limits the trading of swaps on SEFs to ECPs. Both ECPs and non-ECPs may trade swaps through a DCM. 7 U.S.C. 2(e).

[62] SEF Core Principles Final Rule at 33481.

[63] The Commission notes that the preamble to the SEF Core Principles Final Rule addresses the applicability of the SEF registration requirement in CEA section 5h(a)(1) to several types of entities that facilitate swaps activity. SEF Core Principles Final Rule at 33479–84. The Commission maintains its approach to these types of entities with respect to the registration requirement, except as discussed herein. *See infra* Section IV.C.1.b.—Single-Dealer Aggregator Platforms (addressing the SEF registration requirement with respect to single-dealer aggregator platforms).

[64] 7 U.S.C. 5h(a)(1).

[65] 7 U.S.C. 1a(50).

[66] SEF Core Principles Final Rule at 33481 n.88.

[67] *Id.*

[68] *Id.* at 33479–80.

[69] *Id.* at 33481–82.

[70] SEF Core Principles Final Rule at 33481–83.

[71] *See id.*

[72] 7 U.S.C. 1a(50).

While a Single-Dealer Aggregator Platform has elements that resemble a Single-Dealer Platform, which is a type of entity that does not trigger the SEF registration requirement,[73] the Commission believes that both types of platforms are distinguishable from one another. In the preamble to the SEF Core Principles Final Rule, the Commission characterized Single-Dealer Platforms as systems or platforms in which a single dealer serves as a single liquidity provider by exclusively providing all bids and offers against which its customers, *i.e.,* participants, trade or execute swaps.[74] Accordingly, the dealer serves as the counterparty to all swaps executed on its trading system or platform.[75] Unlike the ''one-to-many'' nature of a Single-Dealer Platform, however, a Single-Dealer Aggregator Platform comports with the SEF definition in CEA section 1a(50) by providing a trading system or platform where multiple dealers send or stream bids and offers to multiple participants, thereby subjecting them to SEF registration.

The Commission also believes that Single-Dealer Aggregator Platforms are distinguishable from SEF Aggregator Portals. SEF Aggregator Portals are services or portals that enable market participants to access multiple SEFs, each of which provides a trading system or platform that facilitates the trading or execution of swaps between multiple participants. In the preamble to the SEF Core Principles Final Rule, the Commission stated that a SEF Aggregator Portal does not meet the statutory SEF definition because it merely provides a portal through which its users may access multiple SEFs, rather than providing a venue for the trading or execution of swaps.[76] A SEF Aggregator Portal does not provide a trading system or platform where multiple participants have the ability to execute or trade swaps with multiple participants within its facility; rather, the multiple-to-multiple participant execution or trading occurs on the SEF and not the SEF Aggregator Portal. A Single-Dealer Aggregator Platform, in contrast, acts as more than a mere portal because it provides a system or platform for multiple-to-multiple participant swaps trading or execution, thereby subjecting it to the SEF registration requirement.

Request for Comment

The Commission requests comment on all aspects of the proposed application of the SEF registration requirement to Single-Dealer Aggregator Platforms. The Commission may consider alternatives to the proposed application of the registration requirement to Single-Dealer Aggregator Platforms and requests comment on the following questions:

(7) Is the Commission's position that Single-Dealer Aggregator Platforms meet the SEF definition appropriate? Please explain.

(8) Should the Commission apply the SEF registration requirement to any other type of entity or activity? If so, please describe the type of entity and/or activity at issue.

(9) What factors, if any, would prevent a Single-Dealer Aggregator Platform from complying with the SEF registration requirement?

(10) Is the Commission's existing position that SEF Aggregator Portals and Single-Dealer Platforms do not satisfy the statutory SEF definition appropriate? Please explain.

c. Swaps Broking Entities, Including Interdealer Brokers

In the preamble to SEF Core Principles Final Rule, the Commission specified whether the SEF registration requirement would apply to several specific types of entities,[77] but did not address whether the requirement would apply to swaps broking entities, *i.e.,* interdealer brokers, most of whom are registered with the Commission as IBs and traditionally facilitate swaps trading in the over-the-counter (''OTC'') markets.[78] As discussed below, the Commission believes that the activities of these entities—firms operating trading systems or platforms that facilitate swaps trading primarily between swap dealers—trigger the SEF registration requirement because they allow multiple participants to *trade* swaps with multiple participants in a manner consistent with the language of CEA sections 5h(a)(1) and 1a(50) (emphasis added). In light of existing market practices, the Commission believes that it is necessary to apply the SEF registration requirement to ensure that the multiple-to-multiple ''trading'' that occurs on such trading systems or platforms is subject to the Act and Commission's regulations as regulated SEFs. This application is consistent with Congressional intent, as evidenced by the statutory SEF registration requirement and SEF definition, and is further consistent with the statutory SEF goals.

The Commission understands that the proposed interpretation may require certain non-domestic operations—in particular, foreign swaps broking entities, such as foreign interdealer broker operations—to seek SEF registration or an exemption from SEF registration pursuant to CEA section 5h(g), provided that they fall within the Commission's jurisdiction.[79] Given the potentially complex issues that may arise for these entities from the Commission's proposed application of the SEF registration requirement, the Commission proposes below to delay the compliance date of the requirement with respect to such entities and their operations. This proposed delay would allow the Commission to further develop its cross-border regulatory regime, including the achievement of additional comparability determinations with foreign regulators regarding their respective regulatory frameworks for swap trading venues located within their respective jurisdictions, *i.e.,* foreign multilateral swaps trading

[73] SEF Core Principles Final Rule at 33482.

[74] *Id.*

[75] *See id.*

[76] Although the Commission maintains that a SEF Aggregator Portal is generally not required to register as a SEF, such a system or platform may be subject to the Act and Commission regulations as an IB, as defined in CEA section 1a(31), given that its activity may constitute soliciting or accepting orders to be routed to SEFs. 7 U.S.C. 1a(31).

[77] As noted in the preamble to the SEF Core Principles Final Rule, the Commission received comments characterizing the SEF registration requirement as ambiguous and requesting that the Commission provide clarification with respect to certain entities. SEF Core Principles Final Rule at 33479–81. In response, the Commission provided examples of how the SEF registration requirement would or would not apply to ''certain categories of better understood facilities.'' *Id.* at 33482–84. These categories included (i) one-to-many systems or platforms; (ii) blind auction systems or platforms; (iii) aggregation services or portals; (iv) services facilitating portfolio compression and risk mitigation transactions; and (v) swap processing services. The Commission, however, emphasized that these examples do not ''comprehensively'' address all entities that are subject to SEF registration and urged participants to seek clarification from the Commission as to how the registration requirement applied to their particular operations. *Id.* at 33482.

[78] ''Interdealer broker,'' as used in this notice, refers to an interdealer broker entity or operation in the aggregate and not to a particular individual, *i.e.,* an associated person, who works as a broker within the entity or operation. The Commission, however, considers such individuals to constitute part of the interdealer broker's trading system or platform. *See infra* Section VI.A.1.—§ 37.201(a)—Required Swap Execution Facility Rules (specifying proposed rules for SEF execution methods that apply to activities of SEF trading specialists who facilitate swaps trading or execution by, among other things, conducting broking-like functions).

[79] Pursuant to CEA section 5h(g), the Commission may exempt a facility from SEF registration upon a finding that it is subject to ''comparable, comprehensive supervision and regulation'' under the rules and regulations of the facility's home country. 7 U.S.C. 7b–3(g). *See infra* Section IV.C.1.d.—Foreign Swaps Broking Entities and Other Foreign Multilateral Swaps Trading Facilities.

facilities, which would include foreign swaps broking entities as described below. Such a determination would allow such operations to seek an exemption from SEF registration. A delay would also provide time to foreign swaps broking entities to determine an appropriate course of action for their respective operations.[80]

(1) Structure and Operations of Swaps Broking Entities, Including Interdealer Brokers

Since adopting part 37, the Commission has developed a deeper understanding of the swaps market and has observed how swaps broking entities, including interdealer brokers, have structured themselves in relation to the current SEF regulatory framework. Interdealer broker trading systems or platforms facilitate swaps trading between multiple customers by negotiating or arranging swaps through voice-based or voice-assisted systems that combine voice functionalities with electronic systems such as order books. Swap dealers currently use these trading systems or platforms for several purposes, including obtaining market color or maintaining pre-trade anonymity in the course of trading. Specifically, an interdealer broker typically ''works'' customer orders by issuing RFQs-to-all among other customers and negotiating or arranging any resultant bids or offers. Once the interdealer broker arranges a reciprocating bid and reciprocating offer, it sets a price for a specific swap transaction for a particular product, which in many cases enables a subsequent ''trade work-up'' session.[81] Finally, the interdealer broker will either facilitate the execution of the transaction(s) if the broker is part of a SEF's trading system or platform[82] or will otherwise route the pre-arranged transaction(s) to a SEF for execution if the broker is not a part of the registered SEF.

The Commission notes that interdealer brokers have adopted varying approaches to structuring themselves in relation to the SEF regulatory framework. Some interdealer brokers have registered components of their trading systems or platforms as SEFs. Other interdealer brokers have operated very similar trading systems or platforms outside of the structure of a SEF, often through registered IB entities, and have interacted with a SEF solely as participants of the SEF.[83] As SEF participants, they submit transactions, which have already been arranged on those trading systems or platforms, to the SEF for execution. Notably, many interdealer brokers have maintained the latter approach by operating both a SEF platform and a non-SEF trading system or platform simultaneously, using the latter to facilitate the interaction of bids and offers and bringing the resulting arranged swaps to the SEF for execution.

This bifurcated approach has existed despite the close similarities among interdealer broker trading systems or platforms, whether they are registered or not as SEFs—they offer trading systems or platforms that facilitate the trading of swaps between multiple participants. This approach, however, has been justified by the execution of the swap on a SEF; as noted, the interdealer brokers that conduct activity on non-SEF platforms ultimately route the pre-arranged transactions to a SEF where they are executed. This approach seems premised on the view that because the execution occurs on a registered SEF, the facilitating interdealer broker does not need to register as a SEF, notwithstanding its role in negotiating or arranging the transaction(s).

To facilitate trading in Required Transactions outside the SEF, these interdealer broker trading systems or platforms typically operate outside of SEFs pursuant to the time delay requirement for Required Transactions under § 37.9(b).[84] Under § 37.9(b), the Commission implemented a fifteen-second time-delay requirement for Required Transactions that are pre-arranged or pre-negotiated by a broker and submitted as cross trades for execution through the SEF's Order Book. This requirement allows a broker or dealer to execute a Required Transaction by trading against a customer's order or executing two customers' orders against each other through pre-negotiation or pre-arrangement, provided that one side of the transaction is exposed to the Order Book for fifteen seconds before the other side of the transaction is submitted for execution. The time delay is intended to provide other market participants with an opportunity to execute against the first order.[85] In practice, however, the time delay requirement has enabled interdealer brokers to facilitate ''trading'' of swaps *i.e.,* the negotiating or arranging of swaps transactions outside the SEF, through the interdealer brokers' multiple-to-multiple trading systems or platforms. Negotiating or arranging consists of facilitating the interaction of bids and offers.[86] Once the transaction is pre-negotiated or pre-arranged through the interdealer broker's multiple-to-multiple trading system or platform, the interdealer broker routes the pre-arranged transaction to the SEF, where one side of the transaction is exposed for fifteen seconds on the Order Book prior to the entry of the other side for execution.

For swaps that are not subject to the trade execution requirement, *i.e.,* Permitted Transactions, SEFs have allowed their market participants to conduct trading via pre-execution communications away from their respective facilities and then submit the resulting transaction, with the price, terms, and conditions already agreed upon between the participants, to the SEF's trade capture functionality for execution.[87] The Commission notes that several SEFs affiliated with interdealer brokers offer this type of functionality based in part on the execution flexibility allowed under § 37.9(c)(2) for Permitted Transactions, *i.e.,* a SEF may offer any method of execution for such swaps. Accordingly, interdealer brokers submit Permitted Transactions that have been negotiated or arranged through their trading systems or platforms to an affiliated SEF without being subject to any corresponding order exposure (*e.g.,* a fifteen-second time-delay).[88] Coupled

[80] The Commission notes that potential courses of action for such entities may include seeking SEF or DCM registration; reorganizing into an existing affiliated SEF; working with the appropriate regulator within their home country to seek an exemption from registration pursuant to CEA section 5h(g); or adjusting their activity to avoid the Commission's jurisdiction.

[81] For a description of a ''trade work-up'' session, *see infra* note 269.

[82] As discussed below, persons operating within these SEFs that facilitate swaps trading are commonly referred to as ''trading specialists'' or ''execution specialists.'' *See infra* Section VI.A.3.—§ 37.201(c)—SEF Trading Specialists.

[83] In becoming participants on a SEF, interdealer brokers typically meet the SEF's access criteria prior to onboarding, which provides them with trading privileges on the SEF. As SEF participants, they are subject to the SEF's jurisdiction, including all applicable disciplinary rules, similar to any other SEF participant. Where the SEF offers its participants the ability to submit pre-arranged or pre-negotiated transactions for execution, an interdealer broker SEF participant will route transactions it has arranged between its customers or clients, who are also SEF participants, for execution on the SEF.

[84] 17 CFR 37.9(b).

[85] SEF Core Principles Final Rule at 33503. *See infra* note 322 and accompanying discussion (describing the policy reason for the § 37.9(b) time delay requirement).

[86] *See infra* Section VI.A.2.a.—§ 37.201(b)—Pre-Execution Communications (discussion of how pre-execution communications between market participants constitute ''trading'').

[87] For further discussion of this execution method, *see infra* Section VI.A.2.—§ 37.203(a)—Pre-Arranged Trading Prohibition; § 37.9—Time Delay Requirement.

[88] The Commission has also observed that other swaps broking entities that are not affiliated with a SEF similarly negotiate or arrange transactions

with the ability to submit Required Transactions in accordance with the time delay requirement, these arrangements essentially enable the operation of multiple-to-multiple trading systems or platforms for a broad range of swaps outside of the SEF regulatory framework.

(2) SEF Registration Requirement for Swaps Broking Entities, Including Interdealer Brokers

Based on the statutory SEF registration requirement and SEF definition, the associated SEF goals, the Commission's experience and knowledge from implementing part 37, and its evaluation of trading practices that have developed under the current SEF regulatory framework with respect to swaps broking entities that include interdealer brokers, the Commission proposes that a trading system or platform operated by such an entity must register as a SEF pursuant to CEA section 5h(a)(1) and § 37.3(a).[89] The Commission believes that such trading systems or platforms conform to the statutory SEF definition because they allow multiple participants to *trade* swaps by accepting bids and offers made by multiple participants in that facility or system (emphasis added). As described above, these trading systems or platforms facilitate the negotiation or arrangement of swap transactions through the interaction of bids and offers. The Commission believes that this ''trading'' activity should occur within a SEF, regardless of whether the product is subject to the trade execution requirement.[90] Accordingly, entities operating these types of trading systems or platforms should be subject to the SEF registration requirement.[91]

In addition to the statutory basis for this application, the Commission's proposed approach would advance the Dodd-Frank goals of promoting swaps trading on SEFs and pre-trade price transparency.[92] The Commission believes that the operation of multiple-to-multiple swaps trading systems or platforms by swaps broking entities, including interdealer brokers outside of SEFs has frustrated these statutory goals and moved liquidity formation away from SEFs. To promote both trading on SEFs and pre-trade price transparency, the Commission believes that the activities associated with swaps trading should occur on SEFs consistent with the SEF registration requirement. Allowing such activities to occur away from a SEF and submitting any resulting transactions to a SEF for execution effectively makes the SEF a trade-booking or post-trade processing engine, which is inconsistent with the statutory language and goals of the CEA related to SEFs.

The Commission also believes that requiring these types of swaps broking entities to register as SEFs would help to consistently apply the SEF regulatory framework over a segment of swaps trading activity that is very similar to registered SEF activity. Interdealer brokers currently operate trading systems or platforms outside of the SEF regulatory framework, yet act as participants on SEFs, resulting in multiple-to-multiple trading that is opaque not only to the SEF where the negotiated or arranged trade is eventually routed to for execution, but also to the Commission and the general marketplace. Although many interdealer brokers are registered as IBs pursuant to CEA section 4f and are subject to the Commission's rules and regulations,[93] the Commission believes that these requirements are neither intended nor sufficient for the regulation and oversight of such interdealer brokers' multiple-to-multiple trading activity. The Commission believes that Congress would not have created SEFs and added the word ''trading'' in the statutory SEF registration requirement and SEF definition if it intended that an IB framework would be sufficient for swaps ''trading.'' Given that these interdealer brokers operate trading systems or platforms outside of the SEF regulatory framework that are very similar to the activity that occurs on trading systems or platforms that are located within interdealer brokers' registered affiliated SEFs,[94] the Commission believes such activity would be more appropriately subject to a SEF-specific regulatory framework. This approach would achieve the policy goal of applying more consistent regulatory treatment to very similar swaps market activity.

Requiring interdealer brokers to either register as SEFs or carry out their multiple-to-multiple trading activities within a SEF would also enhance market integrity and monitoring because such activities would become subject to the SEF core principles and regulations, as well as direct regulatory oversight of a SEF in its capacity as a self-regulatory organization (''SRO'').[95] For example, Core Principle 2 requires SEFs to establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means to capture information that may be used in establishing whether rule violations have occurred.[96] These requirements enable SEFs to more comprehensively monitor for, among other things, potential abusive trading practices such as fraud and manipulation.[97] The

away from a registered SEF and subsequently submit those transactions to a registered SEF for execution. These types of transactions, however, are less common and constitute a smaller portion of the overall volume of relevant transactions discussed herein.

[89] Although the Commission's description of swaps broking entities above focuses on the dealer-to-dealer market, the Commission clarifies that any person operating a system or platform for multiple-to-multiple participant swaps *trading* as described herein must register as a SEF consistent with CEA section 5h(a)(1) and § 37.3(a) (emphasis added).

[90] The Commission notes that this view is consistent with the proposed amendment to § 37.3(a) to clarify that a person operating a facility that meets the statutory SEF definition must register as a SEF without regard to whether the swaps that it lists for trading are subject to the trade execution requirement. *See supra* Section IV.C.1.a.—Footnote 88. As part of the proposed elimination of the prescriptive execution methods under § 37.9 for Required Transactions, the Commission is proposing to eliminate the time delay requirement under § 37.9(b). *See infra* Section VI.A.2.—§ 37.203(a)—Pre-Arranged Trading Prohibition; § 37.9(b)—Time Delay Requirement. Based on this proposed elimination and the adoption of a flexible approach to SEF execution methods, the Commission notes that rules permitting the pre-arrangement or pre-negotiation of a swap transaction subject to a time delay requirement would no longer be needed or allowed.

[91] In addition to negotiation or arrangement that occurs through a swaps broking entity, the Commission believes that negotiation or arrangement that occurs directly between participants should also occur within a SEF. The Commission is proposing to require SEFs to have rules that prohibit market participants from engaging in pre-execution communications, *i.e.,* negotiation or arrangement of swaps, away from a SEF's trading system or platform, subject to certain exceptions. *See infra* Section VI.A.2.a.—§ 37.201(b)—Pre-Execution Communications.

[92] 7 U.S.C. 7b–3(e).

[93] 7 U.S.C. 6f(a). Part 3 sets forth the registration and regulatory requirements for IBs, among other registered entities. 17 CFR part 3. Among those requirements, IBs are required to register with the National Futures Association (''NFA'') and therefore are also subject to the NFA rules and regulations. 17 CFR 3.2. The Commission further notes that § 155.4 sets forth trading standards for IBs. 17 CFR 155.4. For a description of additional IB-related Commission requirements, *see infra* note 341.

[94] The Commission emphasizes that an interdealer broker that solely solicits or accepts individual or single bids or offers and introduces them to an exchange, such as a SEF, would not be required to register as a SEF because it would not be facilitating the ''trading,'' *i.e.,* negotiating or arranging of swaps between multiple market participants consistent with the SEF registration requirement. Such brokers would be able to continue to engage in such solicitation or acceptance in conformance with the IB definition. 7 U.S.C. 1a(31).

[95] 17 CFR 1.3 (definition of ''self-regulatory organization'').

[96] 7 U.S.C. 7b–3(f)(2)(B).

[97] Given that the interdealer brokers are participants of the SEFs to which they submit negotiated or arranged transactions for execution, the Commission notes that SEFs still have jurisdiction over that activity and could investigate

Continued

Commission notes that establishing SEF monitoring and surveillance requirements over activity in the interdealer broker market is especially beneficial based on the role of interdealer brokers in the manipulation of ISDAFIX, a benchmark for swap rates and spreads for IRS; and the London Interbank Offered Rate (''LIBOR''), an average benchmark for short-term interest rates used to determine floating rates for IRS.[98]

Accordingly, the Commission proposes that swaps broking entities, including interdealer brokers, that offer a trading system or platform in which more than one market participant has the ability to *trade* any swap with more than one other market participant on the system or platform, shall register as a SEF or seek an exemption from registration pursuant to CEA section 5h(g) (emphasis added). Where an entity operates both a registered SEF and an affiliated swaps broking entity—such as an interdealer broker—that negotiates or arranges trades via a non-SEF trading system or platform and participates on the affiliated SEF as a market participant, the swaps broking entity could also comply with the SEF registration requirement by integrating its non-SEF trading system or platform into its affiliated SEF. The Commission believes that this proposed application of the SEF registration provision in CEA section 5h(a)(1), which the Commission continues to interpret in conjunction with the SEF definition in CEA section 1a(50), is consistent with the statute and helps further the statutory SEF goals provided in CEA section 5h.

The Commission proposes to delay the application of the SEF registration requirement with respect to swaps broking entities, including interdealer brokers, for a period of six months, subject to certain conditions and starting from the compliance date of any final rule adopted from this proposed rulemaking. Swaps broking entities, including interdealer brokers, that meet the conditions set forth below would be able to continue to maintain their current practice of facilitating the negotiating or arranging of swaps transactions between multiple participants and routing those swaps transactions to SEFs for execution.[99] Without the six-month delay period, the Commission believes that applying the SEF registration requirement to these entities would disrupt their operations and further fragment swaps liquidity.

As applied to swaps broking entities, including interdealer brokers—most of whom are registered with the Commission as IBs—the Commission proposes that the six-month delay from the SEF registration requirement would be subject to the following conditions:

(i) All swap transactions that are traded on a swaps broking entity, including an interdealer broker, must be routed for execution to a SEF; and

(ii) The swaps broking entity, including an interdealer broker, must provide electronically the following information with respect to itself to the Secretary of the Commission at *submissions@cftc.gov* and the Commission's Division of Market Oversight (''Division'' or ''DMO'') at *DMOSubmissions@cftc.gov*: (i) Entity name as it appears in the entity's charter; (ii) name and address of the entity's ultimate parent company; (iii) any names under which the entity does business; (iv) address of principal executive office; (v) a contact person's name, address, phone number, and email address; (vi) asset classes and swap products for which the entity facilitates trading; and (vii) any registrations, authorizations, or licenses held.[100]

Upon a DMO determination that a swaps broking entity's notice is complete, the Commission proposes to post these notices on the Commission's website under the ''Industry Filings'' page. This proposed approach would effectively maintain the status quo for these swaps broking entities for the proposed six-month delay period.

The Commission notes that the proposed six-month delay for swaps broking entities, including interdealer brokers, does not affect any other requirements under the CEA or the Commission's regulations. In particular, this delayed compliance date would not affect the application of CEA section 2(e) and its requirement that only ECPs be permitted to trade swaps on SEFs.[101]

As part of this proposed transition period, swaps broking entities, including interdealer brokers, would be able to route their transactions to a SEF for execution. Furthermore, during this period, counterparties subject to the trade execution requirement would be able to satisfy that requirement by trading via a swaps broking entity, including an interdealer broker, that routes the transactions to a SEF for execution.

Request for Comment

The Commission requests comment on all aspects of the proposed application of the SEF registration requirement to swaps broking entities. The Commission may consider alternatives to the proposed application of the requirement and requests comment on the following questions:

(11) Is the Commission's view that swap broking entities, including interdealer brokers, meet the SEF definition appropriate? Please explain why or why not. Is it clear what activity falls within the SEF registration requirement and SEF definition, including the meaning of ''trading''? If not, please explain.

(12) Should the Commission apply the SEF registration requirement to any other type of entity or activity?

(13) What factors, if any, would prevent a swaps broking entity, including an interdealer broker, from complying with the SEF registration requirement or from seeking an exemption from registration pursuant to CEA section 5h(g)?

(14) Is the proposed six-month delay period sufficient to allow swaps broking entities, including interdealer brokers, time to seek registration or alter their operations in compliance with the SEF registration requirements? Why or why not?

(15) Should the Commission allow swaps broking entities, including interdealer brokers, to route swap transactions to exempt SEFs during this six-month delay period? Why or why not?

d. Foreign Swaps Broking Entities and Other Foreign Multilateral Swaps Trading Facilities

As discussed above, the Commission has observed that swaps broking

suspected prohibited activity and issue sanctions where appropriate, pursuant to the SEF's self-regulatory obligations.

[98] *See, e.g.,* Enforcement Order re: Société Générale S.A. Attempted Manipulation and False Reporting of LIBOR and Euribor, CFTC Docket No. 18–14 (June 4, 2018); *see also* Enforcement Order re: JP Morgan Chase Bank, N.A. Attempted Manipulation of U.S. Dollar ISDAFIX Benchmark, CFTC Docket No. 18–15 (June 18, 2018).

[99] As discussed below, the Commission is proposing § 37.201(b) to prohibit the use of pre-execution communications by market participants away from a SEF's trading system or platform. *See infra* Section VI.A.2.a.—§ 37.201(b)—Pre-Execution Communications. The Commission notes that to the extent swaps broking entities, including interdealer brokers, engage in such communications in the course of negotiating or arranging transactions and submitting them to a SEF for execution, the prohibition—if adopted via a final rule—would not apply during the six-month period.

[100] The Commission anticipates that the effective date of any final rule would be established ninety days from the publication of the rule in the **Federal Register**. The Commission believes that the proposed ninety-day period would provide swaps broking entities, including interdealer brokers seeking to avail themselves of the six-month compliance date delay with a sufficient opportunity to compile and submit this information to the Commission.

[101] 7 U.S.C. 2(e). *See supra* note 61.

entities, including interdealer brokers, have utilized various business structures to operate in a bifurcated manner, *i.e.,* a SEF and a non-SEF trading system or platform. One common structure consists of an entity that serves as a parent to a registered SEF entity and several affiliated broker entities that negotiate or arrange trades and participate exclusively on the affiliated SEF as market participants. While many of those broker entities are domestically domiciled, a significant number of them are also located in numerous foreign jurisdictions.[102] Similar to domestic swaps broking entities, these foreign swaps broking entities are not currently registered as SEFs, but are typically registered with the Commission as IBs.[103] These entities often serve as hubs for liquidity within their particular jurisdiction during non-U.S. trading hours—operating trading systems or platforms that facilitate the negotiating or arranging of transactions for multiple U.S. persons with local customers and the routing of those transactions to an affiliated SEF for execution.[104] These foreign swaps broking entities' trading systems or platforms are very similar to those operated by swaps broking entities within in the U.S., such that they provide more than one market participant with the ability to *trade* swaps with more than one other market participant (emphasis added). Therefore, the Commission proposes that these foreign swaps broking entities are ''foreign multilateral swaps trading facilities,'' which are foreign facilities that operate a trading system or platform where multiple participants have the ability to execute or trade swaps with multiple market participants.

Consistent with the proposal regarding the SEF registration requirement above, such foreign multilateral swaps trading facilities, including foreign swaps broking entities, would be required to register as a SEF or seek an exemption from SEF registration if their activity falls within the jurisdictional reach of the Commission pursuant to CEA section 2(i). Pursuant to CEA section 2(i), activities outside of the U.S. are not subject to the swap provisions of the CEA, including any rules prescribed or regulations promulgated thereof, unless those activities either have a ''direct and significant connection'' with activities in, or effect on, commerce of the United States; or contravene any rule or regulation established to prevent evasion of a Dodd-Frank Act-enacted provision of the CEA.[105] The Commission expects that it will clarify the cross-border jurisdictional reach of the SEF registration requirement in the future for foreign multilateral swaps trading facilities, including foreign swaps broking entities, pursuant to CEA section 2(i).[106] To the extent that a foreign multilateral swaps trading facility's activities are determined to fall within the Commission's jurisdictional reach, the facility would be required to register as a SEF or seek an exemption from SEF registration.[107]

Such facilities that do not wish to register as a SEF and prefer to comply with the regulatory requirements of their home country may seek an exemption from SEF registration pursuant to CEA section 5h(g) either directly or via the auspices of their home country regulator. Pursuant to CEA section 5h(g), the Commission may exempt facilities from SEF registration if the facility is subject to comparable, comprehensive supervision and regulation on a consolidated basis by the appropriate governmental authorities in the home country of the facility.[108] Based on this provision, the Commission issued an order in December 2017 that exempts certain MTFs and OTFs authorized within the EU from the SEF registration requirement based on a finding that their respective regulatory frameworks satisfy the standard for granting an exemption from the SEF registration requirement pursuant to CEA section 5h(g).[109] At this time, the Commission has neither adopted a formal regulatory framework for granting an exemption pursuant to this provision nor has it granted exemptive relief to facilities in other jurisdictions beyond the 2017 order to EU-based MTFs and OTFs.

(1) Proposed Delay of SEF Registration Requirement

Given that the Commission intends to address the cross-border jurisdictional reach of the Commission's SEF registration requirement in the future, the Commission proposes to delay the compliance date of the registration

[102] Based on discussions with market participants, the Commission is aware of foreign swaps broking entities that are interdealer brokers located in numerous foreign jurisdictions, including Australia, Brazil, Canada, Chile, Colombia, Hong Kong, Japan, Mexico, Singapore, and South Korea, that participate on SEFs. The Commission is also aware that interdealer brokers domiciled in the European Union (''EU'') operate as investment firms that operate Multilateral Trading Facilities (''MTFs'') and Organized Trading Facilities (''OTFs''). The Commission notes that it has exempted certain MTFs and OTFs located in the EU from registration as SEFs pursuant to CEA section 5h(g). *See infra* note 109 (describing December 2017 exemptive order issued by the Commission to certain MTFs and OTFs based on comparability determination).

[103] *See supra* note 93 (general description of Commission requirements with respect to IBs).

[104] For purposes of this discussion, the term ''U.S. person'' identifies those persons who, under the Commission's interpretation, could be expected to satisfy the jurisdictional nexus set forth in CEA section 2(i) based on their swap activities, either on an individual or aggregate basis. *See* Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations; Rule, 78 FR 45292, 45301 (Jul. 26, 2013) (''2013 Cross-Border Guidance'').

[105] 7 U.S.C. 2(i).

[106] In November 2013, DMO issued guidance regarding the application of the SEF registration requirement to foreign multilateral swaps trading facilities. Division of Market Oversight Guidance on Application of Certain Commission Regulations to Swap Execution Facilities (Nov. 15, 2013). The guidance specified that a foreign multilateral swaps trading platform that provides U.S. persons or persons located in the United States (including personnel and agents of non-U.S. persons located in the United States) (''U.S.-located persons'') with the ability to trade or execute swaps on or pursuant to the rules of the platform, either directly or indirectly through an intermediary, would be expected to register as a SEF or DCM. *Id.* at 2. The guidance listed two non-exhaustive factors to determine whether a foreign platform met this registration requirement: (i) Whether a foreign multilateral swaps trading facility directly solicits or markets its services to U.S. persons or U.S.-located persons; or (ii) whether a significant portion of the market participants who a foreign multilateral swaps trading facility permits to effect transactions are U.S. persons or U.S.-located persons. *Id.* at 2 n.8. The guidance further specified DMO's belief that U.S. persons and U.S.-located persons generally comprise those persons whose activities have the requisite ''direct and significant'' connection with activities in, or effect on, commerce of the United States within the meaning of CEA section 2(i). *Id.* at 2. The guidance also stated DMO's view that a multilateral swaps trading facility's provision of the ability to trade or execute swaps on or through the platform to U.S. persons or U.S.-located persons may create the requisite connection under CEA section 2(i) for purposes of the SEF/DCM registration requirement. *Id.* Subsequently, the Commission learned that many foreign multilateral swaps trading facilities prohibited U.S. persons and U.S-located persons from accessing their facilities due to the uncertainty that the guidance created with respect to SEF registration. The Commission understands that these prohibitions reflect concerns that U.S. persons and U.S.-located persons accessing their facilities would trigger the SEF registration requirement. As noted above, the Commission expects to address the application of CEA section 2(i) to foreign multilateral swaps trading facilities, including foreign swaps broking entities, in the future.

[107] The Commission discusses further below the potential implications for foreign multilateral swaps trading facilities offering swaps that are subject to the trade execution requirement to applicable counterparties.

[108] 7 U.S.C. 7b–3(g).

[109] Order Exempting MTFs and OTFs Authorized Within the EU from SEF Registration Requirement (Dec. 8, 2017) (''2017 MTF and OTF Exemptive Order''). The order established this finding with respect to EU-wide legal requirements—including, in particular, requirements under the EU's new Markets in Financial Instruments Regulation (''MiFIR''), the EU's amended Markets in Financial Instruments Directive (''MiFID II''), and the EU's Market Abuse Regulation—that establish regulatory frameworks for MTFs and OTFs. Pursuant to this finding, the Commission provided specific exemptions to several MTFs and OTFs. *Id.* at app. A.

requirement only with respect to foreign swaps broking entities, including foreign interdealer brokers, that currently facilitate trading, *i.e.,* negotiation or arrangement, of swaps transactions for U.S. persons (''Eligible Foreign Swaps Broking Entities'') for a period of two years, subject to certain conditions and starting from the effective date of any final rule adopted from this notice.

The proposed delay period would not apply to foreign swaps broking entities that do not currently facilitate trading, *i.e.,* negotiation or arrangement, of swaps transactions for U.S. persons, given that their operations would not be materially affected by the proposed application of the SEF registration requirement to swaps broking entities. Further, the proposed delay period would not apply to foreign multilateral swaps trading facilities, as described above, that are not foreign swaps broking entities. Such facilities are not subject to the Commission's proposed application of the SEF registration requirement, and therefore, are already required to register as a SEF pursuant to the SEF registration requirement or seek an exemption pursuant to CEA section 5h(g). Similarly, the Commission notes that MTFs and OTFs located in the EU may not rely on this delay and instead must seek an exemption from SEF registration pursuant to the terms of the Commission's 2017 exemptive order.[110]

Eligible Foreign Swaps Broking Entities that meet the conditions set forth below would be able to continue to maintain the current practice of facilitating the negotiation or arrangement of swaps transactions between multiple participants and routing those swaps transactions to SEFs or Exempt SEFs for execution.[111] Without the two-year period, the Commission believes that applying the SEF registration requirement to these entities would disrupt their operations and fragment swaps liquidity.

During this period, the Commission anticipates that it will address what constitutes a ''direct and significant connection with activities in, or effect on, commerce of the United States'' for foreign multilateral swaps trading facilities, including foreign swaps broking entities, under CEA section 2(i).[112] The proposed delay would also provide the Commission with time to develop any threshold standards for the application of CEA section 2(i) to the SEF registration requirement in CEA section 5h(a)(1). While the Commission has yet to determine standards in this area, the Commission notes that any such standard could include a *de minimis* component, whereby the activity of U.S. persons below some defined quantitative threshold on a particular foreign multilateral swaps trading facility would not trigger a need for SEF registration.

The Commission notes that counterparties that are required to comply with the trade execution requirement may only satisfy the requirement by executing a swap on a SEF, a DCM, or an Exempt SEF.[113] Accordingly, any foreign multilateral swaps trading facility that seeks to offer such swaps to such counterparties for trading must be registered as a SEF or DCM or obtain an exemption from SEF registration pursuant to CEA section 5h(g), regardless of whether that trading system or platform meets the standards (or any future standards the Commission may develop) for CEA section 2(i), *i.e.,* a ''direct and significant connection,'' to trigger SEF registration. As noted above, the proposed delay would not apply to these foreign multilateral swaps trading facilities. Similarly, upon the expiration of the proposed two-year delay, any Eligible Foreign Swaps Broking Entity that seeks to offer such swaps to such counterparties for trading on its trading system or platform must be registered as a SEF or DCM or obtain an exemption from SEF registration pursuant to CEA section 5h(g).

During this time, the Commission could formalize a regulatory framework for providing exemptions from the SEF registration requirement for foreign multilateral swaps trading facilities, including foreign swaps broking entities, that meet that CEA section 2(i) standard. The proposed two-year delay not only could provide the Commission with sufficient time to formalize this framework, which would require standards and processes for evaluating exemption requests, but also give Eligible Foreign Swaps Broking Entities more time to determine their best course of action, *i.e.,* seek SEF registration with the Commission or obtain a CEA section 5h(g) exemption from registration. Accordingly, the proposed delay would further provide the Commission and regulators in foreign jurisdictions with additional time to evaluate such registration applications or requests for exemption received from Eligible Foreign Swaps Broking Entities.

With respect to exemptions, the Commission anticipates that most foreign swaps broking entities and other foreign multilateral swaps trading facilities would seek to comply with the rules and regulations of their home countries, and thus, seek an exemption from SEF registration. The Commission further anticipates that the issuance of such exemptions may take some time based upon the large number of jurisdictions in which these operations are currently located.[114] Thus, the Commission believes that it would be beneficial to provide more time for evaluation of exemption requests because exempting such comparably-regulated foreign entities from SEF registration, similar to other deference initiatives, should generally reduce market fragmentation, regulatory arbitrage, and duplicative or conflicting regulatory requirements, while increasing the potential for harmonized regulatory standards on a global level. Further, the Commission anticipates that any future determination process for granting exemptions from SEF registration would ensure that foreign and domestic multilateral swaps trading facilities, which operate in a similar fashion to one another, are all held to comparable regulatory standards.

The Commission further believes that this proposal should create strong incentives for foreign jurisdictions to establish or bolster their own robust regulatory regimes for swaps trading. Such measures would also be consistent with the commitment made among the G–20 countries in 2009 ''to take action at the national and international level to raise standards together so that our national authorities implement global standards consistently in a way that ensures a level playing field and avoids fragmentation of markets, protectionism, and regulatory arbitrage.'' [115] To the extent that foreign swaps broking entities and other foreign multilateral swaps trading facilities operate in foreign jurisdictions that currently do not have or are not expected to have

[110] 2017 MTF and OTF Exemptive Order.

[111] As discussed below, the Commission is proposing § 37.201(b) to prohibit the use of pre-execution communications by market participants away from a SEF's trading system or platform. *See infra* Section VI.A.2.a.—§ 37.201(b)—Pre-Execution Communications. The Commission notes that to the extent Eligible Foreign Swaps Broking Entities engage in such communications in the course of negotiating or arranging transactions and submitting them to a SEF for execution, the prohibition—if adopted via a final rule—would not apply during the two-year period.

[112] 7 U.S.C. 2(i).

[113] For a discussion of which counterparties must comply with the Category A Transaction-Level Requirements, including the trade execution requirement, *see* 2013 Cross-Border Guidance at 45350–59 app. D.

[114] *See supra* note 102 (listing the foreign jurisdictions where swaps broking entities operate).

[115] Group of Twenty, ''G–20 Leaders' Statement: The Pittsburgh Summit 7 (Sept. 24–25, 2009), *https://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf.*

comparable and comprehensive supervision and regulation, such facilities would be subject to the proposed SEF registration requirement if their operations create a ''direct and significant'' connection to activities in, or effect on, commerce of the United States under CEA section 2(i).

(2) Proposed Conditions for Delay of SEF Registration Requirement

As applied to Eligible Foreign Swaps Broking Entities—most of whom are registered with the Commission as IBs—the Commission proposes that the two-year delay from the SEF registration requirement be subject to the following conditions:

(i) All swap transactions involving U.S. persons that are traded on an Eligible Foreign Swaps Broking Entity must be routed for execution to a SEF or an Exempt SEF; [116] and

(ii) The Eligible Foreign Swaps Broking Entities must provide the following information electronically to the Secretary of the Commission at *submissions@cftc.gov* and DMO at *DMOSubmissions@cftc.gov*: (i) Entity name as it appears in the entity's charter; (ii) name and address of the entity's ultimate parent company; (iii) any names under which the entity does business; (iv) address of principal executive office; (v) a contact person's name, address, phone number, and email address; (vi) asset classes and swap products for which the entity facilitates trading; (vii) certification that the entity currently arranges or negotiates swap transactions for U.S. persons; (viii) the entity's home country regulator or regulators; and (ix) any registrations, authorizations, or licenses held by the entity in its home country.[117]

Upon a DMO determination that an Eligible Foreign Swaps Broking Entity's notice is complete, the Commission would post these notices on the Commission's website under the ''Industry Filings'' page. This proposed approach would effectively maintain the status quo for these Eligible Foreign Swaps Broking Entities during the two-year compliance date delay period. The Commission notes that the proposed two-year delay for Eligible Foreign Swaps Broking Entities does not affect any other requirements under the CEA or the Commission's regulations. In particular, this delayed compliance date would not affect the application of CEA section 2(e) and its limitation of SEF and Exempt SEF trading to ECPs.[118]

As part of this proposed transition period, Eligible Foreign Swaps Broking Entities would be able to route their transactions to either a SEF or an Exempt SEF for execution. Furthermore, during this two-year delay, counterparties subject to the trade execution requirement would be able to satisfy that requirement by trading via an Eligible Foreign Swaps Broking Entity that routes the transactions to either a SEF or an Exempt SEF for execution.

In light of these considerations, the Commission notes that the issue of whether an Eligible Foreign Swaps Broking Entity routes a transaction to a SEF or an Exempt SEF during the proposed two-year time delay period would have practical implications for the counterparties involved in the transaction with respect to complying with Commission reporting and clearing requirements. For swap transactions that are routed to a SEF for execution, the SEF would be responsible for compliance with (i) the real-time reporting requirements under part 43 of the Commission's regulations and (ii) the regulatory reporting requirements under part 45 of the Commission's regulations.[119] Counterparties to a swap transaction that is routed to an Exempt SEF for execution would be responsible for the reporting requirements set forth in both part 43 and part 45, unless there is a substituted compliance determination by the Commission with respect to those requirements.[120]

Further, for swap transactions routed to a SEF that are intended to be cleared or subject to the clearing requirement, the SEF would be responsible for routing the swap transaction to a Commission-registered derivatives clearing organization (''DCO'') or a clearing organization that has been exempted from DCO registration by the Commission pursuant to CEA section 5b(h), *i.e.,* Exempt DCO, for clearing.[121] For swap transactions routed to an Exempt SEF for execution that are intended to be cleared or are subject to the clearing requirement, the Commission notes that the following clearing-related requirements would to apply to such swap transactions:

(i) When a swap transaction executed by a U.S. person on such an Exempt SEF is a ''customer'' position subject to CEA section 4d, the transaction, if intended to be cleared, must be cleared through a Commission-registered FCM at a Commission-registered DCO;

(ii) When a swap transaction executed by a U.S. person on such an Exempt SEF is a ''proprietary'' position under Commission regulation 1.3(y), the transaction, if intended to be cleared, must be cleared either through a Commission-registered DCO or an Exempt DCO; and

(iii) When a swap transaction is subject to the Commission's clearing requirement, the transaction must be cleared either through a Commission-registered DCO or an Exempt DCO, provided that consistent with (i) above, the transaction must be cleared through a Commission-registered FCM at a Commission-registered DCO and cannot be cleared through an Exempt DCO if the transaction is a ''customer'' position subject to CEA section 4d.

Request for Comment

The Commission requests comment on all aspects of its proposed approach to SEF registration for Eligible Foreign Swaps Broking Entities, in particular the proposed two-year delay in the compliance date of any final rule. The Commission may consider alternatives to the proposed two-year delay and requests comment on the following questions:

(16) Is the delay of two years for Eligible Foreign Swaps Broking Entities an adequate delay? If not, then how long of a delay should the Commission consider and why?

(17) Are there additional considerations that the Commission should take into account in establishing this delay?

(18) Are there additional conditions that the Commission should consider imposing on Eligible Foreign Swaps Broking Entities during this delay period?

2. §§ 37.3(a)(2)–(3)—Minimum Trading Functionality and Order Book Definition

In developing the regulatory framework for SEFs, the Commission adopted a ''minimum trading functionality'' requirement under § 37.3(a)(2) that requires a SEF to maintain and offer an Order Book for all

[116] For a current list of Exempt SEFs, *see* 2017 MTF and OTF Exemptive Order at app. A.

[117] The Commission anticipates that the effective date of any final rule would be established ninety days from the publication of the rule in the **Federal Register**. The Commission believes that a ninety-day effective date would provide Eligible Foreign Swaps Broking Entities seeking a two-year compliance date delay with sufficient opportunity to compile and submit the requisite information to the Commission.

[118] 7 U.S.C. 2(e). *See supra* note 61.

[119] In connection with swap transactions executed on a SEF, the Commission notes that the part 45 regulations continue to apply to counterparties that are subject to such reporting requirements. 17 CFR part 45.

[120] Exempt SEFs may report transactions on behalf of counterparties as a service provider; the counterparties, however, retain ultimate responsibility for reporting.

[121] *See* 17 CFR 37.700–702.

of the swaps that it lists for trading.[122] An Order Book is defined under § 37.3(a)(3) as (i) an electronic trading facility; [123] (ii) a trading facility; [124] or (iii) a trading system or platform in which all market participants in the trading system or platform have the ability to enter multiple bids and offers, observe or receive bids and offers entered by other market participants, and transact on such bids and offers.[125] In the preamble to the SEF Core Principles Final Rule, the Commission acknowledged that the Order Book functionality does not have the requisite flexibility to serve as the ideal method of execution for a variety of swaps, in particular those that feature lower levels of liquidity.[126] The Commission nevertheless believed that an Order Book could establish a base level of pre-trade price transparency to all market participants and, therefore, required that each SEF offer an Order Book for all swaps that it lists for trading, including both swaps subject to the trade execution requirement and swaps not subject to the trade execution requirement.[127]

The Commission has observed that market participants have rarely used Order Books to trade swaps on SEFs despite their availability for all swaps listed by SEFs. Depending on the product involved, for example, order book trading typically ranges between ''less than [one percent] to less than [three percent] of total CDS transactions'' on SEFs, while order book trading constitutes between ''less than [one percent] to approximately [twenty percent] of total IRS transactions. . . .'' [128] The Commission believes that this low level of swaps trading on Order Books is attributable [129] to an Order Book's inability to support the broad and diverse range of products traded in the swaps market that trade episodically, rather than on a continuous basis.[130] Given the broad array of liquid and illiquid swaps listed on SEFs, mandating that a SEF offer an Order Book for all of these products has imposed significant operational and financial costs and burdens, particularly from a technological standpoint, with little benefit to most market participants who choose not to utilize them.[131]

Therefore, based in part on its experience, the Commission proposes to eliminate the minimum trading functionality requirement and the regulatory Order Book definition. The Commission believes that eliminating the minimum trading functionality would help reduce operating costs for SEFs, as they would no longer be required to operate and maintain order book systems that are poorly suited for trading in less liquid swaps, and therefore, do not attract significant trading activity. Instead of employing resources to build and support a seldom-utilized trading system or platform, the proposed elimination provides a SEF with the flexibility to determine how to allocate its resources, particularly as it relates to developing methods of execution that are better suited to trading the products that it lists. As discussed below, other execution methods may be better suited to maximizing participation and concentrating liquidity formation on SEFs in episodically liquid swaps markets.[132] Therefore, removing this requirement may spur development and innovation in execution methods. The Commission also believes that eliminating this requirement may encourage SEFs to list new and different types of swaps, given that they would no longer have to incur the costs of operating and supporting Order Books. The Commission notes, however, that a SEF would be free to continue to offer an order book if it so chooses.

The Commission adopted the minimum trading functionality requirement based in part on the goal of promoting pre-trade price transparency,[133] but acknowledges that the CEA does not explicitly prescribe the Order Book as a SEF minimum trading functionality. Accordingly, with the elimination of this requirement under § 37.3(a)(2), the only trading functionality obligation that a SEF must comply with on an ongoing basis is based upon the CEA section 1a(50) definition of SEF.[134] Therefore, the SEF must operate a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce.[135] To meet the SEF definition, a trading system or platform must provide multiple participants with the ability to accept bids and offers from other multiple participants within the facility or system. As long as multiple participants have the ability to accept bids and offers from other multiple participants within the facility or system, the facility or system will meet the SEF definition, regardless of how the multiple participants choose to interact with one another. Based on this more straightforward approach, the Commission expects that determining whether a particular system or platform

[122] 17 CFR 37.3(a)(2).

[123] CEA section 1a(16) defines ''electronic trading facility'' as a trading facility that (i) operates by means of an electronic or telecommunications network; and (ii) maintains an automated audit trail of bids, offers, and the matching of orders or the execution of transactions on the facility. 7 U.S.C. 1a(16).

[124] CEA section 1a(51) defines ''trading facility'' as a person or group of persons that constitutes, maintains, or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions by accepting bids or offers made by other participants that are open to multiple participants in the facility or system; or through the interaction of multiple bids or multiple offers within a system with a pre-determined non-discretionary automated trade matching and execution algorithm. 7 U.S.C. 1a(51)(A).

[125] 17 CFR 37.3(a)(3).

[126] SEF Core Principles Final Rule at 33564–65. In the preamble to the SEF Core Principles Final Rule, the Commission stated its anticipation that an Order Book would typically work well for liquid Required Transactions, *i.e.,* transactions involving swaps that are subject to the trade execution requirement. For less liquid Required Transactions, however, it anticipated that RFQ systems would help facilitate trading.'' *Id.*

[127] SEF Core Principles Final Rule at 33564.

[128] J. Christopher Giancarlo and Bruce Tuckman, Swaps Regulation Version 2.0: An Assessment of the Current Implementation of Reform and Proposals for Next Steps 49–50 (Apr. 26, 2018), *available at https://www.cftc.gov/sites/default/files/2018-05/oce_chairman_swapregversion2whitepaper_042618.pdf.*

[129] In addition to reasons stated above, the Commission acknowledges that the lack of swaps trading on SEF Order Books may also be attributed to other factors, such as concerns over ''name give-up'' practices and the current lack of certain trading features, such as the ability to calculate volume-weighted average pricing.

[130] In their study of the index CDS market, Pierre Collin-Dufresne, Benjamin Junge, and Anders B. Trolle state that ''[p]roponents of bringing all market participants onto one limit order book typically argue that it would (i) increase quote competition among dealers and (ii) allow clients to occasionally supply liquidity via limit orders thereby lowering overall transaction costs (although at the cost of execution risk). However, a limit order book arguably works best when trading is continuous and it is not necessarily optimal when trading is more episodic as is the case for index CDSs. For instance, Barclay, Hendershott, and Kotz (2006) document a precipitous drop in electronic trading (via limit order books) when Treasuries go off-the-run and trading volumes decline.'' Pierre Collin-Dufresne, Benjamin Junge, & Anders B. Trolle, *Market Structure and Transaction Costs of Index CDSs* 6 n.10 (Swiss Fin. Inst. Res. Paper No. 18–40, 2017) (''2017 Collin-Dufresne Research Paper''), citing Michael J. Barclay, Terrence Hendershott, & Kenneth Kotz, *Automation Versus Intermediation: Evidence from Treasuries Going Off the Run,* 61 J. Fin. 2395, 2395–2414 (2006).

[131] The Commission understands that these costs include regularly occurring software updates to electronic order book systems and other ongoing technology-related maintenance.

[132] *See infra* Section IV.I.4.b.—Elimination of Required Execution Methods.

[133] 7 U.S.C. 7b–3(e).

[134] The Commission emphasizes that while the SEF definition in CEA section 1a(50) would serve as the baseline requirement for the type of trading systems or platforms that a SEF must maintain, it also provides the basic criterion to determine which types of trading systems or platforms are subject to the SEF registration requirement.

[135] 7 U.S.C. 1a(50).

meets the SEF definition would generally be self-evident. Nevertheless, the Commission will continue to work with entities that seek interpretive guidance on the parameters of that definition.[136]

3. § 37.3(b)—Procedures for Registration [137]

a. Elimination of Temporary Registration

To implement the SEF regulatory framework, the Commission established a temporary SEF registration regime to help minimize disruptions to incumbent platforms that had been operating prior to the adoption of part 37 and to allow new entities to compete with those incumbent platforms.[138] Section 37.3(c) sets forth the process for SEF applicants to apply for temporary SEF registration prior to the Commission's review of an application for full SEF registration. The temporary registration process, however, has expired pursuant to a two-year sunset provision established under § 37.3(c)(5).[139] Since the expiration of this process, the Commission has reviewed SEF applications pursuant to a 180-day Commission review period.[140]

Based on the expiration of the temporary registration regime, the Commission proposes to eliminate the provisions under existing § 37.3(c) and adopt various conforming changes to other provisions in proposed § 37.3(b) and proposed § 37.3(h), as discussed below.

b. § 37.3(b)(1)—Application for Registration

To request registration as a SEF, § 37.3(b)(1)(i) requires an applicant to electronically file a complete Form SEF, as set forth in Appendix A to part 37, with the Commission.[141] The Commission uses Form SEF, which is comprised of a series of different exhibits that require an applicant to provide details of its operations, to determine whether the applicant demonstrates compliance with the Act and applicable Commission's regulations.[142] Applicants must also use Form SEF to amend a pending application or to seek an amended registration order.[143] As part of the SEF registration process, an applicant must also request from the Commission a unique, extensible, alphanumeric identifier code for the purpose of identifying the SEF in connection with swap reporting requirements pursuant to part 45 of the Commission's regulations.[144]

Based on its experience with the SEF registration process, the Commission believes that some of the information requested under Form SEF has proven to be unnecessary to determine an applicant's compliance with the Act and applicable Commission regulations. The Commission also recognizes that some of the exhibit requirements are unclear in the amount of information required to be provided, thereby causing inconsistency across applications in the information received to evaluate compliance. The proposed changes to the part 37 framework, as discussed further herein, would also necessitate certain Form SEF revisions. Therefore, the Commission is proposing several amendments to Form SEF that would consolidate or eliminate several of the existing exhibits and also request some additional information. Further, the Commission is proposing several amendments to the Form SEF instructions. The Commission intends for these proposed changes to establish a clearer and more streamlined application process that would still provide the Commission with sufficient and appropriate information to determine compliance with the Act and Commission regulations.

(1) Form SEF Exhibits—Business Organization

The Commission proposes several amendments to the ''Business Organization'' exhibits—existing Exhibits A through H—of Form SEF.[145]

First, the Commission proposes to consolidate certain existing exhibits, in particular (i) existing Exhibit G, which requires an applicant to submit various governance documents, into existing Exhibit C, which requires information regarding the applicant's board of directors; [146] and (ii) existing Exhibit F, which requires an analysis of the applicant's staffing, into existing Exhibit E, which requires a description of the personnel qualifications for each category of the applicant's professional employees.[147] Under the consolidated new Exhibit E, the Commission proposes to require more specific detail about the applicant's personnel structure, including personnel seconded to the applicant. As proposed, Exhibit E would require information about the reporting lines among the applicant's personnel; estimates of the number of non-management and non-supervisory employees; and a description of the duties, background, skills, and other qualifications for each officer, manager/supervisor, and any other category of non-management and non-supervisory employees. The Commission believes that amending Exhibit E to provide

[136] Based on the Commission's proposed elimination of the Order Book as a minimum trading functionality requirement, the Commission clarifies one particular issue regarding the scope of the CEA section 1a(50) SEF definition. In the preamble to the SEF Core Principles Final Rule, the Commission expressed doubt as to whether an RFQ-to-one system met the multiple participant aspect of the SEF definition. SEF Core Principles Final Rule at 33498, 33561, and 33563. This view, articulated in the context of the Commission's discussion of RFQ Systems as a required method of execution, would suggest that an ''RFQ-to-one'' trading system or platform may, on its face, not meet the SEF definition. The Commission notes, however, that this view does not appropriately give meaning to the 'ability' factor of the SEF definition. Therefore, the Commission seeks to clarify the application of the 'ability' factor as it applies to RFQ-to-one transactions. The Commission believes that an entity that permits its market participants to use its RFQ-to-one functionality to issue concurrent or serial RFQs to multiple, different recipients would fit within the SEF definition, as it provides participants the ''ability'' to accept bids and offers from multiple participants within the trading system or platform.

[137] Based on the elimination of the temporary registration requirements, the Commission proposes to retitle § 37.3(b) to ''Procedures for registration'' from ''Procedures for full registration.'' The Commission also proposes to add a title to § 37.3(b)(1)—''Application for registration.''

[138] SEF Core Principles Final Rule at 33487.

[139] The Commission notes that the part 37 regulations became effective on August 5, 2013. Accordingly, the temporary registration provisions expired on August 5, 2015, subject to certain exceptions.

[140] 17 CFR 37.3(b)(5).

[141] 17 CFR 37.3(b)(1)(i).

[142] The exhibits that comprise Form SEF concern the applicant's business organization (Exhibits A–H); financial information (Exhibits I–K); compliance (Exhibits L–U); and operational capability (Exhibit V). 17 CFR part 37 app. A.

[143] 17 CFR 37.3(b)(3); 17 CFR part 37 app. A.

[144] 17 CFR 37.3(b)(1)(iii).

[145] The Commission is not proposing any substantive changes to Exhibit A, which requires an applicant to specify persons who own ten percent or more of the applicant's stock or otherwise may control or direct the applicant's management or policies; and Exhibit B, which requires an applicant to provide a list of present officers, directors and governors, or their equivalents. The Commission is proposing non-substantive amendments to Exhibit A to reorganize the existing requirements to paragraphs (a)–(b) and to revise the existing language accordingly.

[146] Existing Exhibit C requires a narrative that describes the composition and fitness standards for the applicant's board of directors. Existing Exhibit G requires a copy of the applicant's constitution, articles of incorporation, articles of formation, or articles of association with all amendments thereto; partnership or limited liability agreements; existing by-laws, operating agreement, rules or instruments corresponding thereto; any governance fitness information not included in existing Exhibit C; and a certificate of good standing. As proposed, the existing Exhibit G requirements would be re-designated as paragraphs (a) and (c) of a consolidated new Exhibit C; existing Exhibit C would be re-designated as paragraph (b) within new Exhibit C.

[147] Existing Exhibit E requires a description of such employees employed by the applicant or a division, subdivision, or other separate entity within the applicant. Existing Exhibit F requires the analysis of staffing requirements that are necessary to operate the applicant as a SEF, including the staff names and qualifications.

greater specificity would promote consistency among applications and further assist in evaluating the applicant's compliance with the Act and the Commission's regulations, particularly with respect to self-regulatory requirements.[148]

The Commission also proposes to narrow the scope of information required by existing Exhibit D, which requires a description of the applicant's organizational structure that includes a list and description of affiliates and relevant divisions, subdivisions, or other separate entities related to the applicant. As proposed, Exhibit D would require an applicant to describe the nature of the business of any affiliated entities which engage in financial services or market activities, including but not limited to, the trading, clearing, or reporting of swaps. The Commission believes that this amendment would more appropriately focus the required information on entities related to the applicant's swaps-trading business and minimize the submission of information that is not related. Further, the Commission proposes non-substantive amendments to the existing exhibit.

(2) Form SEF Exhibits—Financial Information

The Commission proposes several amendments to the ''Financial Information'' exhibits—existing Exhibits I through K—of Form SEF.

The Commission proposes to adopt several changes to existing Exhibit I.[149] This exhibit requires applicants to submit financial information to demonstrate compliance with the financial resources requirements under Core Principle 13. Among other required information, paragraph (a) requires applicants to submit their most recent fiscal-year financial statements [150] and paragraph (b) requires a narrative of how the value of the applicant's financial resources is sufficient to cover operating costs of at least one year, on a rolling basis, of which six months' value of those resources are unencumbered and liquid. Paragraph (c) requires an applicant to submit copies of any agreements (i) establishing or amending a credit facility, (ii) insurance coverage, or (iii) other arrangement that demonstrate compliance with the liquidity requirement. Paragraph (d) requires an applicant to submit representations regarding sources and estimates for future ongoing operational resources.

The Commission proposes to amend the requirements of paragraphs (a) through (c) to conform to the proposed amendments to the SEF financial resources requirements under Core Principle 13. In particular, the proposed required documentation would demonstrate an applicant's ability to maintain resources that exceed one year of operating costs and the existence of resources to meet the liquidity requirement.[151] The Commission also proposes to eliminate paragraph (d) because the representation of an applicant's future ongoing operational resources is not necessary to determine compliance with Core Principle 13. Additionally, the Commission proposes to amend paragraph (a) to incorporate the existing Form SEF instruction for newly-formed applicants who cannot submit the requisite financial statements, but who alternatively seek to provide *pro forma* financial statements for a six-month period.

The Commission also proposes to adopt several changes to Exhibit K.[152] This exhibit requires an applicant to provide disclosures related to fees that it would impose upon participants. Paragraph (a) requires a complete list of all of the facility's dues, fees, and other charges for its services; paragraph (b) requires a description of the basis or methods used to determine those amounts; and paragraph (c) requires a description of any differences in charges between different customers or groups of customers for similar services. The Commission proposes to amend paragraph (a) to require applicants to identify any market maker programs, other incentive programs, or other discounts on dues, fees, or other charges to be imposed. Based on the Commission's experience, this information is beneficial in evaluating compliance with access requirements pursuant to Core Principle 2.[153] Given the Commission's proposed revisions to the existing impartial access requirements—in particular, the elimination of the ''comparable fees'' requirement under existing § 37.202(a)(3)—the Commission further proposes to eliminate the requirement for a description of fee differentials under paragraph (c). The Commission also proposes several streamlining changes to the existing language.

In addition to the amendments to new Exhibit G (existing Exhibit I) and new Exhibit H (existing Exhibit K), the Commission proposes to eliminate existing Exhibit J, which requires an applicant to disclose the financial resources information for any SEF, DCM, or other swap trading platform affiliates. Based on its experience with Exhibit J, the Commission recognizes that this information related to an applicant's affiliates is not particularly useful in demonstrating an applicant's compliance with Core Principle 13 or the conflicts of interest requirements under Core Principle 12.

(3) Form SEF Exhibits—Compliance

The Commission proposes several amendments to the ''Compliance'' exhibits—existing Exhibits L through U—of Form SEF.

First, the Commission proposes to eliminate several exhibits including (i) existing Exhibit P, which requires the applicant to provide information on disciplinary and enforcement protocols, tools, and procedures that is generally duplicative to the details contained in an applicant's rulebook and compliance manual; [154] (ii) existing Exhibit R, which requires a list of the applicant's prohibited trade practice violations that is duplicative to the rules that an applicant must include in its rulebook pursuant to Core Principle 2 requirements; [155] and (iii) existing Exhibit U, which requires a list of items subject to a request for confidential

[148] Based on the proposed consolidation of existing Exhibit F and existing Exhibit G, existing Exhibit H would be re-designated as a new Exhibit F with no additional substantive changes. This exhibit requires a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the applicant or any of its affiliates is a party or to which any of its or their property is the subject.

[149] The Commission also proposes to re-designate existing Exhibit I as a new Exhibit G based on the proposed changes described above.

[150] The financial information currently required under paragraph (a) includes an applicant's balance sheet; income and expense statement; cash flow statement; and statement of sources and application revenues and all notes or schedules thereto.

[151] *See infra* Section XVIII.—Part 37—Subpart N: Core Principle 13 (Financial Resources) for a description of the Commission's proposed changes to the Core Principle 13 regulations upon which new Exhibit G is based.

[152] The Commission also proposes to re-designate existing Exhibit K as a new Exhibit H based on the proposed changes described above.

[153] The Commission notes that proposed § 37.202(a)(2) would require a SEF to establish and apply fee structures and fee practices to its market participants in a fair and non-discriminatory manner. *See infra* Section VII.A.1.b.—§ 37.202(a)(2)—Fees.

[154] An applicant is currently required to submit a copy of its rules under existing Exhibit M and a copy of its compliance manual under existing Exhibit O, as currently designated. The Commission is maintaining those requirements under the proposed revisions to Form SEF as a new Exhibit J and a new Exhibit K, respectively. The Commission notes that it proposes to move ''arrangements for alternative dispute resolution'' under existing Exhibit P to a new Exhibit L described below. *See infra* note 159.

[155] Section 37.203 requires a SEF to establish and enforce trading rules that will deter abuses, including prohibitions on abusive trading practices in its markets. 17 CFR 37.203.

treatment under § 145.9 of the Commission's regulations—as described further below, the Commission proposes to instead require SEFs to identify these documents within the Table of Contents to Form SEF.

Second, the Commission proposes to streamline the requirements of existing Exhibit L.[156] This exhibit currently requires a narrative and documentation that describe the manner in which the applicant complies with each SEF core principle. This documentation includes a regulatory compliance chart that sets forth each core principle and cites the relevant rules, policies, and procedures that describe the manner in which the applicant is able to comply with each core principle. For issues that are novel or for which compliance with a core principle is not evident, this exhibit also requires an applicant to explain how that item and the application satisfy the SEF core principles. The Commission proposes to streamline this exhibit to require that the applicant only submit the regulatory compliance chart and an explanation of novel issues, as is currently required. Based on its experience, the Commission believes that the regulatory compliance chart with citations to relevant rules, policies, and procedures is sufficient to determine an applicant's compliance with the Act and the Commission's regulations. The Commission has found that the additional narrative and documentation that describe the manner in which the applicant complies with each SEF core principle creates unnecessary paperwork and does not further the Commission's review of an application in this regard. The Commission further proposes certain non-substantive amendments to the existing language of Exhibit L.

Third, the Commission proposes to simplify the requirements of existing Exhibit M.[157] This exhibit currently requires a copy of the applicant's rules, and any technical manuals, other guides, or instruction for SEF users, including minimum financial standards for members or market participants. The Commission proposes to eliminate the existing requirement to cite position limits and aggregation standards in part 151 of the Commission's regulations and any position limit rules set by the facility. As discussed below with respect to Core Principle 6, the Commission intends to address the position limit issue in a separate rulemaking; [158] the Commission also notes that this requirement is redundant to the applicant's requirement to submit a copy of its rules. Further, the Commission proposes several non-substantive amendments to streamline Exhibit M's existing language.

Fourth, the Commission proposes to eliminate the requirements under existing Exhibit N. The exhibit currently requires an applicant to provide executed or executable copies of any agreements or contracts that facilitate the applicant's compliance with the SEF core principles, including third-party regulatory service provider or member or user agreements. To streamline Form SEF, the Commission would require instead that applicants submit these documents pursuant to other relevant exhibits, as described below.

Fifth, the Commission proposes a new Exhibit L, which would continue to require an applicant to submit user agreements. As proposed, the new exhibit would specify that the required agreements would include, but not be limited to, on-boarding documentation, regulatory data use consent agreements, intermediary documentation, and arrangements for alternative dispute resolution.[159] The new Exhibit L would also require a narrative of the legal, operational, and technical requirements for users to directly or indirectly access the SEF. This requirement reflects some documents that applicants have previously submitted under existing Exhibit N. The additional specificity, however, reflects the Commission's experience with different participant-related agreements that implicate (i) a SEF participant's ability to access the facility's trading system or platform pursuant to Core Principle 2; and (ii) the facility's use of a SEF participant's proprietary data or personal information under existing § 37.7.[160]

Sixth, the Commission proposes a new Exhibit M to establish requirements related to an applicant's swaps reporting capabilities. The new Exhibit M would require the applicant to submit (i) a list of the SDRs to which the applicant will report swaps data, including the respective asset classes; [161] (ii) an executed copy of all agreements between the applicant and those SDRs; and (iii) a representation from each of those SDRs stating that the applicant has satisfactorily completed all requirements, including all necessary testing, that enables the SDR to reliably accept data from the applicant. These requirements reflect some of the documents that the Commission has required applicants to submit under existing Exhibit N and would enable the Commission to determine the applicant's ability to comply with § 37.901, which requires a SEF to report swap data pursuant to parts 43 and 45 of the Commission's regulations.[162]

Seventh, the Commission proposes a new Exhibit N to incorporate the requirements in existing Exhibit T related to an applicant's ability to submit swaps to a DCO for clearing. New Exhibit N would require the applicant to submit (i) a list of DCOs and exempt DCOs to which the applicant will submit swaps for clearing, including the respective asset classes; (ii) a representation that the clearing members of those DCOs and exempt DCOs will guarantee all trades submitted by the swap execution facility for clearing; (iii) an executed copy of the clearing agreement and any related documentation for each of those DCOs or exempt DCOs; and (iv) a representation from each of those DCOs or exempt DCOs stating that the applicant has satisfactorily completed all requirements, including all necessary testing, that enable its acceptance of swap transactions submitted by the applicant for clearing. These requirements reflect some of the documents that the Commission has required applicants to submit under existing Exhibit N and would enable the Commission to determine an applicant's ability to comply with proposed § 37.702(b)(1) under Core Principle 7, which requires a SEF to coordinate with each DCO to facilitate ''prompt, efficient, and accurate'' processing and routing of transactions to the DCO for clearing.[163]

Eighth, the Commission proposes a new Exhibit O to require an applicant to submit all other agreements or contracts that enable the applicant to comply with the applicable SEF core principles and are not already required to be submitted

[156] The Commission also proposes to re-designate existing Exhibit L as a new Exhibit I based on the proposed changes described above.

[157] The Commission also proposes to re-designate existing Exhibit M as a new Exhibit J based on the proposed changes described above.

[158] *See infra* Section XI.—Part 37—Subpart G: Core Principle 6 (Position Limits or Accountability).

[159] The Commission notes that ''arrangements for alternative dispute resolution'' are included based on the requirements of existing Exhibit P, which the Commission proposes to eliminate from Form SEF. *See supra* note 154.

[160] The Commission notes that it proposes to move the language of existing § 37.7, which generally prohibits a SEF from using a participant's proprietary data or personal information that it collects or receives for regulatory purposes for business or marketing purposes, to a new § 37.504. *See infra* Section X.D.—§ 37.504—Prohibited Use of Data Collected for Regulatory Purposes.

[161] The Commission notes that the reference to a Commission-registered SDR in Exhibit M also includes a provisionally-registered SDR.

[162] 17 CFR 37.901.

[163] For a discussion of the relevant proposed amendments to the Core Principle 7 regulations, *see infra* Section XII.B.—§ 37.702—General Financial Integrity.

under new Exhibits L, M, N, or Q.[164] In conjunction with these other exhibits, new Exhibit O matches the scope of documents that an applicant is currently required to submit under existing Exhibit N.[165]

Ninth, the Commission proposes to adopt several changes to existing Exhibit Q.[166] This exhibit currently requires an applicant to provide an explanation of how its trading system(s) or platform(s) satisfy the Commission's rules, interpretations, and guidelines concerning SEF execution methods. Where applicable, paragraphs (a) and (b) of Exhibit Q specify that the explanation should include various details related to the minimum trade functionality requirement under § 37.3(a)(2), *i.e.,* an Order Book, and the prescribed execution methods for Required Transactions under § 37.9, *i.e.,* an Order Book or an RFQ System. As discussed below, the Commission is proposing to eliminate these requirements and to allow SEFs to offer flexible means of execution,[167] subject to certain trading-related rules under proposed § 37.201(a).[168] Accordingly, the Commission proposes conforming changes to Exhibit Q. In addition to the explanation of the applicant's trading system(s) or platform(s), the Commission also proposes to require an applicant to provide screenshots of any of its trading system(s) or platform(s). Based on the Commission's experience, these screenshots provide a useful supplement to evaluate any explanation provided under this exhibit.

Finally, the Commission proposes to consolidate existing Exhibit S, which currently requires a discussion of how the applicant will maintain trading data, into new Exhibit K (re-designated from existing Exhibit O). Exhibit K would require an applicant to submit a copy of its compliance manual and documents that describe how the applicant will conduct trade practice, market, and financial surveillance.

(4) Form SEF Exhibits—Operational Capability

The Commission proposes to re-designate existing Exhibit V, which requires the applicant to provide information pertaining to its program of risk analysis and oversight via the Technology Questionnaire, as a new Exhibit Q and to adopt non-substantive amendments to the exhibit's existing language.[169] Additionally, the Commission is making certain amendments to update the questionnaire, as described below.[170]

(5) Other Form SEF Amendments

In addition to the proposed amendments to the existing exhibits, the Commission is proposing several changes to the Form SEF instructions. Form SEF currently requires applicants to include a Table of Contents that lists each exhibit submitted as part of the application. In lieu of a separate list provided via existing Exhibit U, the Commission proposes to require that applicants designate, in the Table of Contents, the exhibits that are subject to a request for confidential treatment. The Commission also proposes to require that any such confidential treatment be reflected by some type of identifying number and code on the appropriate exhibit(s), similar to the approach followed for DCO applications and Form DCO.[171] Further, the Commission proposes to eliminate the existing instruction for newly-formed applicants regarding *pro forma* financial statements, which the Commission proposes to incorporate in paragraph (a) of new Exhibit G.

The Commission also proposes two minor amendments related to the Form SEF cover sheet. First, to enable the Commission to evaluate a SEF's compliance with ongoing filing requirements more readily, the Commission proposes to require an applicant to specify its fiscal year-end date.[172] Second, the Commission proposes to eliminate the reference to the use of Form SEF to amend an existing order or registration, in conformance with the proposed amendment to § 37.3(b)(3) discussed further below.[173]

(6) Request for Legal Entity Identifier

The Commission proposes to eliminate the requirement that an applicant request a ''unique, extensible, alphanumeric code'' from the Commission under § 37.3(b)(1)(iii) and to require instead that the applicant obtain a legal entity identifier (''LEI''). The Commission adopted part 37 prior to the establishment of the technical specification and governance mechanism for a global entity identifier. Since that adoption, a 20-digit alphanumeric LEI has been developed and adopted by many regulatory authorities in other jurisdictions, as well as the Commission, for use in identifying counterparties and other entities pursuant to various regulatory reporting requirements, including part 45 of the Commission's regulations.[174]

Request for Comment

The Commission requests comments on all aspects of the proposed amendments to § 37.3(b)(1) and Appendix A to part 37.

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[164] Exhibit Q requires an applicant to complete and submit the Program of Risk Analysis and Oversight Technology Questionnaire. Among other things, the questionnaire requires an applicant to provide any agreements with third-party IT providers. *See infra* Section XIX.B.—§ 37.1401(g)—Program of Risk Analysis and Oversight Technology Questionnaire.

[165] Given this new proposed exhibit, the Commission proposes to re-designate existing Exhibit O as a new Exhibit K. The content of the exhibit would remain the same and require an applicant to submit a copy of a compliance manual and documents that describe how the applicant will conduct trade practice, market, and financial surveillance.

[166] The Commission also proposes to re-designate existing Exhibit Q as a new Exhibit P based on the proposed changes described above.

[167] *See infra* Section IV.I.—§ 37.9—Methods of Execution for Required and Permitted Transactions; § 37.10—Process for a Swap Execution Facility to Make a Swap Available to Trade; § 37.12—Trade Execution Compliance Schedule; § 38.11—Trade Execution Compliance Schedule; § 38.12—Process for a Designated Contract Market to Make a Swap Available to Trade.

[168] Proposed § 37.201(a) would require a SEF to establish rules that govern the operation of the SEF, including rules that specify (i) the protocols and procedures for trading and execution; (ii) the use of discretion in facilitating trading and execution; and (iii) the sources and methodology for generating any market pricing information. *See infra* Section VI.A.1.—§ 37.201(a)—Required Swap Execution Facility Rules.

[169] As discussed below, the Commission is proposing § 37.1401(g) to require a SEF to annually prepare and submit an up-to-date Technology Questionnaire to Commission staff. *See infra* Section XIX.B.—§ 37.1401(g)—Program of Risk Analysis and Oversight Technology Questionnaire.

[170] *See infra* Section XIX.B.—§ 37.1401(g)—Program of Risk Analysis and Oversight Technology Questionnaire.

[171] The Commission also proposes to specify in the Form SEF instructions that an applicant must file a confidentiality request in accordance with § 145.9 of the Commission's regulations.

[172] The Commission notes that these ongoing filing requirements include (i) a fiscal year-end financial report that a SEF would be required to file within ninety days after the end of its fourth fiscal quarter under proposed § 37.1306(d), *see infra* Section XVIII.F.4.—§ 37.1306(d); (ii) proposed Exhibit Q of Form SEF, *i.e.,* the Program of Risk Analysis and Oversight Technology Questionnaire that a SEF would be required to file within ninety days after the end of its fiscal year under proposed § 37.1401(g), *see infra* Section XIX.B.—§ 37.1401(g)—Program of Risk Analysis and Oversight Technology Questionnaire; and (iii) an annual compliance report that a SEF would be required to file within ninety days after the end of its fiscal year under proposed § 37.1501(e)(2), *see infra* Section XX.A.5.—§ 37.1501(e)—Submission of Annual Compliance Report and Related Matters.

[173] *See infra* Section IV.C.3.d.—§ 37.3(b)(3)—Amendment of Application for Registration.

[174] The Commission notes that applicants may obtain an LEI from an LEI-issuing organization that has been accredited by the Global Legal Entity Identifier Foundation (''GLEIF''). GLEIF, About LEI—Get an LEI: Find LEI Issuing Organizations, *https://www.gleif.org/en/about-lei/get-an-lei-find-lei-issuing-organizations.*

c. § 37.3(b)(2)—Request for Confidential Treatment

The Commission is not proposing any amendments to § 37.3(b)(2).

d. § 37.3(b)(3)—Amendment of Application for Registration [175]

Section 37.3(b)(3) specifies that an applicant amending a pending application or requesting an amendment to a registration order must file an amended application with the Secretary of the Commission in the manner specified by the Commission. The Form SEF instructions correspond to this requirement and currently specify that requests for amending a registration order and any associated exhibits must be submitted via Form SEF. Section 37.3(b)(3) otherwise specifies that a SEF must file any amendment to its application subsequent to registration as a submission under part 40 of the Commission's regulations, or as specified by the Commission.[176] In the preamble to SEF Core Principles Final Rule, the Commission also stated that if any information provided in a Form SEF is or becomes inaccurate for any reason, even after registration, the SEF ''must promptly make the appropriate corrections with the Commission.'' [177]

The Commission proposes to clarify and amend the requirements regarding post-registration amendments to both Form SEF exhibits and registration orders. First, the Commission proposes to amend § 37.3(b)(3) and Form SEF to eliminate the required use of Form SEF to request an amended order of registration from the Commission.[178] Under current practice, SEFs file a request for an amended order with the Commission rather than submitting Form SEF. Commission staff typically will review the request, obtain additional information from the SEF where necessary, and subsequently recommend to the Commission whether to grant or deny the amended order. Given current practice, the Commission believes that an updated Form SEF is not needed to request an amended order of registration.

Second, the Commission proposes to eliminate the existing language that specifies the use of part 40 to file application amendments subsequent to registration. The Commission emphasizes that not all of the information from the Form SEF exhibits need to be updated pursuant to part 40 subsequent to registration; certain part 37 provisions already require SEFs to update their information on an ongoing basis. For example, under § 37.1306, a SEF is required to file updated financial reports, including fiscal year-end reports, which precludes the need to amend and file new Exhibit G (existing Exhibit I) through part 40. The Commission clarifies that part 40 only applies to information from application exhibits that constitute a ''rule,'' as defined under § 40.1(i).[179] Therefore, registered SEFs have already been submitting changes to these types of documentation pursuant to the part 40 rule filing procedures. Given that part 40 defines ''rule,'' the existing language is not required to be included under proposed § 37.3(b)(3). If certain information from the Form SEF exhibits are not required to be updated through other part 37 provisions or part 40, then a SEF does not have to file those amendments subsequent to registration. The Commission notes, however, that it may otherwise request information related to a SEF's business pursuant to § 37.5(a).[180]

Request for Comment

The Commission requests comments on all aspects of the proposed amendments to § 37.3(b)(3).

e. § 37.3(b)(4)—Effect of Incomplete Application

The Commission is not proposing any amendments to § 37.3(b)(4).

f. § 37.3(b)(5)—Commission Review Period

Based on the elimination of the temporary registration regime under existing § 37.3(c), the Commission proposes to amend the existing provision to eliminate related language and specify that the Commission reviews a SEF registration application pursuant to a 180-day timeframe and the procedures specified in CEA section 6(a).

g. § 37.3(b)(6)—Commission Determination

The Commission is not proposing any amendments to § 37.3(b)(6).

4. § 37.3(c)—Amendment to an Order of Registration

Consistent with existing Commission practice and the proposal to eliminate the use of Form SEF to request an amended registration order, the Commission proposes a new § 37.3(c)—''Amendment to an order of registration''—to establish a separate process for such requests.[181] A SEF would be required to submit its request electronically in the form and manner specified by the Commission.[182] Similar to the procedures set forth for the registration application process, a SEF would be required to provide the Commission with any additional information and documentation necessary to review a request. The Commission would issue an amended order if the SEF would continue to maintain compliance with the Act and the Commission's regulations after such amendment. Further, the Commission may also issue an amended order subject to conditions. The Commission also proposes to specify that it may decline to issue an amended order based upon a determination that the SEF would not continue to maintain compliance with the Act and the Commission's regulations upon such amendment.

Request for Comment

The Commission requests comments on all aspects of proposed § 37.3(c).

5. § 37.3(d)—Reinstatement of Dormant Registration

The Commission is not proposing any amendments to § 37.3(d).

[175] The Commission proposes to retitle § 37.3(b)(3) to ''Amendment of application for registration'' from ''Amendment of application prior or subsequent to full registration'' based on the proposed changes described below.

[176] 17 CFR 37.3(b)(3). Part 40 governs the submission of new products, rules and rule amendments for registered entities, including a process for the voluntary submission of rules for Commission review and approval under § 40.5 and a process for the self-certification of rules under § 40.6. 17 CFR 40.5–6.

[177] SEF Core Principles Final Rule at 33485.

[178] *See infra* Section IV.C.4.—§ 37.3(c)—Amendment to an Order of Registration.

[179] ''Rule'' is defined under § 40.1(i) as any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, advisory, terms and conditions, trading protocol, agreement or instrument corresponding thereto, including those that authorize a response or establish standards for responding to a specific emergency, and any amendment or addition thereto or repeal thereof, made or issued by a registered entity or by the governing board thereof or any committee thereof, in whatever form adopted. 17 CFR 40.1(i). The Commission generally interprets the § 40.1(i) rule definition broadly to encompass governance documentation (proposed Exhibit C); fees (proposed Exhibit H); rulebooks (proposed Exhibit J); compliance manuals (proposed Exhibit K); participant agreements (proposed Exhibit L); SDR-related agreements (proposed Exhibit M); clearing-related agreements (proposed Exhibit N); other third-party agreements (proposed Exhibit O); and information related to execution methods (proposed Exhibit P).

[180] 17 CFR 37.5(a).

[181] *See supra* Section IV.C.3.d.—§ 37.3(b)(3)—Amendment of Application for Registration.

[182] The Commission proposes to eliminate existing § 37.3(c), which establishes the temporary SEF registration process that is no longer available to applicants, as described above. *See supra* Section IV.C.3.a.—Elimination of Temporary Registration.

6. § 37.3(e)—Request for Transfer of Registration

Section 37.3(e) establishes requirements that a SEF must follow when seeking to transfer its registration from its current legal entity to a new legal entity as a result of a corporate change.[183] Among these requirements, § 37.3(e)(2) requires a SEF to file a transfer request no later than three months prior to the anticipated corporate change, or if not possible, as soon as it knows of the change.[184] Section 37.3(e)(3) requires a transfer request to include certain information, such as the transferee's governing documents under § 37.3(e)(3)(iv).[185] Under § 37.3(e)(3)(vi), the request must also include certain representations from a transferee, including representations that it will (i) retain and assume, without limitation, all of the assets and liabilities of the transferor; (ii) assume responsibility for complying with the Act and the Commission's regulations; (iii) assume, maintain, and enforce all of the transferor's rules that are applicable to SEFs, including the transferor's rulebook and any amendments; (iv) comply with all self-regulatory responsibilities, including maintaining and enforcing all self-regulatory programs; and (v) notify market participants of all changes to the rulebook prior to the transfer, as well as the transfer and issuance of a corresponding order by the Commission.[186] Under § 37.3(e)(3)(vii), the transfer request must also include a representation from the transferee that upon the transfer, it will assume responsibility for and maintain compliance with the SEF core principles for all swaps previously made available for trading through the transferor; and that none of the proposed rule changes will affect the rights and obligations of any market participant.[187]

The Commission proposes several non-substantive amendments to streamline the existing requirements under § 37.3(e) for filing a transfer request. First, the Commission proposes to simplify the timeline for filing a request by requiring that a SEF file the request ''as soon as practicable,'' rather than no later than three months prior to the anticipated corporate change or as soon as it knows of such a change, if less than three months prior to the change.[188]

Second, with respect to the required information in a transfer request, the Commission also proposes to specifically reference other types of governing documents that would be adopted by transferees, such as a limited liability agreement or an operating agreement.[189] This proposed change acknowledges that a transferee of a SEF's registration may be a non-corporate entity, such as a limited liability company or partnership.

Third, the Commission proposes to simplify a transferee's compliance-related representations under § 37.3(e)(3)(vi). The Commission proposes to consolidate and eliminate unnecessary language; [190] and eliminate the existing requirement that the transferee attest that it will assume, maintain, and enforce compliance with the SEF core principles, as well as maintain and enforce self-regulatory programs.[191] The Commission notes that the language that it proposes to delete is otherwise duplicative to § 37.3(e)(3)(vi)(B), which generally requires the transferee to represent that it will assume responsibility for compliance with all applicable provisions of the Act and the Commission's regulations. Further, the Commission proposes to eliminate the existing requirement under § 37.3(e)(3)(vii)(A) that a transferee represent that it will continue to comply with the SEF core principles for all swaps made available for trading through the transferor. The Commission notes that all SEFs, whether or not a transferee, must comply with the Act and Commission regulations, including all requirements applicable to a SEF's listed swaps.

Fourth, the Commission proposes to amend § 37.3(e) to better reflect the practical realities of the transfer process. Rather than require a transferee to represent that it will retain and assume all the assets and liabilities of the transferor without limitation, the Commission proposes to instead require that the transferee state in the request when it would not do so.[192] In addition, rather than require a transferee to represent that none of a transferee's proposed rule changes will affect the rights and obligations of any market participant, the Commission proposes instead to require that the transferee represent that it will notify market participants of changes that may affect their rights and obligations.[193] These amendments would eliminate certain pre-emptive restrictions upon business-related changes associated with the transfer, but also allow the Commission to continue reviewing whether such changes may be inconsistent with the Act or the Commission's regulations.

7. § 37.3(f)—Request for Withdrawal of Application for Registration

The Commission is not proposing any amendments to § 37.3(f).

8. § 37.3(g)—Request for Vacation of Registration

The Commission is not proposing any amendments to § 37.3(g).

9. § 37.3(h)—Delegation of Authority

Given the deletion of the phrase relating to temporary registration in the existing paragraph, the Commission proposes a conforming non-substantive amendment.

D. § 37.4—Procedures for Implementing Rules [194]

Section 37.4 currently sets forth rules related to the listing of swap products and the submission of rules on a pre- and post-registration basis. Section 37.4(a) specifies that a SEF applicant may submit the terms and conditions of swaps that it intends to list for trading as part of its registration application.[195] Section 37.4(b) specifies that any swap

[183] 17 CFR 37.3(e).

[184] 17 CFR 37.3(e)(2).

[185] 17 CFR 37.3(e)(3).

[186] 17 CFR 37.3(e)(3)(vi).

[187] 17 CFR 37.3(e)(3)(vii).

[188] The Commission proposes to adopt this amendment under § 37.3(e)(2).

[189] The Commission proposes to adopt this amendment under § 37.3(e)(3)(iv). The Commission recognizes that different types of entities are established and governed by different types of documentation. For example, a corporation is formed based on articles of incorporation and operates pursuant to bylaws; a limited liability company is generally established pursuant to articles of organization and operates pursuant to an operating agreement; and a limited partnership is generally formed based on a limited partnership agreement. Based on the proposed amendments to § 37.3(e)(iv), the Commission also proposes to amend § 37.3(e)(3)(i) by changing the word ''agreement'' to ''documentation.''

[190] The Commission proposes to consolidate existing clauses (B) and (D) into a new proposed clause (B).

[191] The Commission proposes to eliminate this requirement under existing clause (C) and renumber existing clause (E) as clause (C).

[192] The Commission proposes to adopt this amendment under subparagraph (3)(vi)(A).

[193] The Commission proposes to amend the language of existing subparagraph (3)(vii)(B) and renumber the provision to subparagraph (3)(vii)(C) based on the proposed changes described above. The Commission notes that the transferee's notification obligations would not be limited to those that may affect a market participant's rights and obligations; the proposed rule would maintain the existing requirement that a transferee represent that it will notify market participants of all changes to the transferor's rulebook prior to the transfer.

[194] The Commission proposes to retitle § 37.4 to ''Procedures for implementing rules'' from ''Procedures for listing products and implementing rules'' based on the proposed changes described below.

[195] 17 CFR 37.4(a).

terms and conditions or rules submitted as part of the SEF's application shall be considered for approval by the Commission at the time it issues the SEF's registration order.[196] Section 37.4(c) specifies that after the Commission issues a registration order, the SEF shall submit any proposed swap terms and conditions, including amendments to such terms and conditions, proposed new rules, or proposed rule amendments, pursuant to part 40 of the Commission's regulations.[197] Section 37.4(d) specifies that any swap terms and conditions or rules submitted as part of an application to reinstate a dormant SEF shall be considered for approval at the time that the Commission approves the dormant SEF's reinstatement of registration.[198]

The Commission proposes to eliminate § 37.4(a) and to adopt conforming amendments to § 37.4(b) to establish that the Commission's process of reviewing the terms and conditions of a swap product that the applicant intends to list for trading upon registration is separate from the review process of a SEF's application for registration.[199] As amended, § 37.4(b) would specify that rules, except swap product terms and conditions, submitted by the SEF applicant as part of a registration application would be considered for approval at the time the Commission issues an order of registration. Upon obtaining an order of registration, a registered SEF may formally submit product terms and conditions under § 40.2 or § 40.3, which controls the submission of new product terms and conditions by registered entities.[200] Given that the submission procedures for rules, including product terms and conditions, are established under part 40, the Commission also proposes to eliminate unnecessary language by deleting § 37.4(c). The Commission believes that separating these two processes would promote efficiency for both Commission staff and SEF applicants. For example, a SEF applicant's registration order could otherwise be unnecessarily delayed or stayed if the SEF applicant submits for Commission approval, along with its application for registration, a novel or complex product that would require additional consideration or analysis by Commission staff.

To conform to the proposed approach for reviewing swap product terms and conditions from SEF applicants described above, the Commission also proposes to amend § 37.4(d) to delete the reference to any ''swap terms and conditions'' submitted by a dormant SEF that is applying for reinstatement of registration.[201] Accordingly, dormant SEFs would not be able to provide proposed swap product terms and conditions for approval as part of the dormant SEF registration reinstatement process. Upon obtaining a reinstatement of registration, a SEF may formally submit product terms and conditions under § 40.2 or § 40.3, which controls the submission of new product terms and conditions by registered entities.

Request for Comment

The Commission requests comments on all aspects of the proposed amendments to § 37.4.

E. § 37.5—Provision of Information Relating to a Swap Execution Facility[202]

1. § 37.5(a)—Request for Information

The Commission is not proposing any amendments to § 37.5(a).

2. § 37.5(b)—Demonstration of Compliance

The Commission is proposing certain non-substantive amendments to § 37.5(b).

3. § 37.5(c)—Equity Interest Transfer

Section 37.5(c) sets forth notification requirements related to transfers of equity interest in a SEF. Section 37.5(c)(1) requires a SEF to notify the Commission if the SEF enters into a transaction involving the transfer of fifty percent or more of the equity interest in the SEF.[203] Section 37.5(c)(2) requires the SEF to file the notice at the earliest possible time, but no later than the open of business ten business days following the date upon which the SEF enters into a firm obligation to transfer the equity interest.[204] Upon such a notification, the Commission may request supporting documentation of the transaction.[205] Where any aspect of the transfer constitutes a rule as defined under part 40, § 37.5(c)(3) requires a SEF to comply with the requirements of CEA section 5c(c) and part 40.[206]

The Commission has previously stated that in situations where such an equity transfer occurs, the Commission has an interest in reviewing and considering the implications of the changes in ownership.[207] In particular, the Commission seeks to determine whether the change in ownership will adversely impact the operations of the SEF or the SEF's ability to comply with the core principles and the Commission's regulations thereunder.[208] Further, the Commission intended for § 37.5(c) to enable Commission staff to consider whether any term or condition contained in an equity transfer agreement(s) is inconsistent with the self-regulatory responsibilities of a SEF or with any of the core principles.[209]

The Commission proposes to amend § 37.5(c)(1) to require a SEF to file a notice with the Commission in the event of any transaction that results in the transfer of direct or indirect ownership of fifty percent or more of the equity interest in the SEF. The Commission notes that indirect ownership may transpire, for example, through a transaction involving a direct or indirect parent company of the SEF. Section 37.5(c), however, only requires a SEF to file a notice where the SEF is a party to a transaction involving a transfer of direct ownership of fifty percent or more of the equity interest in the SEF, but not where the SEF is not a party to the transaction, or where the transaction results in a transfer of indirect ownership of the SEF. The Commission believes that such transfers implicate the same regulatory policies underlying the existing rule and therefore proposes

[196] 17 CFR 37.4(b).

[197] 17 CFR 37.4(c).

[198] 17 CFR 37.4(d).

[199] The Commission proposes to renumber subsection (b) to subsection (a) based on the proposed amendment as described above.

[200] 17 CFR part 40. Although an applicant may not submit swap product terms and conditions for approval as part of the registration process, the Commission notes that SEF applicants may informally discuss any proposed products with Commission staff for informal feedback as part of the registration process.

[201] The Commission proposes to renumber subsection (d) to subsection (b) based on the proposed amendments as described above.

[202] The Commission proposes to retitle § 37.5 to ''Provision of information relating to a swap execution facility'' from ''Information relating to swap execution facility compliance'' based on the proposed changes described below.

[203] 17 CFR 37.5(c)(1).

[204] 17 CFR 37.5(c)(2).

[205] 17 CFR 37.5(c)(1). In the SEF Core Principles Final Rule, the Commission specified the types of documentation to include, but not be limited to, (i) relevant agreement(s); (ii) associated changes to relevant corporate documents; (iii) a chart outlining any new ownership or corporate or organization structure, if available; and (iv) a brief description of the purpose and any impact of the equity interest transfer. SEF Core Principles Final Rule at 33490. The final rule also stated that a SEF must file a certification regarding its compliance with CEA section 5h and the Commission's regulations thereunder, as set forth in existing § 37.5(c)(4). *Id.*

[206] 17 CFR 37.5(c)(3).

[207] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR 1214, 1217 (Jan. 7, 2011) (''SEF Core Principles Proposed Rule'').

[208] *Id.*

[209] *Id.* In the SEF Core Principles Final Rule, the Commission raised the provision to 50 percent from 10 percent and maintained a similar policy rationale, SEF Core Principles Final Rule at 33490, *i.e.,* to ''ensure that SEFs remain mindful of their self-regulatory responsibilities when negotiating the terms of significant equity interest transfers.'' SEF Core Principles Proposed Rule at 1217.

amendments to broaden the requirement. Based on the proposed changes described above, the Commission further proposes conforming non-substantive amendments to § 37.5(c)(2)—''Timing of notification''—and § 37.5(c)(4)—''Certification.'' [210]

The Commission further proposes to streamline § 37.5(c) by deleting § 37.5(c)(3)—the Commission notes that part 40 already applies to SEFs with respect to rule filings, and therefore, a separate provision is not necessary to apply part 40 to SEFs.

Request for Comment

The Commission requests comments on all aspects of the proposed amendments to § 37.5(c).

4. § 37.5(d)—Delegation of Authority

The Commission is not proposing any amendments to § 37.5(d).

F. § 37.6—Enforceability

1. § 37.6(a)—Enforceability of Transactions

Section 37.6(a) is intended to provide market participants with legal certainty with respect to swap transactions on a SEF and generally clarifies that a swap transaction entered into on or pursuant to the rules of a SEF cannot be void, voidable, subject to recession, otherwise invalidated, or rendered unenforceable due to a violation by the SEF of the Act or applicable Commission regulations or any proceeding that alters or supplements a rule, term or condition that governs such swap or swap transaction.[211]

The Commission proposes non-substantive amendments to § 37.6(a).[212] These amendments include (i) amending the phrase ''entered into'' to ''executed'' to provide greater clarity; and (ii) eliminating the reference to swaps executed ''pursuant to the rules of'' a SEF, which conforms to the proposed amendment to the ''block trade'' definition under § 43.2, discussed further below.[213]

2. § 37.6(b)—Swap Documentation

Section 37.6(b) requires a SEF to provide each counterparty to a transaction with a written ''confirmation'' that contains all of the terms of a swap transaction at the time of the swap's execution for both cleared and uncleared swap transactions, including (i) ''economic terms'' that are specific to a transaction, *e.g.,* swap product, price, and notional amount; and (ii) non-specific ''relationship terms'' that generally govern all transactions between two counterparties, *e.g.,* default provisions, margin requirements, and governing law.[214] ''Confirmation'' is defined under parts 43 and 45 of the Commission's regulations as the consummation (electronically or otherwise) of legally binding documentation that memorializes the agreement of the counterparties to *all terms* of the swap (emphasis added).[215] The definition also states that a confirmation shall be in writing (electronic or otherwise) and legally supersede any previous agreement (electronic or otherwise) relating to the swap.[216] The Commission adopted § 37.6(b), in part, to facilitate this process for swaps transactions—both cleared and uncleared—executed on or pursuant to the rules of a SEF.[217]

For uncleared swap transactions, the Commission is aware that many relationship terms that may govern certain aspects of an uncleared swap transaction are often negotiated and executed between potential counterparties prior to execution.[218] The Commission previously provided that SEFs may satisfy § 37.6(b) for uncleared swap transactions by incorporating by reference the relevant terms set forth in such agreements, as long as those agreements have been submitted to the SEF prior to execution.[219] As applied, § 37.6(b) requires that the SEF obtain and incorporate this documentation into the issued confirmation, which is intended in part to provide SEF participants with legal certainty with respect to uncleared swap transactions.[220]

This requirement, however, has created impractical burdens for SEFs. Based upon feedback from SEFs, the Commission understands that SEFs have encountered many issues in trying to comply with the requirement for uncleared swaps, including high financial, administrative, and logistical burdens to collect and maintain bilateral transaction agreements from many individual counterparties. SEFs have stated that they are unable to develop a cost-effective method to request, accept, and maintain a library of every previous agreement between counterparties.[221] SEFs have also noted that the potential number of previous agreements is considerable, given that SEF counterparties enter into agreements with many other parties and have multiple agreements for different asset classes.[222]

Commission staff has acknowledged these technological and operational challenges and has accordingly granted time-limited no-action relief.[223] Based on this relief, SEFs have incorporated

[210] The Commission also proposes to renumber paragraph (c)(4) to paragraph (c)(3) based on the proposed elimination of the existing language in paragraph (c)(3) described below.

[211] 17 CFR 37.6(a).

[212] The Commission also proposes to add a new title to § 37.6(a)—''Enforceability of transactions.''

[213] *See infra* Section XXII.—Part 43—§ 43.2—Definition of ''Block Trade.''

[214] 17 CFR 37.6(b).

[215] 17 CFR 43.2; 17 CFR 45.1. *See also* 17 CFR 23.500 (similar definition of ''confirmation'' that applies to swap dealers (''SDs'') and major swap participants (''MSPs'')).

[216] 17 CFR 43.2; 17 CFR 45.1.

[217] SEF Core Principles Final Rule at 33491.

[218] SEF Core Principles Final Rule at 33491 n.195. Swap counterparties have typically relied on the use of industry-standard legal documentation, including master netting agreements, definitions, schedules, and confirmations, to document their swap trading relationships. This documentation, such as the ISDA Master Agreement and related Schedule and Credit Support Annex (''ISDA Agreements''), as well as related documentation specific to particular asset classes, offers a framework for documenting uncleared swap transactions between counterparties. *See* Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904, 55906 (Sept. 11, 2012). For uncleared swap transactions, § 23.504(b) requires written documentation of all the terms governing the trading relationship between an SD or MSP and its counterparty. 17 CFR 23.504(b).

[219] SEF Core Principles Final Rule at 33491 n.195.

[220] To ensure that the SEF confirmation provides legal certainty, the Commission stated that counterparties choosing to execute a swap transaction on or pursuant to the rules of a SEF must have all terms, including possible long-term credit support arrangements, agreed to no later than execution, such that the SEF can provide a written confirmation inclusive of those terms at the time of execution. SEF Core Principles Final Rule at 33491.

[221] Many of these agreements are maintained in paper form or scanned PDF files that are difficult to quickly digitize in a cost-effective manner. *See* WMBAA, Request for Extended Relief from Certain Requirements under Parts 37 and 45 Related to Confirmations and Recordkeeping for Swaps Not Required or Intended to be Cleared at 3 (Mar. 1, 2016). Further, some SEFs have cited the considerable resource cost of obtaining the number of different agreements that exist to accommodate the different parties and different asset classes. *Id.*

[222] *Id.*

[223] Commission staff provided initial no-action relief in 2014. CFTC Letter No. 14–108, Re: Staff No-Action Position Regarding SEF Confirmations and Recordkeeping Requirements under Certain Provisions Included in Regulations 37.6(b) and 45.2 (Aug. 18, 2014). Commission staff has since extended this no-action relief on several occasions. *See* CFTC Letter No. 17–17, Re: Extension of No-Action Relief for Swap Execution Facility Confirmation and Recordkeeping Requirements under Commodity Futures Trading Commission Regulations 37.6(b), 37.1000, 37.1001, 45.2, and 45.3(a) (Mar. 24, 2017); CFTC Letter No. 16–25, Re: Extension of No-Action Relief for Swap Execution Facility Confirmation and Recordkeeping Requirements under Commodity Futures Trading Commission Regulations 37.6(b), 37.1000, 37.1001, 45.2, and 45.3(a) (Mar. 14, 2016); CFTC Letter 15–25, Re: Extension of No-Action Relief for SEF Confirmation and Recordkeeping Requirements under Commission Regulations 37.6(b), 37.1000, 37.1001, and 45.2, and Additional Relief for Confirmation Data Reporting Requirements under Commission Regulation 45.3(a) (Apr. 22, 2015).

applicable relationship terms from previous agreements by reference in the confirmation without obtaining copies of these agreements prior to the execution of a swap.[224] SEFs, however, still must memorialize the relationship terms contained in separate, previously-negotiated agreements that the SEF has not reviewed at the time of incorporation, and would likely not review post-execution. One industry participant, however, noted that a SEF would not be familiar with the terms of the agreements that it is required to incorporate by reference into a confirmation.[225]

Based on its experience with the part 37 implementation, the Commission acknowledges that cleared and uncleared swaps raise different issues with respect to confirmation requirements and the current SEF requirements create difficulties for the latter type of swap transaction. Therefore, the Commission is proposing a revised approach to § 37.6(b) as described below.

a. § 37.6(b)(1)—Legally Binding Documentation

The Commission proposes §§ 37.6(b)(1)(i)–(ii) to establish separate swap transaction documentation requirements for cleared and uncleared swaps. Proposed § 37.6(b)(1)(i)(A) would apply the existing confirmation requirement—that a SEF must issue a written confirmation that includes all of the terms of the transaction—to cleared swap transactions. The Commission further proposes to define ''confirmation document'' under § 37.6(b)(1)(i)(B) as a legally binding written documentation that memorializes the agreement to all terms of a swap transaction and legally supersedes any previous agreement that relates to the swap transaction between the counterparties.

With respect to uncleared swap transactions the Commission proposes a revised approach under § 37.6(b)(1)(ii) that would require a SEF to provide the counterparties to an uncleared swap transaction with a ''trade evidence record'' that memorializes the terms of the swap transaction agreed upon between the counterparties on the SEF. In contrast to a cleared swap confirmation, the trade evidence record would not be required to include all of the terms of the swap transaction, including relationship terms contained in underlying documentation between the counterparties. As defined under proposed § 37.6(b)(1)(ii)(B), a trade evidence record means a legally binding written documentation that memorializes the terms of a swap transaction agreed upon by the counterparties and legally supersedes any conflicting term in any previous agreement that relates to the swap transaction between the counterparties. The Commission anticipates that these terms would include, at a minimum, the ''economic terms'' that are agreed upon between the counterparties to a specific SEF transaction, *e.g.,* trade date, notional amount, settlement date, and price.

The Commission believes that the proposed rule would provide SEFs with a simplified approach to comply with the legal documentation requirement, but also continue to promote the policy objective of § 37.6(b) by providing SEF participants with legal certainty with respect to both cleared and uncleared swap transactions. Further, the proposed approach accommodates existing counterparty trading practices for uncleared swaps, particularly the use of separate, previously-negotiated underlying agreements to establish relationship terms that generally govern the trading relationship, as opposed to a specific transaction, between two counterparties. To the extent that such terms either are agreed upon between the counterparties in underlying documentation established away from the SEF and continue to govern the transaction post-execution or are not required to establish legal certainty for a specific transaction, a SEF would not be required to incorporate those terms into a trade evidence record. The proposed approach should address the challenges that have prevented SEFs from fully complying with § 37.6(b) by reducing the administrative burdens for SEFs, who would not be required to obtain, incorporate, or reference those previous agreements, and for counterparties, who would not be required to submit all of their relevant documentation with other potential counterparties to the SEF.[226]

Request for Comment

The Commission requests comments on all aspects of proposed § 37.6(b)(1). In particular, the Commission is particularly interested in the prescribed contents and legal import of a trade evidence record and requests comment on the following questions:

(19) Should the Commission allow a SEF to issue a trade evidence record that does not include all the terms of a swap transaction agreed to on the SEF?

(20) Should the Commission require a SEF to include a minimum set of terms in a trade evidence record, *e.g.,* material economic terms? Should the Commission specify those terms in the proposed regulation?

(21) Should the Commission require a SEF to include any of the ''primary economic terms,'' as defined under § 45.1, in a trade evidence record? If so, which terms should be included?

(22) Should the Commission specify that a trade evidence record (i) serves as evidence of a legally binding agreement upon the counterparties; and (ii) legally supersedes any previous agreement, rather than any conflicting term in any previous agreement, as proposed? With respect to (i), are there terms that are generally contained within previously-negotiated, underlying agreements between the counterparties that are necessary to make a transaction legally binding, and therefore must be submitted to the SEF?

(23) Should the Commission specify in its regulations that notwithstanding the trade evidence record requirement, a SEF is allowed to incorporate by reference underlying, previous agreements containing terms governing a swap transaction into any trade evidence record associated with the transaction?

(24) Do proposed §§ 37.6(b)(1)(i)–(ii) provide sufficient legal certainty with respect to any contradictory terms that may be contained within the previous agreements?

b. § 37.6(b)(2)—Requirements for Swap Documentation

Section 37.6(b) requires that the confirmation take place at the same time as execution, except for a limited exception for certain information for bunched orders.[227] The Commission proposes § 37.6(b)(2)(i) to amend this requirement and instead require a SEF to provide a confirmation document or trade evidence record to the counterparties to a transaction ''as soon as technologically practicable'' after the

[224] *Id.*

[225] *See* SIFMA Asset Management Group, Re: Straight-Through Processing, Swap Execution Facility Implementation and Relief Relating to the Aggregation Provision in Final Block Trade Rule at 6 n.14 (Oct. 25, 2013) (stating that ''it is highly impractical for a SEF to familiarize itself with the often complex, bespoke master agreement and trade terms (and the various documents that may be incorporated by reference) in order to produce a customized, potentially complex confirmation on a trade by trade basis.'').

[226] The Commission acknowledges that the issuance of a trade evidence record would not alter the other obligations of a SEF or the counterparties under the CEA and the Commission's regulations. For example, a SEF would still be required to report all required swap creation data under § 45.3(a), as applicable. 17 CFR 45.3(a). Further, a counterparty that is a swap dealer or major swap participant would also still be required to transmit a confirmation pursuant to § 23.501, as applicable. 17 CFR 23.501.

[227] 17 CFR 37.6(b).

execution of the swap transaction on the SEF.[228]

The Commission recognizes that a strict implementation of the existing requirement is not practical from a temporal standpoint, given that a SEF's issuance of a written confirmation document or trade evidence record would only occur upon execution by counterparties.[229] Further, the required issuance of a written confirmation document or trade evidence record simultaneous with execution may become further impracticable for some SEFs from an operational and technological standpoint based on the different trading systems or platforms that SEFs may offer under a more flexible approach to execution methods proposed by the Commission.[230] Therefore, proposed § 37.6(b)(2)(i) is intended to establish a more practical approach that accommodates different types of SEF operations. The Commission believes that the proposed standard—''as soon as technologically practicable''—would also continue to promote the Commission's goals of providing the swap counterparties with legal certainty in a prompt manner. Based on this proposed amendment to the existing language of § 37.6(b), the Commission also proposes to renumber the existing requirement regarding bunched orders to proposed § 37.6(b)(2)(ii) and adopt non-substantive amendments.

As noted, § 37.6(b) requires a SEF to provide the written confirmation of a transaction executed on or pursuant to the SEF's rules to ''each counterparty to [the] transaction.'' The Commission proposes to add § 37.6(b)(2)(iii) to provide that a SEF may issue a confirmation document or trade evidence record to the intermediary trading on behalf of a counterparty, provided that the SEF establish and enforce rules to require any intermediary to transmit any such document or record to the counterparty as soon as technologically practicable. Based on industry practice, the Commission notes that to the extent that intermediaries, acting on behalf of swap participants, facilitate swap execution on a SEF, the SEF transmits the written confirmation to the intermediary and then requires the intermediary to forward the confirmation to its customer. The Commission understands that participants using intermediaries to trade on a SEF may not establish the appropriate connectivity necessary to receive written confirmations directly from the SEF. Requiring the intermediary to transmit the document or record as soon as technologically practicable would further accommodate current market practices, as discussed above.

Request for Comment

The Commission requests comments on all aspects of proposed § 37.6(b)(2). In particular, the Commission requests comment on the following questions:

(25) Is the Commission's proposal, to require a SEF to transmit confirmation documents or trade evidence records to counterparties ''as soon as technologically practicable'' after the execution of the swap transaction on the SEF an appropriate time frame? Should the Commission require that the SEF issue the confirmation document or trade evidence record within a specified time limit?

(26) Is the Commission's proposal to require a SEF to establish and enforce rules that require an intermediary acting on behalf of a counterparty to transmit a confirmation document or trade evidence record to such counterparty ''as soon as technologically practicable'' an appropriate time frame? Should the Commission require that the SEF issue the confirmation document or trade evidence record within a specified time limit?

(27) Should the Commission define ''as soon as technologically practicable'' in a similar manner to the definition in part 43?

G. § 37.7—Prohibited Use of Data Collected for Regulatory Purposes

The Commission proposes to move and amend § 37.7, which prohibits a SEF from using proprietary or personal information that it collects or receives to fulfill regulatory obligations for business or marketing purposes, as a new § 37.504 under the Core Principle 5 (Ability to Obtain Information) regulations. The Commission discusses the proposed amendments to the existing requirements further below.[231]

H. § 37.8—Boards of Trade Operating Both a Designated Contract Market and a Swap Execution Facility[232]

Section 37.8(a) requires an entity that operates as both a DCM and a SEF to separately register with the Commission in accordance with the procedures set forth under part 38 and part 37 of the Commission's regulations, respectively. Section 37.8(a) further requires that a dually-registered entity comply with the respective DCM and SEF core principles and regulations on an ongoing basis.

The Commission notes that the language is superfluous to the similar requirements that already exist under § 38.2 and § 37.2 for DCMs and SEFs, respectively, and therefore proposes to delete this latter requirement. The Commission notes, however, that this is not a substantive change and DCMs and SEFs must otherwise comply with the Act and applicable regulations.

I. § 37.9—Methods of Execution for Required and Permitted Transactions; § 37.10—Process for a Swap Execution Facility To Make a Swap Available to Trade; § 37.12—Trade Execution Compliance Schedule; § 38.11—Trade Execution Compliance Schedule; § 38.12—Process for a Designated Contract Market To Make a Swap Available To Trade

The CEA, as amended by the Dodd-Frank Act, requires the Commission to develop and implement a regulatory framework for trading swaps on registered SEFs and establishes a corresponding trade execution requirement that requires certain swaps to be executed on DCMs, SEFs, or Exempt SEFs.[233] The regulatory framework that the Commission developed to implement these provisions prescribes, among other things, (i) a process that allows SEFs and DCMs to initiate determinations of which swaps should be subject to the CEA section 2(h)(8) trade execution requirement, *i.e.,* the MAT process; and (ii) the methods of execution that must be used for swaps that are subject to the trade execution requirement. In addition, the framework permits SEFs to offer any method of execution for swaps

[228] The Commission notes that in the context of real-time public reporting, it has defined ''as soon as technologically practicable'' to mean as soon as possible, taking into consideration the prevalence, implementation and use of technology by comparable market participants. 17 CFR 43.2. The meaning of this term, as proposed in § 37.6(b)(2)(i) herein, would be consistent with this definition.

[229] The Commission notes that a public commenter previously cited execution and confirmation as two separate processes in the swap transaction process. SEF Core Principles Final Rule at 33491 (comment from the Energy Working Group that execution and confirmation are ''distinct steps'' in the swap transaction process).

[230] *See infra* Section IV.I.—§ 37.9—Methods of Execution for Required and Permitted Transactions; § 37.10—Process for a Swap Execution Facility to Make a Swap Available to Trade; § 37.12—Trade Execution Compliance Schedule; § 38.11—Trade Execution Compliance Schedule; § 38.12—Process for a Designated Contract Market to Make a Swap Available to Trade.

[231] *See infra* Section X.D.—§ 37.504—Prohibited Use of Data Collected for Regulatory Purposes.

[232] The Commission proposes to renumber § 37.8 to § 37.7 based on the proposed changes described above.

[233] 7 U.S.C. 2(h)(8). Although the trade execution requirement may be satisfied through DCMs, the Commission's discussion of the trade execution requirement in this proposed rulemaking will generally pertain to SEFs, unless otherwise noted.

that are not subject to the trade execution requirement.

The Commission adopted this framework in part to achieve the SEF statutory goals in CEA section 5h(e) of promoting trading on SEFs and promoting pre-trade transparency in the swaps market. The Commission acknowledges that the existing framework has transitioned some swaps trading and market participants to SEFs. Since 2013, however, the Commission has gained considerable knowledge and experience with swaps trading dynamics through implementing part 37, particularly with respect to the required use of certain execution methods. Based on that knowledge and experience, the Commission believes that certain aspects of the current SEF regulatory framework should be enhanced to further promote the statutory SEF goals and better maximize the role of SEFs as vibrant and liquid marketplaces for swaps trading.

Accordingly, the Commission is proposing two revisions to the current framework. First, the Commission proposes to adopt a revised interpretation of CEA section 2(h)(8) to set the applicability of the trade execution requirement, *i.e.,* swaps subject to the clearing requirement and listed for trading by a SEF or DCM would be subject to the requirement. Instead of maintaining the current MAT determination process, the Commission believes that this proposed approach would be better aligned with the intent of CEA section 2(h)(8) and further the statutory goal of promoting swaps trading on SEFs. As applied to the current scope of swaps that are subject to the clearing requirement and listed for trading by SEFs and DCMs, the Commission anticipates that this approach would significantly expand the scope of swaps that are subject to the trade execution requirement. Second, based on its understanding of swaps trading dynamics and the increased scope of swaps that would become subject to the trade execution requirement, the Commission also proposes to allow greater flexibility in the trading of such swaps by eliminating the prescribed execution methods for swaps subject to the requirement.

1. Trade Execution Requirement and MAT Process

The trade execution requirement mandates counterparties to execute swap transactions subject to the clearing requirement on a SEF or DCM, unless no SEF or DCM ''makes the swap available to trade.'' [234] The Commission adopted § 37.10 and § 38.12 to establish a ''MAT determination'' process that allows SEFs and DCMs, respectively, to make swaps ''available to trade,'' and therefore, subject to the trade execution requirement.[235] These processes enable a SEF or DCM to make a swap ''available to trade'' by submitting a determination to the Commission pursuant to the part 40 rule filing procedures.[236] A SEF or DCM that submits a MAT determination must include an assessment of whether the subject swap has ''sufficient trading liquidity'' and must address at least one of six factors that serve as indicia of the swap's trading liquidity.[237] Swaps that become subject to the trade execution requirement pursuant to the approval or certification of a MAT determination must, with the limited exception of block transactions, be executed by counterparties on a SEF or DCM.[238]

2. Execution Method Requirements

Section 37.9 defines swaps that are subject to the trade execution requirement, *i.e.,* those swaps that must be executed on a SEF or DCM, as ''Required Transactions'' [239] and specifies that a SEF may only offer two methods for executing such swaps. Specifically, Required Transactions must be executed on (i) an Order Book, as defined under § 37.3(a)(3) and discussed above; [240] or (ii) an RFQ System, as defined under § 37.9(a)(3).[241] An RFQ System is defined, among other requirements, as a trading system or platform where a market participant transmits a request for a bid or offer to no less than three market participants who are not affiliates of, or controlled by, the requester or each other (''RFQ-to-3 requirement'').[242] To the extent that a SEF offers an RFQ System for Required Transactions, that system must operate in conjunction with an Order Book, which a SEF is currently required to establish and maintain as a minimum trading functionality.[243] Pursuant to the statutory SEF definition, SEFs have been able to offer these methods through ''any means of interstate commerce,'' [244] which the Commission has interpreted to mean ''a variety of means of execution or communication, including, but not limited to, telephones, internet communications, and electronic transmissions.'' [245] Accordingly, SEFs have been able to develop and offer an Order Book or RFQ System through various forms, including voice-based systems.

In establishing the Order Book and RFQ System requirements, the Commission sought in part to transition swaps trading onto SEFs and achieve the statutory SEF goal of promoting pre-trade price transparency in the swaps market. In addition to establishing the Order Book as a minimum trading functionality for all swaps listed for trading by a SEF, the Commission intended for the Order Book requirement to promote such transparency for swaps subject to the trade execution requirement. The Commission did acknowledge, however, that an Order Book lacks the appropriate

[234] 7 U.S.C. 2(h)(8). CEA section 2(h)(8) also specifies that swaps that are subject to a clearing exception under section 2(h)(7) are not subject to the trade execution requirement. *See infra* Section XXI.A.3.—§ 36.1(c)—Exemption for Swap Transactions Excepted or Exempted from the Clearing Requirement under Part 50. The Commission interprets ''swap execution facility'' in CEA section 2(h)(8)(B) to include a swap execution facility that is exempt from registration pursuant to CEA section 5h(g). *See supra* note 10.

[235] 17 CFR 37.10; 17 CFR 38.12.

[236] The Commission notes that a SEF or DCM may submit a MAT determination pursuant to the rule approval process under § 40.5 or through the rule certification process under § 40.6. 17 CFR 37.10(a)(1) and 38.12(a)(1).

[237] 17 CFR 37.10(b), 38.12(b). Parts 37 and 38 respectively specify the same six factors: (i) Whether there are ready and willing buyers and sellers for the swap; (ii) the frequency or size of transactions in the swap; (iii) the swap's trading volume; (iv) the number and types of market participants trading the swap; (v) the swap's bid/ask spread; and (vi) the usual number of resting firm or indicative bids and offers in the swap. 17 CFR 37.10(b), 38.12(b). The Commission explained in the preamble to the MAT Final Rule that with respect to factors (ii)–(iii), the submitting DCM or SEF could look to DCM, SEF, or bilateral transactions. MAT Final Rule at 3360.

[238] Based on part 40, a MAT determination filing applies the trade execution requirement to a particular swap either upon Commission approval (in the case of a filing submitted for approval under § 40.5) or upon the lack of Commission objection (in the case of a filing submitted on a self-certified basis under § 40.6).

[239] 17 CFR 37.9(a)(1).

[240] *See supra* notes 123–125 and accompanying discussion (definition of ''Order Book'' under § 37.3(a)(3)).

[241] 17 CFR 37.9(a)(2).

[242] 17 CFR 37.9(a)(3). The RFQ System definition additionally specifies that the three requesters may not be affiliates or controlled by one another; and the system must provide each of its market participants with equal priority in receiving RFQs and transmitting and displaying for execution responsive orders. 17 CFR 37.9(a)(3); 17 CFR 37.9(a)(3)(iii).

[243] 17 CFR 37.9(a)(2)(i)(B). In operating an RFQ System in conjunction with an Order Book, a SEF must communicate to a requester any firm bid or offer pertaining to the same instrument resting on any of the SEF's Order Books; and provide the requester with the ability to execute against such firm resting bids or offers along with any responsive RFQ orders. 17 CFR 37.9(a)(3)(i)–(ii). As discussed above, the Commission is proposing to eliminate the minimum trading functionality under § 37.3(a)(2) and the Order Book definition under § 37.3(a)(3). *See supra* Section IV.C.2.—§§ 37.3(a)(2)–(3)—Minimum Trading Functionality and Order Book Definition.

[244] 7 U.S.C. 1a(50).

[245] SEF Core Principles Final Rule at 33501 n.328.

flexibility to be suitable for trading many types of swaps, in particular those lacking liquidity.[246] The lack of liquidity is a characteristic of broad segments of the swaps market, which trade episodically among a limited number of market participants in large average notional amounts.

To address this lack of suitability even within the scope of Required Transactions, the Commission prescribed the RFQ System as an alternative execution method for these transactions.[247] At the time, the Commission observed that RFQ systems provide market participants with a certain level of trading flexibility, in particular by allowing them to balance the risks of information leakage and front-running associated with disclosing trading interests against the price competition benefits derived by disseminating a request to a larger number of participants.[248] The Commission recognizes that most SEFs currently offer an RFQ System for most of the respective products that they list for trading; when trading swaps subject to the trade execution requirement, market participants have mostly utilized an RFQ System, transmitting RFQs to more than three unaffiliated market participants in many instances.[249]

3. Implementation of Existing Requirements

While the Commission acknowledges that the existing approach has transitioned some swaps trading to SEFs, this transition has stagnated and will not likely increase further without changes to the existing regulatory framework. This stagnation, as discussed further below, is reflected by the limited set of swaps that have become subject to the trade execution requirement, and therefore subject to mandatory trading on SEFs, through the Commission's MAT process. The lack of additional swaps becoming subject to the requirement over the last several years has been attributable to market participants' concerns over the Commission's Order Book and RFQ System requirements for Required Transactions under § 37.9; this concern, in turn, has dissuaded SEFs from submitting additional MAT determinations.

Since the Commission's adoption of the MAT determination process, a small number of swaps that are subject to the clearing requirement have become subject to the trade execution requirement. In the fall of 2013, four SEFs and one DCM submitted a limited number of swaps to the Commission as ''available to trade'' via the Commission's § 40.6 self-certification process.[250] The swaps submitted consist of the current ''on-the-run'' and most recent ''off-the-run'' index CDS with a five-year tenor and fixed-to-floating IRS with benchmark tenors denominated in U.S. dollars, euros, and pound sterling.[251] The IRS and CDS that are currently subject to the trade execution requirement represent the most standardized and highly liquid swaps contracts offered by SEFs,[252] but also represent a very limited segment of the potential universe of swaps eligible to become subject to the trade execution requirement, *i.e.,* those swaps that are both subject to the clearing requirement and currently listed for trading on a SEF.[253] Based on data evaluated by the International Swaps and Derivatives Association (''ISDA''), approximately 85 percent of total reported IRS traded notional volume (''traded notional'') in 2017 consisted of swaps subject to the clearing requirement.[254] This represents an increase from the approximately 73 to 77 percent of total reported IRS traded notional during 2015 to 2016 that was subject to the clearing requirement.[255] Data analysis conducted by Commission staff found that the percentage of trading volume in IRS subject to the trade execution requirement is far lower than the percentage subject to the clearing requirement and has actually declined, from approximately 10 to 12 percent of total reported IRS traded notional in 2015 to approximately 7 to 9 percent of the total reported IRS traded notional in 2017 and the first half of 2018.[256]

Beyond this limited initial set of self-certified MAT determinations, however,

[246] SEF Core Principles Final Rule at 33564–65. In the preamble to the SEF Core Principles Final Rule, the Commission expressed its anticipation that ''the order book method will typically work well for liquid Required Transactions (*i.e.,* transactions involving swaps that are subject to the trade execution requirement in CEA section 2(h)(8)), but for less liquid Required Transactions, RFQ systems are expected to help facilitate trading.'' *Id.*

[247] 17 CFR 37.9(a)(2). The Commission adopted the RFQ System requirement based upon its prevalence in the OTC swaps market. *Id.* at 33564. The Commission stated that ''RFQ systems are currently used by market participants in the OTC swap market, many in conjunction with order book functionality.'' In adopting the requirement, the Commission also stated it was ''leveraging best practices from current swaps trading platforms.'' *Id.* at 33565.

[248] SEF Core Principles Final Rule at 33476.

[249] In discussing trading of CDX and iTraxx indices, Lynn Riggs, Esen Onur, David Reiffen, and Haoxiang Zhu found that ''[c]ustomers most frequently request quotes from three dealers, which happens in about 45% of the RFQ sessions, followed by five dealers, which happens in just below 30% of the RFQ sessions. In about 18% of the sessions the customer selects four dealers.'' Lynn Riggs, Esen Onur, David Reiffen, & Haoxiang Zhu, Mechanism Selection and Trade Formation on Swap Execution Facilities: Evidence from Index CDS 10 (2017), *https://www.cftc.gov/idc/groups/public/@economicanalysis/documents/file/oce_mechanism_selection.pdf* (''2017 Riggs Study'').

[250] TW SEF LLC—Amendment to Self-Certification for Swaps to be Made Available to Trade (Jan. 26, 2014) (third amended filing from initial submission on October 28, 2013); Javelin SEF, LLC, No. 13–06R(3), Javelin Determination of Made Available to Trade of Certain Interest Rate Swaps made Pursuant to Parts 37 of the Rules of the Commodity Futures Trading Commission (Jan. 8, 2014) (third amended filing from initial submission on October 18, 2013) (''Javelin SEF MAT Determination''); Bloomberg SEF LLC, No. 2013–R–9, Bloomberg SEF LLC—Made Available to Trade (''MAT'') Submission of Certain Credit Default Swaps (''CDS'') and Interest Rate Swaps (''IRS'') pursuant to Commodity Futures Trading Commission (the ''Commission'') Regulation 40.6 (submission #2013–R–9) (Dec. 5, 2013) (''Bloomberg SEF MAT Determination''); MarketAxess SEF Corporation, Made Available to Trade (''MAT'') Submission of Certain Credit Default Swaps (Oct. 30, 2013) (''MarketAxess SEF MAT Determination''); trueEX, LLC, Submission 2013–14, Made Available to Trade (''MAT'') Submission of Certain Interest Rate Swaps (''IRS'') pursuant to CFTC Regulation 40.6 (Oct. 21, 2013) (''trueEX MAT Determination'').

[251] CFTC, Industry Filings—Swaps Made Available to Trade, *https://www.cftc.gov/idc/groups/public/@otherif/documents/file/swapsmadeavailablechart.pdf.*

[252] *See, e.g.,* TW SEF LLC—Self-Certification for Swaps to be Made Available to Trade at 8 (Oct. 28, 2013) (describing the IRS submitted as benchmark swaps with the most liquidity and the CDS submitted as the most actively traded); Javelin SEF MAT Determination at 11 (noting that the bid-offer spreads for the IRS submitted is tight and characteristic of considerable liquidity); Bloomberg SEF MAT Determination at 3 (stating that the scope of the MAT determination represents IRS and CDS that are the most standardized and liquid); MarketAxess SEF MAT Determination at 1 (stating that the MAT determination consists of the most liquid CDS listed); trueEX MAT Determination at 4 (specifying that the trade frequency of IRS with whole-year tenors is sufficient to support a MAT determination).

[253] The clearing requirement currently applies to various categories of IRS, including fixed-to-floating swaps denominated in U.S. dollars, pound sterling, and euros with whole- and partial-year tenors that range from 28 days to 50 years; fixed-to-floating swaps in additional currency denominations with whole and partial tenors that range from 28 days up to 30 years; basis swaps, overnight index swaps, and forward rate agreements in varying denominations and tenors; and various CDX and iTraxx index CDS in the current on-the-run series and a broad range of older series (prior to the most recent off-the-run series) with whole-year benchmark tenors. 17 CFR 50.4.

[254] ISDA, ISDA Research Note: Actual Cleared Volumes vs. Mandated Cleared Volumes: Analyzing the US Derivatives Market 3 (July 2018), *https://www.isda.org/a/6yYEE/Actual-Cleared-Volumes-vs-Mandated-Cleared-Volumes.pdf* (''2018 ISDA Research Note'').

[255] *Id.*

[256] Commission staff conducted data analysis based on publicly available data accessed via Clarus Financial Technology (''Clarus''). In a separate analysis, ISDA found that only 5 percent of trading volume in IRS during 2015 and the first three quarters of 2016 consisted of IRS subject to the trade execution requirement. ISDA, ISDA Research Note: Trends in IRD Clearing and SEF Trading 1, 3, 11 (December 2016), *https://www.isda.org/a/xVDDE/trends-in-ird-clearing-and-sef-trading1.pdf* (''2016 ISDA Research Note'').

the Commission has not received any additional MAT determinations for the significantly large number of IRS and CDS that are subject to the clearing requirement. This discrepancy has grown even larger as a result of a subsequent expansion of the clearing requirement.[257] The Commission believes that the lack of further MAT determinations from SEFs or DCMs is largely attributed to the influence of market participants who believe that applying the trade execution requirement, and therefore the required use of an Order Book or RFQ System, would adversely impact their ability to utilize execution methods that are best suited for the swap they are trading and their individual trading needs.[258]

To establish which swaps would be sufficiently liquid to be traded via an Order Book or RFQ System, the Commission relied upon the expertise and experience of SEFs and DCMs in the MAT determination process.[259] The limited number of MAT determinations that has resulted reflects these execution methods' lack of suitability in facilitating a broad range of swaps trading. Market participants have stated that the prescriptive requirements under § 37.9 limit their ability to otherwise utilize other execution methods that they believe may be better suited to address their business needs, adapt to quickly-changing market conditions, or achieve some combination thereof.[260] Given that many of the swaps that are subject to the clearing requirement are highly customizable and less liquid, continuing to mandate the use of an Order Book and RFQ System is inconsistent with transitioning a broader segment of the swaps market to the SEF regulatory framework. Therefore, the Commission recognizes the need for greater flexibility in execution methods to broaden the scope of the trade execution requirement over additional swaps trading.[261]

The Commission acknowledges that the Order Book and RFQ System requirements are too prescriptive and limiting to be applied over a broader segment of the swaps market. Specifically, these methods do not account for the swaps products that are highly customized and episodically liquid by nature. The Commission previously acknowledged that market participants take into account factors such as swap product complexity, trade size, and liquidity in deciding how to trade swaps, including the number of market participants to whom a request for quote will be sent.[262] Thus, even the RFQ-to-3 requirement, which the Commission adopted to provide more execution flexibility, may hinder market participants from determining the appropriate number of market participants to disseminate an RFQ for the additional swaps that would be subject to the trade execution requirement. Mandating the use of limited methods of execution for swaps subject to the requirement imposes the Commission's judgment regarding how best to execute different swaps and ultimately inhibits market participants from tailoring their own trading strategies and decisions based on the swaps involved, their individual business needs, the desired transaction size, and existing market conditions, among other factors.

The required methods of execution has also limited SEFs from developing more efficient, transparent, and cost-effective methods of trading, as well as impeded their ability to compete with one another using innovative and different methods of execution.[263] For example, a SEF may develop a new trading functionality that does not qualify as an Order Book or RFQ System, but is effective and efficient in trading both IRS that are and are not subject to the trade execution requirement. Under the current regulatory framework, participants could not use that new method for IRS that are subject to the trade execution requirement or IRS that would become subject to the requirement in the future. This scenario deprives market participants of a useful execution method and deprives the SEF that developed the method of benefitting from its innovative efforts.

The Commission notes that this scenario could occur with respect to forward rate agreements (''FRAs''), many of which are economically similar to IRS that are currently subject to the trade execution requirement. In spite of this economic similarity, FRAs in several different types of currency denominations and tenor ranges that are currently subject to the clearing requirement, but have not been submitted to the Commission as ''available to trade.'' [264] Based on an ISDA analysis, over 97 percent of total reported FRA traded notional during the third quarter of 2016 was cleared and approximately 81 percent of which was traded on SEF and accounted for slightly less than 54 percent of total reported IRS traded notional occurring on SEFs.[265] The Commission has

[257] The Commission expanded the list of swaps subject to the clearing requirement in 2016 by adding several new classes of IRS denominated in nine different currencies. *See supra* note 35. The Commission believes that the expansion likely contributed to the increase noted above in the percentage of total reported IRS traded notional subject to the clearing requirement in 2017 relative to prior years.

[258] SIFMA AMG noted that these limited methods of execution meant that a MAT determination ''could force the entire swap market to change its practice, disrupting trading and upending the natural evolution of market dynamics.'' *See* Letter from the Asset Management Group of the Securities Industry and Financial Markets Association (''SIFMA AMG''), In re Concerns Regarding the SEF Framework 3 (May 11, 2015) (''2015 SIFMA AMG Letter''). Further, SIFMA AMG argued that the ''artificial limitation'' on execution methods for required transactions ''has resulted in reduced liquidity and fewer options for asset managers working to reduce portfolio risk in a cost-effective manner. . . .'' *Id.* At a Commission roundtable discussion on the MAT process, one participant noted that market participant aversion to a broad MAT determination by Javelin SEF discouraged other SEFs from submitting determinations, based on the fear that market participants would cease trading or avoid their respective platforms altogether. 2015 MAT Roundtable at 65–67. *See also* Joe Rennison, Experts split on MAT determinations, Risk.net (Nov. 8, 2013), *https://www.risk.net/infrastructure/trading-platforms/2305790/experts-split-mat-determinations* (noting market participant resistance to Javelin SEF's initial MAT submission).

[259] MAT Final Rule at 33609.

[260] *See* 2015 SIFMA AMG Letter at 8 (In re the current approach to required methods of execution: ''this prescriptive approach has negatively impacted market conditions and has caused fragmentation of the U.S. swap market. The unnecessary restriction on modes of execution . . . limits a SEF's ability to foster liquidity and diminishes the venues that asset managers may access for liquid, competitive pricing.'').

[261] The Commission notes that the current SEF regulatory framework allows a SEF to offer flexible methods of execution for swaps that are not subject to the trade execution requirement, *i.e.,* Permitted Transactions; this approach would facilitate trading in bespoke or less liquid swaps on a SEF. 17 CFR 37.9(c). As noted above, only 7 to 9 percent of total reported IRS traded notional has consisted of swaps subject to the trade execution requirement in recent months; however, approximately 57 percent of total reported IRS traded notional has occurred on SEFs in 2018. ISDA, ISDA SwapsInfo Weekly Analysis: Week Ending October 19, 2018, *http://analysis.swapsinfo.org/2018/10/interest-rate-and-credit-derivatives-weekly-trading-volume-week-ending-october-19-2018/* (''2018 ISDA SwapsInfo Weekly Analysis''). Accordingly, the Commission believes that adopting a more flexible approach to execution methods in the SEF regulatory framework would better reflect the current swaps market environment.

[262] SEF Core Principles Final Rule at 33562.

[263] At the Commission's 2015 MAT Roundtable, one participant expressed concern that a MAT determination would ''cut[ ]off potential modes of execution,'' rather than promoting new innovative execution methods. *See* 2015 MAT Roundtable at 165.

[264] 17 CFR 50.4 (specifying the FRAs that are subject to mandatory clearing).

[265] 2016 ISDA Research Note at 5. The Commission notes that these statistics include both swaps subject to the clearing requirement and swaps that are voluntarily cleared. In a subsequent analysis, however, ISDA determined that 92 to 98 percent of total reported FRA traded notional from 2014 to 2017 consisted of FRAs subject to the clearing requirement. 2018 ISDA Research Note at 9. Commission staff replicated ISDA's results and also found that in 2018, the share of total reported

Continued

observed that FRA trading on SEFs occurs through ''permitted'' execution methods, such as risk mitigation services,[266] that assist market participants with managing their exposures to market, credit, and other sources of risk.[267] Despite their utility, risk mitigation services do not constitute an Order Book or RFQ System, and therefore, are not available as an execution method for swaps subject to the trade execution requirement under the current regulatory framework. Given that many FRAs would become subject to the trade execution requirement under the Commission's proposed regulatory framework, as discussed further below, allowing SEF participants to continue executing these types of swaps would require more flexible execution methods that are appropriate for conducting risk mitigation exercises.

Further, the Commission believes that the current approach to required methods of execution may have imposed barriers to entry for entities that seek to offer swaps trading. As noted above, limiting the execution methods that a SEF can provide limits their ability to offer new and innovative trading solutions. As a result, new entrant SEFs have been unable to differentiate themselves from incumbent SEFs on the basis of innovation and development, given that both incumbent platforms and newly-registered entities are otherwise limited to offering an Order Book and an RFQ System. Accordingly, SEFs have been forced to compete with one another on a more ancillary basis, rather than on fundamental operating aspects that provide value to market participants, in particular the available trading system and platform.

The Commission's current approach to required methods of execution has also compelled SEFs to make unintended adjustments and alterations to their execution methods, including auction platforms [268] and work-up trading protocols.[269] Given the prescriptive requirements that a SEF execution method must comply with to qualify as an Order Book under § 37.3(a)(3) or as an RFQ System under § 37.9(a)(3), some SEFs have expended time and effort to amend certain aspects of their trading systems or platforms, including trading protocols, prior to allowing participants to use those methods to execute swaps subject to the trade execution requirement. The Commission acknowledges that SEFs have not been able to employ and operate execution methods that are fully developed to facilitate price discovery and more robust participation on the SEF in periods of episodic liquidity. Rather, requiring SEFs to adjust various aspects of their respective systems or platforms to comply with the required methods of execution has likely introduced operating inefficiencies that have not provided corresponding benefits to SEF participants. Therefore, the Commission believes that the prescriptive execution methods have inhibited the effectiveness of execution methods designed and developed by SEFs to promote trading.

4. Proposed Approach

To further promote the SEF statutory goals, the Commission proposes a SEF regulatory framework that would facilitate a more robust application of the trade execution requirement and allow more flexibility in the execution methods that may be offered and used for trading swaps that are subject to the requirement. The Commission believes that this approach would better establish SEFs as vibrant and liquid marketplaces for swaps trading that foster price discovery and liquidity formation. The Commission believes that its proposed approach is consistent with the statutory SEF provisions and would also further the statutory SEF goals, while helping to alleviate the challenges of the existing approach described above.

The Commission proposes to adopt a new interpretation of the trade execution requirement that would greatly expand the scope of swaps that are subject to the requirement. Considering the market characteristics and episodic liquidity profiles of these additional swaps, the Commission's proposed approach would provide needed flexibility to SEFs and market participants to support more trading through SEF trading systems or platforms. In conjunction with an expansion of the trade execution requirement, the Commission also proposes to eliminate the prescriptive execution methods for swaps subject to the requirement. Rather than impose execution method requirements that are limited to an Order Book or RFQ System, the Commission's proposed approach would allow SEFs to develop and offer—and therefore enable—market participants to choose execution methods that are appropriate to their trading. Providing market participants with greater choice in execution methods allows them to utilize trading systems or platforms that are not constrained by prescriptive regulatory requirements and suit their trading circumstances and the market conditions for those swaps at a given time. This flexibility is necessary to facilitate trading in the broad scope of swaps that would become subject to the trade execution requirement. This flexibility should also allow the swaps market and SEFs to continue to naturally evolve and innovate to more efficient, transparent, and cost effective means of trading, even for swaps currently subject to the trade execution requirement. The Commission believes that this flexibility, in concert with the concentration of trading activity in episodically liquid swaps on SEFs, should help foster price discovery and allow market participants to pursue more appropriate, counterparty and swap-specific levels of pre-trade price transparency through additional methods of execution.[270] Accordingly,

FRA traded notional that is cleared has increased to 99 percent, with approximately 81 percent of cleared FRAs continuing to trade on SEF. Commission staff also found that during the first half of 2018, cleared FRAs accounted for approximately 48 percent of IRS volume on SEFs, a somewhat smaller share than the amount that ISDA found during its own review period.

[266] The Commission notes that market participants have contended that the required methods of execution are unsuitable for allowing SEFs to conduct risk mitigation services for swaps that are subject to the trade execution requirement. *See* CFTC Letter No. 13–81, Time-Limited No-Action Relief from Required Transaction Execution Methods for Transactions that Result from Basis Risk Mitigation Services (Dec. 23, 2013). *See also* 2016 WMBAA Letter at app. A (stating that ''[a]dditional methods of execution for Required Transactions should include risk mitigation [platforms]'').

[267] The Commission previously determined that risk mitigation services that facilitate swap execution are subject to the SEF registration requirement. SEF Core Principles Final Rule at 33482–83.

[268] For a description of auction-based platforms, *see infra* note 313 and accompanying discussion.

[269] In a trade work-up session associated with a SEF's trading system or platform, two participants that execute a particular swap transaction at a particular price have the opportunity to execute additional volume of that swap at that price within a given time period established by the SEF. When that period has lapsed, multiple other buyers and sellers may then seek to execute that particular swap at the established price set by the initial transaction. Interested participants may continue to seek to execute that swap at the established price until the buying and selling interest is exhausted or the work-up session has expired, as set forth by the SEF. The Commission has observed that SEFs offer these sessions within a particular execution method, *e.g.,* an electronic order book, to encourage participants to provide liquidity to the market.

[270] As discussed above, the Commission acknowledges that market participants take into account factors such as swap product complexity, trade size, liquidity, and the associated desire to minimize potential information leakage and front-running risks in deciding how to trade swaps, including the number of market participants to whom a request for quote will be sent. In selecting that number of market participants to whom a request for quote will be sent, the market participant is determining the appropriate level of

the Commission believes that more execution flexibility also reduces certain complexity, costs, and burdens that have impeded SEF development and innovation, particularly with more swaps that would be subject to mandatory trading on SEFs. Ultimately, this approach is intended to attract greater liquidity that would promote more trading on SEFs.

a. § 36.1(a)—Trade Execution Requirement

The Commission has interpreted the trade execution requirement in CEA Section 2(h)(8)—in particular, the phrase ''makes the swap available to trade''—in a manner that has limited the scope of swaps that must be traded on a SEF.[271] Initially designed to ensure that the Order Book and RFQ System requirements could support swaps that are sufficiently liquid for trading, the MAT determination process has resulted in a small number of swaps that are currently subject to the trade execution requirement. As noted above, Commission staff has determined that only a small and declining percentage of total reported IRS traded notional over a recent time period is subject to the trade execution requirement, with only part of overall IRS trading volume occurring on SEFs.[272]

Given the current regulatory framework's limited ability in promoting swaps trading on SEFs, which limits the statutory SEF goals, the Commission is proposing to adopt a revised interpretation of CEA section 2(h)(8). The Commission believes that the phrase ''makes the swap available to trade'' should be interpreted to mean that once the clearing requirement applies to a swap, then the trade execution requirement applies to that swap upon any single SEF or DCM listing the swap for trading.[273] As previously noted by some commenters to the proposed MAT rule, CEA section 2(h)(8) does not mandate the MAT process adopted by the Commission to implement the trade execution requirement.[274] The Commission believes that the most straightforward reading of CEA section 2(h)(8) would specify that once the clearing requirement applies to a swap, then the trade execution requirement also applies to that swap unless no SEF or DCM ''makes the swap available to trade.'' Accordingly, once any single DCM or SEF ''makes available,'' *i.e.,* lists, a swap that is subject to the clearing requirement for trading on its facility, then the trade execution requirement would apply to that swap, such that market participants may only execute the swap on a SEF, a DCM, or an Exempt SEF.

The Commission notes that Congress had the ability to delineate a comprehensive statutory process for determining when a swap should be subject to the trade execution requirement, but did not do so when amending the CEA via the Dodd-Frank Act.[275] In contrast, the clearing requirement, established by Congress concurrently with the trade execution requirement under the Dodd-Frank Act, sets forth a formal statutory process for the Commission to follow in determining which swaps must be submitted to a DCO for clearing.[276] The Commission notes that the statutory process in CEA section 2(h)(2) establishes that submissions from a DCO for each swap, or any group, category, type, or class of swap that it plans to accept for clearing is automatically subject to a clearing determination by the Commission.[277] As part of a clearing requirement determination, the CEA requires the Commission to evaluate submitted swaps based on a prescribed set of factors that includes trading liquidity.[278] Given the absence of analogous CEA provisions governing the trade execution requirement and based on its experience since implementing the swaps trading framework, the Commission believes that the proposed interpretation of CEA section 2(h)(8) is consistent both with that statutory provision and with the statutory goal of promoting the trading of swaps on SEFs.

As support for its view that the proposed interpretation of CEA section 2(h)(8) would promote the trading of swaps on SEFs, the Commission notes that more than 85 percent of IRS and index CDS trading volume is currently subject to the clearing requirement;[279] many, but not all, of those swaps are currently listed for trading by SEFs. Therefore, the proposed reading would both promote the statutory SEF goal of swaps trading on SEFs and help to further swaps liquidity on SEFs by requiring all counterparties to trade these swaps on a SEF, which may promote increased pre-trade price transparency.[280] A more robust trade

pre-trade transparency necessary to efficiently and effectively execute that swap transaction based on the above factors and its individual trading needs. *See supra* Section I.B.1.b.—Swaps Market Characteristics.

[271] MAT Final Rule at 33606.

[272] *See supra* notes 256 and 261 and accompanying discussion.

[273] In addition to DCMs and SEFs, CEA section 2(h)(8) contemplates the ability of Exempt SEFs to list swaps subject to the clearing requirement. As discussed below, the Commission proposes to use its exemptive authority pursuant to CEA section 4(c) to exclude swaps that are exclusively listed by Exempt SEFs from being subject to the trade execution requirement. Accordingly, only a CFTC-registered DCM or SEF would be able to trigger the CEA section 2(h)(8) trade execution requirement by listing a clearing requirement swap. *See infra* Section XXI.A.2.—§ 36.1(b)—Exemption For Certain Swaps Listed Only By Exempt SEFs.

[274] MAT Final Rule at 33607. These commenters believed that use of the clearing determination process in CEA section 2(h)(2) ''as the exclusive basis for finding that a swap is available to trade would subject more swaps to the trade execution requirement and further the objectives of the Dodd-Frank Act.'' SEF Core Principles Final Rule at 33607–08. Some commenters pointed out that the procedure for determining whether a swap was made available to trade was ''duplicative of the mandatory clearing determination process [in CEA section 2(h)(2)] and accordingly stated that the Commission should rely on the clearing determination process to also determine whether a swap is available to trade.'' MAT Final Rule at 33607.

[275] The Commission also observes that Congress specifically placed the trade execution requirement within the CEA section 2(h) heading of ''clearing requirement.'' The Commission believes that this placement of the trade execution requirement within the clearing requirement further supports the view that no additional framework was intended by Congress beyond the processes already enumerated within this section. 7 U.S.C. 2(h).

[276] Specifically, CEA section 2(h)(2) delineates a structured process that outlines a specific set of factors that the Commission must consider in its clearing requirement determination and includes a provision for public comment. Among other things, the Commission must consider outstanding notional exposures; trading liquidity; adequate pricing data; adequate clearing infrastructure; mitigation of systematic risk; effects on competition; and legal certainty surrounding solvency concerns. 7 U.S.C. 2(h)(2).

[277] CEA section 2(h)(2)(B)(iii)(II).

[278] As adopted under part 50 of the Commission's regulations, the Commission has noted that this required analysis of a swap's trading liquidity is intended for risk management purposes, *i.e.,* pricing and margining of cleared swaps. In this connection, the Commission has noted that higher trading liquidity in swaps would assist DCOs in end-of-day settlement procedures, as well as in managing the risk of CDS portfolios, particularly in mitigating the liquidity risk associated with unwinding a portfolio of a defaulting clearing member. 77 FR 47176.

[279] 2018 ISDA Research Note at 3, 15–16.

[280] The Commission believes that further achieving both SEF statutory goals—promoting trading on SEFs and promoting pre-trade price transparency—requires both (i) increasing the number of swaps that are subject to the trade execution requirement, thereby increasing the amount of trading that must occur on SEF; and (ii) concurrently providing flexible execution methods. The Commission believes that requiring market participants to conduct a larger portion of their swaps trading on SEFs would centralize liquidity, foster additional competition among a more concentrated number of market participants, and reduce information asymmetries that would increase market efficiency and decrease transaction costs. While offering flexible methods of execution alone could transition additional swaps trading to SEFs, the Commission believes that maximizing the potential benefits of the proposed approach necessitates an approach that would also lessen fragmentation in trading of swaps on SEFs versus the OTC environment.

Accordingly, the Commission's proposed approach would have a profound impact on the amount of swaps trading that occurs on SEFs. As noted above, Commission staff found that a small and declining percentage of the reported IRS

Continued

execution requirement would help migrate and concentrate additional trading interests to available trading systems or platforms on SEFs.[281] The Commission believes that all of these factors can increase activity on SEFs, as well as help improve their efficiency and effectiveness.

Given the Commission's proposed approach to the trade execution requirement, as described above, the Commission proposes to eliminate (i) the MAT process for SEFs under § 37.10; (ii) the associated trade execution compliance schedule under § 37.12; (iii) the MAT process for DCMs under § 38.12; and (iv) the associated trade execution compliance schedule under § 38.11.

The Commission further proposes to codify under § 36.1(a) the statutory language of the trade execution requirement in CEA section 2(h)(8), which requires counterparties to execute a swap that is subject to the clearing requirement on a DCM, a SEF, or an exempt SEF unless no such entity ''makes the swap available to trade'' or the swap is subject to a clearing exception in CEA section 2(h)(7).[282] As proposed, § 36.1(a) would specify that counterparties must execute a transaction subject to the clearing requirement on a DCM, a SEF, or an Exempt SEF that lists the swap for trading. As discussed above, the Commission believes that the statutory phrase ''makes the swap available to trade'' specifies the listing of a swap by a DCM, a SEF, or an exempt SEF on its facility for trading. Accordingly, the trade execution requirement would apply to a swap that is subject to the clearing requirement upon the listing of that swap by any DCM or SEF.[283]

As discussed further below, the Commission is also proposing (i) exemptions of various transactions from the trade execution requirement under § 36.1 pursuant to its exemptive authority in CEA section 4(c); (ii) a compliance schedule for market participants with respect to the expanded application of the trade execution requirement to additional swaps; (iii) a public registry with information as to which swaps are subject to the trade execution requirement and the SEFs or DCMs that list them for trading; and (iv) a standardized form to assist the Commission in populating the public registry with relevant information regarding the trade execution requirement.[284]

Request for Comment

The Commission requests comment on all aspects of its proposed approach to the trade execution requirement, including § 36.1(a) as well as any alternative approaches to implementation of the trade execution requirement.

b. Elimination of Required Execution Methods

To better foster trading on SEFs—particularly with respect to the many episodically liquid swaps that will become subject to the trade execution requirement—the Commission proposes to eliminate the existing execution method requirements under § 37.9. These requirements include the (i) definition of and associated requirements for Required Transactions under § 37.9(a), including the RFQ System definition under § 37.9(a)(3);[285] and (ii) the definition and associated provision for Permitted Transactions under § 37.9(c). Therefore, a SEF would be permitted to offer any method of execution that meets the SEF definition for any swap that it lists for trading, irrespective of whether the particular swap is or is not subject to the trade execution requirement. The Commission believes that this approach is consistent with the statutory SEF definition in CEA section 1a(50), which establishes that a SEF operates a trading system or platform whereby multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants also using the trading system or platform.[286]

The Commission's proposed elimination of § 37.9(a) also includes the elimination of subparagraph (a)(2)(ii), which currently specifies that with respect to offering an Order Book or RFQ System for Required Transactions, a SEF may utilize ''any means of interstate commerce'' for purposes of execution and communication, including, but not limited to, the mail, internet, email and telephone.[287] Given the elimination of the Order Book and RFQ System requirements, the Commission notes that this provision is no longer necessary.

As noted above, implementing the proposed interpretation of the trade execution requirement would increase the number of swaps that are required to trade on a SEF. Many of these swaps, which are all currently subject to the clearing requirement would have terms and conditions, *e.g.,* partial-year tenors and varying payment terms, that counterparties customize to address idiosyncratic risks, such as larger and longer duration risk exposures.[288] Given

volume in recent months has consisted of swaps subject to the trade execution requirement (currently less than 10 percent). ISDA determined, however, that more than 55 percent of total reported IRS traded notional has been occurring on SEFs since 2015. *See supra* note 261 (noting that SEFs have facilitated trading of Permitted Transactions). Based on these determinations, the Commission's proposed interpretation of the trade execution requirement may result in a significantly larger amount of additional IRS trading volume on SEFs, given that the Commission believes that many, but not all, of that 85 percent of IRS that is subject to clearing requirement is currently listed on SEFs. Moreover, it is plausible that adopting this proposed interpretation would induce SEFs to list additional swaps subject to the clearing requirement, which would expand the amount of swaps trading that is subject to the trade execution requirement.

[281] As noted above, the Commission expects that the proposal would greatly expand the scope of the trade execution requirement. In particular, the Commission expects that the following swaps would become subject to the trade execution requirement based on the fact they are currently subject to the clearing requirement and also listed by at least one SEF or DCM: (i) Various swaps in the interest rate asset class including fixed-to floating swaps denominated in U.S. dollars, pound sterling, and euros with non-benchmark tenors (whole and partial) that range from 28 days to 50 years; fixed-to-floating swaps in additional denominations with whole and partial tenors ranging from 28 days up to 30 years; basis swaps, overnight index swaps (''OIS''), and FRAs with different denominations and tenors; and (ii) various CDX and iTraxx index CDSs in older series (prior to the most recent off-the-run series) and additional tenors, as well as new CDS indices.

[282] 7 U.S.C. 2(h)(8)(B). The Commission interprets ''swap execution facility'' in CEA section 2(h)(8)(B) to include a swap execution facility that is exempt from registration pursuant to CEA section 5h(g). *See supra* note 10.

[283] As discussed below, the Commission is proposing an exemption from the requirement for swap transactions involving swaps that are listed for trading only by an Exempt SEF. *See infra* Section XXI.A.2.—§ 36.1(b)—Exemption For Certain Swaps Listed Only By Exempt SEFs.

[284] *See infra* Section XXI.A.—§ 36.1—Trade Execution Requirement.

[285] As discussed above, the Commission is also proposing to eliminate the Order Book definition set forth under § 37.3(a)(3). *See supra* Section IV.C.2.—§§ 37.3(a)(2)–(3)—Minimum Trading Functionality and Order Book Definition. As discussed below, the Commission is also proposing to eliminate the time delay requirement under § 37.9(b), which applies to Required Transactions executed on an Order Book. *See infra* Section VI.A.2.—§ 37.203(a)—Pre-Arranged Trading Prohibition; § 37.9(b)—Time Delay Requirement.

[286] 7 U.S.C. 1a(50).

[287] 17 CFR 37.9(a)(2)(ii).

[288] Additionally, market participants may execute such swaps as part of different transaction structures, including package transactions composed of multiple risk-assuming or risk-hedging swap and non-swap components that are priced together. In their review of three months of OTC IRS trading, Federal Reserve Bank of New York (''FRBNY'') staff found that the swaps traded were ''broad in scope with a wide range of products, currencies, and maturities traded . . . [including] transactions in eight different product types, 28 currencies and maturities ranging from less than one month to 55 years.'' Michael Fleming, John Jackson, Ada Li, Asani Sarkar, & Patricia Zobel, Federal Reserve Bank of New York Staff Report No. 557, *An Analysis of OTC Interest Rate Derivatives Transactions: Implications for Public Reporting* 2

their variable and complex nature, trading in these types of swaps can be punctuated by alternating periods of liquidity and illiquidity.[289] The markets for many of these swaps may consist of only a few trades per day or, in some cases, a few trades per month.[290] Historically, market participants have had discretion to utilize execution methods tailored to their particular trading motives and needs, the liquidity profile and characteristics of the swap being traded, and current market conditions, among other considerations.[291]

The existing execution methods for Required Transactions under the current framework, however, has precluded the full use of such discretion and forces participants to trade certain swaps in accordance with an Order Book or an RFQ System. As noted above, the Commission believes that these limited execution methods would not be suitable for the broad swath of the swaps market that would become newly subject to the trade execution requirement. Instead, prescribing those execution methods for this expanded group of swaps would likely impose greater trading risks on market participants, including execution and liquidity risks that negate any benefits associated with the centralized exchange trading of such swaps.[292] The Commission also notes that the current execution methods could exacerbate the current information leakage and front running risks as described above.[293]

The existing framework was designed to promote the SEF statutory goals, in particular to promote pre-trade price transparency, but based on its implementation experience, the Commission believes that a SEF regulatory framework that requires a greater number of swaps to be traded through flexible execution methods on a SEF will better promote both SEF statutory goals. The Commission believes that requiring more swaps to be traded on SEFs would help foster vibrant and liquid SEF markets as liquidity formation and price discovery is centralized on these markets. With more swaps trading activity occurring in a concentrated SEF environment, the Commission anticipates that a greater number of observable transactions—for example, IRS of varying tenors along a single price curve—would allow for a richer price curve that provides participants with more accurate pricing for economically similar swaps along other points of the curve.

For example, auction platforms and work-up sessions—both of which SEFs currently offer under the existing framework—help to maximize participation and trading on the SEF at specific points of time and serve as effective tools for price discovery for market participants in periods of episodic liquidity. By allowing SEFs the flexibility to develop and tailor these types of functionalities to facilitate trading across a wide range of market liquidity conditions, a SEF can effectively promote appropriate counterparty and swap-specific levels of pre-trade price transparency [294] across a broader range of swaps. Further, as discussed above, affording SEFs with greater flexibility with execution methods would avoid forcing them to alter these types of functionalities in a sub-optimal manner simply to conform to certain limited execution methods that are not suitable for trading a broad range of swaps with varying liquidity profiles.

By eliminating the existing approach to required methods of execution, the Commission's proposed regulatory framework is also expected to foster customer choice in a manner that would benefit the swaps markets. The Commission believes that its proposed approach appropriately allows market participants, each of whom is a sophisticated entity trading in a professional market, to determine the execution method that best suits the swap being traded and their trading needs and strategies.[295] As noted above, the Commission believes that market participants in a professional market, in part because of sophistication and self-interest, will seek the most efficient and cost-effective method of execution to achieve their business and trading objectives. The Commission believes that providing for customer choice, while also concentrating liquidity and price discovery onto SEFs, may help create an environment for swaps trading that is better able to promote appropriate counterparty and swap-specific levels of pre-trade price transparency than the existing framework and will also do so for a significantly broader segment of the swaps markets than the existing framework. As noted above, execution methods such as auction platforms and work-up sessions may do a better job of maximizing participation and concentrating liquidity than Order Books or RFQ Systems in episodically liquid markets.

The proposed approach would allow SEFs to offer varied and innovative execution methods that are best suited to the products they list, as well as the

(2012) (''2012 FRBNY Analysis''). The analysis further identified ''a meaningful degree of customization in contract terms, particularly in payment frequencies and floating rate tenors.'' *Id.* at 3. The Commission acknowledges that while some of the swaps that were included in the FRBNY's analysis would not be subject to the clearing requirement, *e.g.,* any IRS with a 55-year tenor, the Commission nevertheless believes that this analysis captures many of the swaps that are subject to the clearing requirement.

[289] In a 2011 Senate hearing related to SEFs, one participant testified that ''[t]rading in [swaps] markets is characterized by variable or non[-]continuous liquidity. Such liquidity can be episodic, with liquidity peaks and troughs that can be seasonal . . . or more volatile and tied to external market and economic conditions (*e.g.,* many credit, energy and interest rate products).'' *Emergence of Swap Execution Facilities: A Progress Report: Hearing Before the S. Subcomm. on Sec., Ins., and Investment of the S. Comm. on Banking, Hous., and Urban Affairs,* 112th Cong. 15 (2011) (statement of Stephen Merkel, Executive Vice President and General Counsel, BGC Partners, Inc.).

[290] In their review of three months of OTC IRS swaps, FRBNY staff also ''found over 10,500 combinations of product, currency, tenor and forward tenor traded during [their] three-month sample, with roughly 4,300 combinations traded only once.'' 2012 FRBNY Analysis at 3. Further, their analysis found that within the data set, even the most commonly traded instruments were not frequently traded. No single instrument in the data set traded more than 150 times per day, on average, and the most frequently traded instruments in OIS and FRA only traded an average of 25 and 4 times per day, respectively. *Id.* Collin-Dufresne, Junge, and Trolle also made similar observations with respect to index CDS trading on SEFs, noting that the market is generally characterized by relatively few trades in very large sizes. Based on their analysis, the CDX.IG swaps market consists of 114 dealer-to-client trades and 24 dealer-to-dealer trades per day, on average, with a median trade size of USD $50 million in both segments. The average number of trades in the CDX.HY market are greater—164 dealer-to-client trades and 27 dealer-to-dealer trades per day, on average—but the median trade size is smaller—USD $10 million in both segments—which they attributed to the significantly higher volatility of high-yield contracts. 2017 Collin-Dufresne Research Paper at 16.

[291] Those means include, for example, voice-based trading systems or platforms that utilize human trading specialists who exercise discretion and judgment in managing the degree to which trading interests are exposed and how orders are filled. Where pre-trade market information from bids and offers may be limited due to market participants' caution in displaying trading interests, SEFs often offer session-based execution methods, such as auctions, to generate trading interest.

[292] *See supra* note 130 (explaining that requiring all market participants to use a central limit order book will not necessarily promote price competition among dealers in markets that lack continuous trading or have episodic liquidity).

[293] SEF Core Principles Final Rule at 33562. *See generally* 2017 Riggs Study (discussing the ''winner's curse,'' which is similar to information leakage in context, in the dealer-to-client CDS market).

[294] *See supra* note 270 (discussing appropriate counterparty and swap-specific levels of pre-trade price transparency).

[295] The Commission notes that other markets—such as bonds, U.S. treasuries, and FX—do not prescribe methods of execution, but rather permit their market participants to determine the best method of execution for the transaction. Swaps markets have historically followed this model. In this respect, the Commission believes that its proposal realigns the swaps market trading characteristics with other fixed income markets.

trading needs of their market participants. Rather than being confined to limited execution methods, SEFs would be able to develop more efficient, transparent, and cost-effective means for participants to trade swaps. In turn, the Commission believes that this innovation may serve to promote more competition between SEFs to attract participation through novel trading systems or platforms. The Commission further believes greater execution flexibility may also potentially incentivize new entrant trading venues to enter the SEF marketplace, as they would be able to utilize new and different execution methods than are currently employed by incumbent platforms.

Request for Comment

The Commission requests comment on all aspects of its proposed approach to execution methods as well as any alternative approaches.

V. Part 37—Subpart B: Core Principle 1 (Compliance With Core Principles)

The Commission is not proposing any amendments to § 37.100, which codifies the language of Core Principle 1.[296]

VI. Part 37—Regulations Related to SEF Execution Methods—Subpart C: Core Principle 2 (Compliance With Rules)

Core Principle 2 requires a SEF to establish and enforce rules that govern its facility, including trading procedures to be followed when entering and executing orders, among other requirements.[297]

To support the proposed approach of allowing more flexible execution methods on SEFs, which is intended to foster more liquidity formation through trading activity on SEF trading systems and platforms, the Commission is proposing to amend certain rules and adopt new rules under Core Principle 2, as described below. These proposed rules would, among other things, help foster open and transparent markets as well as promote market efficiency and integrity. In particular, the Commission proposes to establish general rules that would apply to any execution method that a SEF offers on its facility. The Commission also proposes to limit the ability of market participants to conduct pre-execution communications and submit resulting pre-negotiated or pre-arranged trades to a SEF for execution; and eliminate exceptions to the pre-arranged trading prohibition under § 37.203(a), including the time delay requirement under § 37.9(b).

Additionally, the Commission proposes to amend certain existing rules and adopt new rules under Core Principle 2, as described below, that correspond to the Commission's application of the SEF registration requirement to swap broking entities, including interdealer brokers. Among other goals, these proposed rules would enhance professionalism requirements for certain SEF personnel—''SEF trading specialists''—that operate as part of a SEF's trading system or platform, *e.g.,* voice-based trading functionalities, by facilitating trading and execution on the facility. Specifically, the Commission proposes rules under § 37.201(c) that would require SEFs to ensure minimum proficiency and conduct standards for SEF trading specialists.

A. § 37.201—Requirements for Swap Execution Facility Execution Methods[298]

Section 37.201 implements the Core Principle 2 requirement that a SEF establish and enforce rules that govern its facility. Section 37.201(a) specifies that these requirements include trading procedures to be followed when entering and executing orders traded or posted on the SEF.[299] Section 37.201(b) additionally requires a SEF to establish and impartially enforce rules related to (i) the terms and conditions of swaps traded or processed on the SEF; (ii) access to the SEF; (iii) trade practice requirements; (iv) audit trail requirements; (v) disciplinary requirements; and (vi) mandatory trading requirements.[300] The Commission proposes to eliminate these rules, which are largely duplicative of the Core Principle 2 requirements, and adopt the new rules described below.

1. § 37.201(a)—Required Swap Execution Facility Rules

Proposed § 37.201(a) would require a SEF to establish rules that govern the operation of the SEF, including rules that specify (i) the protocols and procedures for trading and execution; (ii) the permissible uses of ''discretion'' in facilitating trading and execution; and (iii) the sources and methodology for generating any market pricing information.

Pursuant to a SEF regulatory framework that would allow SEFs to offer flexible execution methods, the Commission believes that such rules would benefit market participants by providing a baseline level of transparency in SEF trading. As the Commission previously noted, one of the central goals of the Dodd-Frank Act is to bring transparency to the opaque OTC swaps market.[301] The Commission has further observed that when markets are open and transparent, prices are more competitive and markets are more efficient.[302] In this regard, the Commission notes that rather than imposing detailed, prescriptive SEF execution method requirements that do not comport with swaps market characteristics, this proposed rule represents a more balanced approach—a SEF would have the flexibility to develop and offer execution methods designed to foster trading based on the dynamics of the applicable swaps market (*e.g.,* liquidity and product characteristics) and on its market participants' needs, but also would be required to disclose how these execution methods operate. This disclosure would help to foster open and transparent markets, and promote market efficiency and integrity by establishing a consistent level of disclosure and information across all SEFs, which would allow market participants to make informed decisions regarding whether to onboard to a particular SEF and whether to use a particular execution method offered by a SEF.[303] In making such decisions,

[296] Core Principle 1 requires a SEF to comply with the core principles set forth in CEA section 5h(f) and any requirement that the Commission may impose by rule or regulation pursuant to CEA section 8a(5) as a condition of obtaining and maintain registration as a SEF. 7 U.S.C. 7b–3(f)(1). Core Principle 1 also provides a SEF with reasonable discretion in establishing the manner in which it complies with the core principles, unless the Commission determines otherwise by rule or regulation. 7 U.S.C. 7b–3(f)(1)(B).

[297] Core Principle 2 also requires a SEF to (i) establish and enforce compliance with rules, including terms and conditions of swaps traded or processed on or through the SEF and any limitation on access to the SEF; (ii) establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means to provide market participants with impartial access to the market and to capture information that may be used in establishing whether rule violations have occurred; and (iii) provide by its rules that when a SD or MSP enters into or facilitates a swap that is subject to the clearing requirement, the SD or MSP will be responsible for compliance with the trade execution requirement. 7 U.S.C. 7b-3(f)(2). The Commission codified Core Principle 2 under § 37.200. 17 CFR 37.200.

[298] The Commission proposes to retitle § 37.201 to ''Requirements for swap execution facility execution methods'' from ''Operation of swap execution facility and compliance with rules'' based on the proposed changes described below.

[299] 17 CFR 37.201(a).

[300] 17 CFR 37.201(b).

[301] SEF Core Principles Final Rule at 33553.

[302] *Id.*

[303] The Commission notes that this view is analogous to the principles set forth in the FX Global Code. The FX Global Code was developed by a partnership between central banks and participants from 16 jurisdictions. The code does not impose legal or regulatory obligations on participants nor does it act as a substitute for

market participants would be able to understand more fully any differences among those flexible methods across SEFs.

Based on the definition of ''rule'' under § 40.1(a), which encompasses any SEF ''trading protocol,'' the proposed rule clarifies those features of a SEF's execution methods that constitute SEF ''rules'' and must be submitted to the Commission pursuant to part 40 and disclosed to SEF market participants.[304] Accordingly, SEFs would be required to disclose such information in their rulebooks. After reviewing SEF rulebooks, the Commission believes that this proposed disclosure requirement is consistent with current market practice and the general level of information already disclosed by many SEFs. Accordingly, the Commission does not anticipate that this proposed rule would require material changes to most SEF rulebooks; rather, the proposed rule would ensure that currently-registered and new SEFs provide a consistent, minimum level of transparency and disclosure to the marketplace. The Commission further notes that SEFs are free to provide additional levels of disclosure beyond that required under proposed § 37.201(a).

a. § 37.201(a)(1)—Trading and Execution Protocols and Procedures

Proposed § 37.201(a)(1) would require a SEF to establish rules governing the protocols and procedures for trading and execution, including entering, amending, cancelling, or executing orders for each execution method offered by the SEF. The Commission believes that requiring SEFs to provide this level of detail and transparency for each of their execution methods is particularly important given the Commission's proposal to permit SEFs to offer flexible execution methods for all of their listed swaps.

The Commission believes that proposed § 37.201(a)(1) clarifies a SEF's existing obligations and is consistent with current market practice, in particular the general level of disclosure and information that many SEFs already provide in their rulebooks. This proposed rule is also better aligned with other proposed Core Principle 2 regulations that relate to SEF trading protocols and procedures, such as proposed § 37.203(e), which would require SEFs to promulgate rules and procedures to resolve error trades, including trade amendments or cancellations, as discussed below.[305]

To comply with this rule, for example, a SEF that offers an RFQ protocol could specify various operational aspects of that protocol in its rulebook. Those aspects could include, among other things, how a requestor could initiate an RFQ; whether the RFQ requestor's identity is disclosed or anonymous; whether an RFQ request could be made visible to the entire market; whether a responder could offer either indicative or firm bids or offers; the length of time that an RFQ response with a firm bid or firm offer would have to remain executable by the RFQ requestor; or whether RFQ responses are disclosed to the whole market or just the requestor. By specifically requiring a SEF to disclose information regarding how each offered execution method operates, a market participant would have the ability to (i) make an informed decision about whether to trade and execute on that SEF; (ii) determine the type of trading system or platform that best suits its needs; and (iii) conform its trading and execution practices to the SEF's protocols and procedures.[306]

b. § 37.201(a)(2)—Discretion

Proposed § 37.201(a)(2) would require a SEF, where applicable, to establish rules specifying the manner or circumstances in which the SEF may exercise ''discretion'' in facilitating trading and execution for each of its execution methods. Many SEFs, in particular those that resemble or are based upon operations of swaps broking entities, including interdealer brokers, feature execution methods that involve the use of discretion.[307] SEF trading specialists,[308] who have traditionally served as interdealer brokers in the wholesale swaps market, exercise discretion on behalf of market participants in a variety of ways. This discretion includes determining how, when, and with whom to disseminate, arrange, and execute bids and offers; and determining whether and when to amend or cancel those bids and offers in response to market developments. Exercising this type of trading and execution judgment involves taking different factors into account, such as the characteristics and needs of the client, size and nature of the order, likelihood and speed of execution, price and costs of execution, and current market conditions. The use of discretion in trading reflects the market characteristics of the wholesale swaps market, where the wide range of different swaps and transaction sizes results, in some instances, in low liquidity markets with episodic, non-continuous trading activity.

Given the established role of swaps broking entities, including interdealer brokers, in fostering market liquidity through identifying and arranging multiple trading interests—both liquid and illiquid—amidst changing market conditions, the Commission recognizes that the use of discretion is an important element in fostering an efficient market. Therefore, the Commission's proposed regulatory framework would further accommodate the use of discretion by SEFs. As described above, SEFs would be allowed to offer flexible execution methods, thereby allowing methods that involve the exercise of discretion by SEF trading specialists.[309] Further, the proposed expansion of the trade execution requirement would lead to a greater number of swaps being traded on SEFs.

The Commission believes that the proposed broadening of both the SEF registration requirement and the trade execution requirement would increase the level of discretion that SEFs (and their trading specialists) exercise in connection with swaps trading. To address this situation, proposed § 37.201(a)(2) would require SEFs to disclose the manner or circumstances in which they may exercise discretion. The Commission believes that such a disclosure requirement is important to

regulation, but rather serves as a supplement to local laws by setting forth guidelines for good practices in the FX markets. The code specifies, among other recommendations, that ''Market Participants,'' which include operators of trading systems or platforms, should provide all relevant disclosures and information to participants to help them make informed decisions about whether to transact or not. *See* FX Global Code at 13–14 (updated Aug. 2018) (''FX Global Code''), *available at https://www.globalfxc.org/docs/fx_global.pdf.*

[304] *See supra* note 179 (definition of ''rule'' in the Commission's regulations).

[305] *See infra* Section VII.B.5.—§ 37.203(e)—Error Trade Policy.

[306] *See* FX Global Code at 13–14 (recommending that trading systems or platforms have rules that are transparent, including how orders are handled and transacted).

[307] As noted above, upon the adoption of part 37, some interdealer brokers have registered their operations or components of their operations, *i.e.,* trading systems or platforms, as SEFs. *See supra* Section IV.C.1.c.(1)—Structure and Operations of Swaps Broking Entities, Including Interdealer Brokers.

[308] ''SEF trading specialist'' refers to a natural person employed by a SEF (or acting in a similar capacity as a SEF employee) to perform various core functions that facilitate trading and execution, including discussing market color with market participants, negotiating trade terms, issuing RFQs, and arranging bids and offers. For the Commission's proposed definition of ''SEF trading specialist,'' *see infra* Section VI.A.3.—§ 37.201(c)—SEF Trading Specialists.

[309] The Commission's clarification of the SEF registration requirement, as discussed above, would require swaps broking entities, including interdealer brokers, to register as SEFs. *Id.* The Commission notes that as a result, a significant number of personnel at these entities would likely meet the definition of ''SEF trading specialist.''

inform market participants, facilitate an orderly SEF trading environment, foster open and transparent markets, and promote market integrity while remaining consistent with Core Principle 2.[310] Such information would help a market participant have important awareness of how a trading system or platform is designed, thereby allowing them to make informed decisions with respect to swaps trading on a particular SEF. For example, such information would help market participants determine appropriate parameters or instructions in submitting their bids and offers to a particular SEF, as well as inform their expectations about possible trading outcomes or objectives on that SEF. The Commission believes that more informed market participants would promote fairer and more efficient trading on SEFs and, ultimately, make SEFs more robust price discovery mechanisms.

Pursuant to proposed § 37.201(a)(2), the Commission intends to require each SEF to generally disclose the possible areas in which it may use discretion for each execution method, rather than establish exact, pre-determined trading protocols and procedures. In identifying those general areas, a SEF's rules should disclose sufficient information that a reasonable market participant would consider important in deciding whether to onboard onto the SEF and, once participating on the SEF, in understanding how discretion may affect trading. The proposed rule, however, does not necessarily require a SEF to disclose any proprietary or confidential information in its public rulebook.[311] Based on its experience with reviewing SEF rulebooks, the Commission believes that proposed § 37.201(a)(2) is consistent with current market practice and the general level of information that many SEFs already provide in their rulebooks.[312] Accordingly, the Commission does not anticipate that existing SEFs will be required to adopt material changes to their rulebooks; rather, the proposed rule would ensure that both currently-registered and new SEFs continue to provide sufficient transparency and disclosure.

c. § 37.201(a)(3)—Market Pricing Information

Proposed § 37.201(a)(3) would require each SEF to adopt rules that disclose the general sources and methodology for generating any market pricing information that the SEF provides to market participants to facilitate trading and execution. The term ''sources'' would include any general inputs that the SEF may consider when forming a price, such as swaps pricing data, *e.g.,* the last traded price; historical, executable, or indicative bids and offers on the SEF or other trading platforms; or the views of market participants, who the SEF may contact to ascertain interest. The term ''methodology'' means that a SEF should generally identify the extent to which it may formulate a price on its trading systems or platforms, whether prices generated by SEFs are based on discretion or some type of pre-set approach, and how the information or data sources are generally applied or weighted within the SEF's methodology.

The Commission recognizes that some SEFs provide participants either an indicative or executable ''market price'' to encourage price discovery and liquidity or otherwise inform trading interest. The use of market prices is particularly prevalent in connection with certain execution methods, such as auctions and similar matching sessions.[313] SEFs often generate these prices by considering various sources of data, including prices from executed transactions, prices from executable or indicative bids and offers, publicly reported swaps data, active market participant views, or prices from related instruments in other markets. Based on the availability of this information at a given time, a SEF may take one or more of these factors into account differently in formulating a single price. These pricing mechanisms help to initiate the price discovery process and allow market participants to formulate views about the current state of the market. By relying upon an established price, a market participant may make trading decisions without being exposed to information leakage that might otherwise cause widened bid-offer spreads and impose higher transaction costs.[314] Given this unique feature of the swaps market due to its episodic liquidity, the Commission recognizes that SEF pricing practices are an important element in fostering liquidity on SEFs and, therefore, in promoting the Act's statutory goals of encouraging SEF trading and pre-trade price transparency.

Where pricing generated by a SEF in lieu of pricing based on market participant bids and offers help to foster liquidity and price discovery, the Commission believes that requiring SEFs to inform market participants as to their price formation sources and methodology would foster open and transparent markets and promote market integrity and efficiency. Requiring a SEF to disclose the sources of information used to generate a price and the methodology for calculating that price, for example, would allow market participants to be aware of prevailing liquidity and market conditions, thereby helping them to form views as to whether that price is an appropriate indicator of a particular market. Accordingly, market participants would be able to make informed trading decisions, such as whether to participate in an available trading session, and if so, the level of participation, *e.g.,* whether they would contribute their own information to help establish a trading price in a particular execution method.[315] The Commission believes that this information should build confidence among participants in the integrity, fairness, and effectiveness of the SEF as a regulated trading venue. In turn, a greater level of confidence in SEFs should lead to increased swaps trading volume and, ultimately, an increased potential for higher levels of pre-trade price transparency through increased participation.

Similar to proposed § 37.201(a)(2), the Commission emphasizes that proposed § 37.201(a)(3) would establish a general

[310] *See* FX Global Code at 13–14 (recommending that trading systems or platforms should make participants aware of where discretion may exist or may be expected, and how it may be exercised, as a way to promote fairness and transparency in trading).

[311] The Commission notes, however, that if a SEF believes that any such information should be kept confidential, such that it should be provided to market participants but not in a public filing, the SEF may submit a request for confidential treatment with its respective rule submission. 17 CFR 40.8. The Commission's treatment of such information would be governed by § 145.9, 17 CFR 145.9, and the Freedom of Information Act. 5 U.S.C. 552.

[312] The Commission notes, for example, that SEF rules have generally specified several areas where discretion may be exercised in facilitating trading, such as determining when to enter orders on behalf of participants; determining when and with which participants to gauge possible trading interest; and determining how to calculate mid-market prices for use in a session-based execution method, *i.e.,* determining the number of factors to consider in the calculation of a mid-market price or the weight of each factor.

[313] In a typical SEF auction or matching session-based trading functionality, a SEF establishes a price for a listed swap that is determined through a variety of different factors. Participants may submit their trading interest in the swap at the established price, either within an established time session or on a continuous basis, and subsequently execute that swap at the established price, often on a time-priority basis.

[314] The Commission understands that participants often avoid acting as a ''first-mover'' for relatively less liquid swaps by exercising caution in displaying their trading interests, *i.e.,* price and size; accordingly, SEFs—similar to historical OTC trading environments—utilize these types of methods to promote trading for particular swaps and pre-trade price transparency.

[315] *See supra* note 313 (describing mechanics of a SEF auction or matching session-based trading functionality).

approach as to the scope of information that a SEF must disclose and does not require the SEF to specify detailed calculations or algorithms used to generate pricing information. The Commission also notes that the proposed rule would not require SEFs to disclose the identities of market participants who provide data used to formulate prices or to disclose proprietary aspects of their pricing methodology.[316] Rather, a SEF's rules should disclose sufficient information that a reasonable market participant would consider important to determine whether to join the SEF and to generally understand the nature of the market pricing information provided by the SEF. In addition, proposed § 37.201(a)(3) would not require a SEF to provide any proprietary or confidential information in its public rulebook. Based on its experience with reviewing SEF rulebooks submitted via the part 40 rule filing process, the Commission believes that proposed § 37.201(a)(3) is consistent with current market practice and the general level of information that many SEFs already include in their rulebooks.[317]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.201(a). In particular, the Commission requests comment on the following question:

(28) Do the requirements under proposed §§ 37.201(a)(1)–(3) set an appropriate level of disclosure by SEFs to market participants? Are the requirements too broad? Should the Commission require additional disclosures that would be material for market participants to make an informed decision to participate on the SEF? If so, what additional disclosures should be required? Please provide specific examples in your responses.

[316] The Commission further notes, however, that regardless of whether market participants participate in the price-formation process or whether their identities remain anonymous, all market participants remain subject to section 9(a)(2) of the Act. That provision prohibits any attempt to provide false, misleading, or knowingly inaccurate reports concerning market information or conditions that affect or tend to affect the price of any swap. 7 U.S.C. 13(a)(2).

[317] In disclosing the general sources and methodologies for generating market pricing information, the Commission notes that such SEF rules have generally specified (i) the SEF's ability to consider either a single or multiple number of established factors in determining a price; (ii) the various types of factors that it may take into account to determine a price; or (iii) other additional analytical methods that may be used to supplement a price calculated from existing bids and offers on the platform.

2. § 37.203(a)—Pre-Arranged Trading Prohibition; § 37.9(b) Time Delay Requirement

Part 37 has permitted market participants to communicate with one another away from a SEF in connection with the eventual execution of swap transactions via the SEF's trading systems or platforms.[318] The Commission has observed that such communications, which commonly occur on a direct basis between swap dealers and their clients in the dealer-to-client market, vary in nature and scope. Such communication may, for example, include communications to discern trading interest prior to trading on the SEF, *e.g.,* obtaining market color, identifying potential trades, and locating interested counterparties. Such communications, however, may also consist of the actual negotiation or arrangement of a swap transaction's terms and conditions prior to execution on a SEF. Such communications are permitted through several provisions in the current regulatory framework, as described below, based in part on whether the transaction qualifies for an exception to the prohibition on pre-arranged trading under § 37.203(a); or whether the swap is otherwise not subject to the trade execution requirement.

The Commission notes that ''pre-arranged trading'' is prohibited as an abusive trading practice under § 37.203(a). This prohibition generally applies to market participants who communicate with one another to pre-negotiate the terms of a trade away from a SEF's trading system or platform, but then execute the trade on such system or platform in a manner that appears competitive and subject to market risk. The Commission has intended for this prohibition to maintain the integrity of price competition and market risk that is incident to trading in the market.[319] Notwithstanding this prohibition, SEFs have permitted pre-arranged trading on their facilities in certain instances.

For Required Transactions executed via an Order Book, a SEF may permit market participants to communicate with one another and pre-arrange or pre-negotiate a swap transaction away from its trading system or platform, subject to a time delay requirement and facility rules on pre-execution communications. Section 37.9(b)(1) currently permits a broker or dealer to engage in pre-execution communications to pre-arrange or pre-negotiate a swap, as long as one side of the resulting transaction is entered into the Order Book for a 15-second delay before the second side is entered for execution against the first side (the ''time delay requirement''). The Commission defined ''pre-execution communications'' as communications between market participants to discern interest in the execution of a transaction prior to the exposure of the market participants' orders (*e.g.,* price, size, and other terms) to the market; such communications include discussion of the size, side of market, or price of an order, or a potentially forthcoming order.[320] To the extent that SEFs would allow their market participants to engage in such pre-execution communications, the Commission required SEFs to adopt associated rules.[321]

The Commission implemented § 37.9(b) to ensure a minimum level of pre-trade price transparency for orders based on pre-execution communications that occur away from the SEF, and to incentivize price competition between market participants for orders entered into an Order Book.[322] The Commission

[318] SEF Core Principles Final Rule at 33503.

[319] The Commission generally considers pre-arranged trading to be a form of ''fictitious'' trading that is prohibited pursuant to CEA section 4c(a)(1), which makes it unlawful for any person to offer to enter into, or confirm the execution of a fictitious sale. 7 U.S.C. 6c(a)(1), 6c(a)(2)(A)(ii). Specifically, pre-arranged trading involves ''the use of trading techniques that give the appearance of submitting trades to the open market while negating the risk of price competition incident to such a market.'' Harold Collins, [1986–1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) 22982, 31902 (CFTC Apr. 4, 1986). Generally, pre-arranged trading creates a false impression to the market that an executed transaction is indicative of a competitive trading environment. *Id.* at 31903 (''By determining trade information such as price and quantity outside the pit, then using the market mechanism to shield the private nature of the bargain from public scrutiny, both price competition and market risk are eliminated.'').

[320] SEF Core Principles Final Rule at 33503. In light of the Commission's general prohibition on pre-arranged trading under § 37.203(a), the Commission defined this term to clarify the permissible types of communications in which market participants can pre-arrange or pre-negotiate a transaction consistent with § 37.9(b)(1). The Commission currently requires that SEFs that choose to allow their market participants to engage in pre-execution communications prior to executing such transactions must do so pursuant to their rules. 17 CFR 37.203(a). Such communications may constitute an element of pre-arranged trading, which is an abusive trading practice prohibited under existing § 37.203(a).

[321] SEF Core Principles Final Rule at 33509.

[322] *Id.* at 33503. The Commission modeled the time delay requirement after similar DCM rules that have imposed time delays on cross trades involving futures and options on futures. Pursuant to these rules, market participants are permitted to conduct pre-execution communications with respect to orders that are later exposed to the market for a certain period of time prior to execution on the DCM's trading system or platform. As DCM Core Principle 9 requires DCMs to provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized

Continued

anticipated that disclosing one side of a pre-arranged transaction in the Order Book first would provide other market participants with an opportunity to execute against that side prior to entry of the second side in the Order Book.[323] A similar requirement, however, was not applied to Required Transactions executed through a SEF's RFQ System. The Commission noted that the requirement to send an RFQ to three other market participants already provides pre-trade price transparency, thereby obviating the need for a corresponding time delay.[324]

In addition to the time delay requirement, § 37.203(a) also specifies that a SEF may choose to permit pre-arranged trading in other instances. First, a SEF may permit a swap that it lists to be executed as a block trade away from a SEF pursuant to part 43. This exception allows such large-sized transactions to be privately negotiated to avoid potentially significant and adverse price impacts that would occur if traded on trading systems or platforms with pre-trade price transparency.[325] Second, a SEF may permit pre-arranged trading for ''other types of transactions'' through rules that are filed with the Commission pursuant to part 40. These rules permit pre-arranged trading with respect to Required Transactions that are intended to resolve error trades [326] or are executed as a component of certain categories of package transactions.[327]

In the preamble to the SEF Core Principles Final Rule, the Commission did not discuss the issue of pre-execution communications regarding swaps that are not subject to the trade execution requirement, *i.e.,* Permitted Transactions, but the Commission has permitted SEFs to adopt a more flexible approach to the use of communications away from the SEF. This approach corresponds to the Commission's approach to Permitted Transactions, which are not required to be executed on a SEF and otherwise may be executed on a SEF through flexible execution methods.[328] Under a more flexible approach, the Commission has observed that SEFs—both those that facilitate trading in the dealer-to-client market and those that facilitate trading in the dealer-to-dealer market—have consequently adopted rules to allow their market participants to engage in a variety of pre-execution communications away from their respective trading systems or platforms prior to executing Permitted Transactions on SEFs. The Commission notes in particular that some methods allow counterparties to submit pre-negotiated terms and conditions of a transaction to a SEF ''order entry'' system for execution and related post-trade processing.[329]

a. § 37.201(b)—Pre-Execution Communications

The Commission proposes several amendments under the proposed framework that would broadly apply to pre-execution communications that occur away from a SEF. For swaps subject to the trade execution requirement, proposed § 37.201(b) would require a SEF to prohibit its participants from engaging in pre-execution communications away from its facility, including negotiating or arranging the terms and conditions of a swap prior to its execution on the SEF, *i.e.,* via the SEF's methods of execution. This prohibition would be subject to certain proposed exceptions discussed further below. Given this general prohibition, the Commission also proposes to eliminate the existing exceptions to the pre-arranged trading prohibition, including (i) the time delay requirement under § 37.9(b); (ii) the exception for block trades under § 37.203(a) as part of the Commission's proposed amendments to the ''block trade'' definition under § 43.2; [330] and (iii) the exception for ''other types of transactions'' under § 37.203(a). Proposed § 37.203(a), as discussed below, would continue to require a SEF to prohibit abusive trading practices, including pre-arranged trading, as appropriate to its trading systems or platforms. Therefore, a SEF would not be allowed to provide rules that allow market participants to pre-negotiate or pre-arrange a transaction and submit the sides of the transaction to an order book pursuant to a time delay.

In eliminating the prescriptive execution methods and allowing more flexible execution for swaps subject to the trade execution requirement, the Commission believes that pre-execution communications, including the negotiation or arrangement of those swaps, would be able to occur entirely within a SEF's trading system or platform. Such negotiation or arrangement, regardless of the method through which they may occur, *i.e.,* among participants themselves or through a swaps broking entity, constitutes ''trading'' that should occur on a SEF. The Commission notes that ''trading,'' as discussed above, includes the negotiation or arrangement of transactions through the interaction of bids and offers.[331] Based on its experience with implementing part 37, the Commission believes that the broad scope of pre-execution communications that have been allowed to occur away from the SEF under the existing framework has undermined a meaningful role of the SEF in facilitating trading activity and liquidity formation.

Accordingly, the Commission believes that these proposed changes are an important element of the proposed SEF regulatory framework and are intended

market of the DCM, 7 U.S.C. 7(d)(9)(A), DCMs have implemented certain time delay procedures that establish a ''safe harbor'' for orders resulting from pre-execution communications that would otherwise be considered pre-arranged trading. To protect price discovery, such orders must be exposed to the market for a minimum amount of time prior to allowing such orders to match against one another on a DCM. This time delay generally provides other participants with an opportunity to execute against the initial order. *See, e.g.,* CME Group, Rule 539.C (rules on pre-execution communications regarding Globex trades).

[323] 17 CFR 37.9(b)(1).

[324] SEF Core Principles Final Rule at 33504. The SEF Core Principles Final Rule did not explicitly require a SEF to adopt pre-execution communication rules for swaps executed using its RFQ System. Nevertheless, the Commission has observed that some SEFs have self-certified rules under § 40.6 to allow their market participants to engage in pre-execution communication prior to transmitting an RFQ through the facility's RFQ System.

[325] As defined under § 43.2, a ''block trade'' involves a SEF-listed swap transaction with a notional amount that meets the corresponding appropriate minimum block size and is executed away from the SEF's trading system or platform, but pursuant to the SEF's rules and procedures. 17 CFR 43.2. The Commission is proposing to amend that definition to specify that block trades must be executed on a SEF. *See infra* Section XXII.—Part 43—§ 43.2—Definition of ''Block Trade.''

[326] Based on time-limited no-action relief issued by DMO, a SEF may submit pre-arranged Required Transactions for execution on the SEF that resolve error trades, *i.e.,* correct transactions to offset an initial transaction executed on the SEF containing a clerical or operational error, and where necessary, a new transaction that reflects the terms to which the counterparties had originally assented. *See infra* note 433 and accompanying discussion.

[327] Based on time-limited no-action relief issued by DMO, a SEF may submit pre-arranged Required Transactions for execution on SEFs that are components of certain categories of package transactions. *See infra* note 334.

[328] SEF Core Principles Final Rule at 33504.

[329] As noted above, several SEFs affiliated with interdealer brokers offer this type of functionality. As participants affiliated with a SEF, interdealer brokers have arranged Permitted Transactions on behalf of dealer clients through ''communications'' on their trading systems or platforms and submitted those transactions to a SEF for execution without being subject to any corresponding order exposure. *See supra* note 88 and accompanying discussion.

[330] *See infra* Section XXII.—Part 43—§ 43.2—Definition of ''Block Trade.''

[331] With respect interdealer brokers, the Commission believes that their trading systems or platforms facilitate ''trading'' between multiple participants in conformance with the statutory SEF definition and, therefore, are subject to the SEF registration requirement. *See supra* Section IV.C.1.c.(2)—SEF Registration Requirement for Swaps Broking Entities, Including Interdealer Brokers.

to enhance this framework, such that a broader range of swaps trading activity would be occurring on SEFs and creating a vibrant and liquid marketplace for swaps trading. For example, the Commission notes the likely increase in the number of swaps that would become subject to the trade execution requirement under this proposal. Currently, many of those swaps are Permitted Transactions submitted to a SEF for execution after negotiation or arrangement away from the facility, or are negotiated and executed on an OTC basis. With an expanded scope of swaps subject to the trade execution requirement, the Commission is concerned that allowing a disproportionate amount of SEF transactions to be pre-arranged or pre-negotiated away from the facility under the pretense of trading flexibility would undercut the import of the expansion of the requirement. Without a limitation on pre-execution communications that occur away from the SEF, the SEF's role in facilitating swaps trading is also diminished and would undermine the statutory goals of promoting greater swaps trading on SEFs and promoting pre-trade price transparency.

The Commission also notes that its proposed approach to pre-execution communications, as applied to SEFs in the dealer-to-dealer market, is consistent with the application of the SEF registration requirement to swaps broking entities, *e.g.,* interdealer brokers that facilitate swaps trading activity between market participants. As discussed above, the Commission believes that brokers, who facilitate trading communications between market participants away from a SEF and subsequently submit pre-negotiated or pre-arranged trades to the SEF for execution, relegate the SEF to a de facto post-trade processing venue. Requiring these entities to register as SEFs would ensure that this type of liquidity formation occurs on a SEF.[332] Similarly, the submission of trade terms negotiated or arranged via direct communications between participants, *e.g.,* a swap dealer and a client, away from a SEF allows liquidity formation to occur outside of the SEF regulatory framework, which undermines the statutory SEF goals. Limiting the scope of these communications would also help ensure that this activity occurs on a registered SEF via flexible means of execution, which promotes the statutory goals of promoting trading on SEFs and promoting pre-trade price transparency.

(1) Exception for Swaps Not Subject to the Trade Execution Requirement

The Commission proposes an exception to the proposed prohibition on pre-execution communications under § 37.201(b) for swaps that are not subject to the trade execution requirement. The Commission's proposed exception recognizes that market participants do not have to execute such swaps on SEFs. The Commission also acknowledges that two counterparties may initially discuss or negotiate a potential swap transaction on a bilateral basis away from a SEF with the intent to execute the transaction away from the SEF, but subsequently determine to submit the resulting arranged transaction to be executed on a SEF. The Commission believes that applying the proposed § 37.201(b) prohibition to swaps not subject to the trade execution requirement would not be practical, given that counterparties do not have to execute these swaps on a SEF. The Commission emphasizes, however, that this proposed exception does not affect the SEF registration requirement under proposed § 37.3(a), which would specify that a person operating a facility that meets the statutory SEF definition must register as a SEF without regard to whether the swaps that it lists for trading are subject to the trade execution requirement.[333]

(2) § 37.201(b)(1)—Exception for Package Transactions

The Commission also proposes an exception under § 37.201(b)(1) to the proposed prohibition on pre-execution communications for swaps subject to the trade execution requirement that are components of ''package transactions'' that also include components that are not subject to the trade execution requirement.[334] For purposes of this

[332] As noted above, the Commission recognizes that domestic swaps broking entities and foreign swaps broking entities would be subject to a six-month and two-year delayed application of the SEF registration requirement, respectively. These delays would allow them to continue to negotiate or arrange swaps transactions between multiple participants and route them to SEFs or Exempt SEFs for execution. Accordingly, the compliance date of any final rule with respect to the prohibition on pre-execution communication under proposed § 37.201(b) and the pre-arranged trading prohibition under § 37.203(a) for these entities would also be subject to a delay of six months or two years, depending on the entity's domicile and starting from the effective date of the final rule. *See supra* Section IV.C.1.c.—Swaps Broking Entities, Including Interdealer Brokers and Section IV.C.1.d.—Foreign Swaps Broking Entities and Other Foreign Multilateral Swaps Trading Facilities.

[333] *See supra* Section IV.C.1.a.—Footnote 88. For example, the exception would inherently not apply to a swaps broking entity that conducts pre-execution communications to facilitate trading activity on behalf of multiple participants in swaps that are not subject to the trade execution requirement. As noted above, such an entity would be subject to the SEF registration requirement and personnel facilitating those communications would likely be designated as SEF trading specialists that constitute part of a SEF's trading system or platform. *See supra* notes 308–309.

[334] The Commission notes that the swap components of different categories of package transactions have been subject to time-limited no-action relief provided by Commission staff from the trade execution requirement and required methods of execution. These categories of package transactions include those where (i) each of the components is a swap subject to the trade execution requirement (''MAT/MAT''); (ii) at least one of the components is subject to the trade execution requirement and each of the other components is subject to the clearing requirement (''MAT/Non-MAT (Cleared)''); (iii) each of the swap components is subject to the trade execution requirement and all other components are U.S. Treasury securities (''U.S. Dollar Swap Spreads''); (iv) each of the swap components is subject to the trade execution requirement and all other components are agency mortgage-backed securities (''MAT/Agency MBS''); (v) at least one individual swap component is subject to the trade execution requirement and at least one individual component is a bond issued and sold in the primary market (''MAT/New Issuance Bond''); (vi) at least one individual swap component is subject to the trade execution requirement and all other components are futures contracts (''MAT/Futures''); (vii) at least one of the swap components is subject to the trade execution requirement and at least one of the components is a CFTC swap that is not subject to the clearing requirement (''MAT/Non-MAT (Uncleared)''); (viii) at least one of the swap components is subject to the trade execution requirement and at least one of the components is not a swap (excluding aforementioned categories) (''MAT/Non-Swap Instruments''); and (ix) at least one of the swap components is subject to the trade execution requirement and at least one of the components is a swap over which the CFTC does not have exclusive jurisdiction, *e.g.,* a mixed swap (''MAT/Non-CFTC Swap''). *See* CFTC Letter No. 14–12, No-Action Relief from the Commodity Exchange Act Sections 2(h)(8) and 5(d)(9) and from Commission Regulation § 37.9 for Swaps Executed as Part of a Package Transaction (Feb. 10, 2014) (''NAL No. 14–12''); CFTC Letter No. 14–62, No-Action Relief from the Commodity Exchange Act Sections 2(h)(8) and 5(d)(9) and from Commission Regulation § 37.9 for Swaps Executed as Part of Certain Package Transactions and No-Action Relief for Swap Execution Facilities from Compliance with Certain Requirements of Commission Regulations § 37.9(a)(2), § 37.203(a) and § 38.152 for Package Transactions (May 1, 2014) (''NAL No. 14–62''); CFTC Letter No. 14–121, Extension of No-Action Relief for Swap Execution Facilities and Designated Contract Markets from Compliance with Certain Requirements of Commission Regulations § 37.9(a)(2), § 37.203(a) and § 38.152 for Package Transactions (Sept. 30, 2014) (''NAL No. 14–121''); CFTC Letter No. 14–137, Extension of No-Action Relief from the Commodity Exchange Act Sections 2(h)(8) and 5(d)(9) and from Commission Regulation § 37.9 and Additional No-Action Relief for Swap Execution Facilities from Commission Regulation § 37.3(a)(2) for Swaps Executed as Part of Certain Package Transactions (Nov. 10, 2014) (''NAL No. 14–137''); CFTC Letter No. 15–55, Extension of No-Action Relief from the Commodity Exchange Act Sections 2(h)(8) and 5(d)(9) and from Commission Regulation § 37.9 and No-Action Relief for Swap Execution Facilities from Commission Regulation § 37.3(a)(2) for Swaps Executed as Part of Certain Package Transactions (Oct. 15, 2014) (''NAL No. 15–55''); CFTC Letter No. 16–76, Re: Extension of No-Action Relief from the Commodity Exchange Act Sections 2(h)(8) and 5(d)(9) and from

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exception, a ''package transaction'' involves two or more counterparties and consist of two or more component transactions whose executions are (i) contingent upon one another, (ii) priced or quoted together as one economic transaction, and (iii) executed simultaneous or near simultaneous to each other.[335]

The Commission recognizes that some package transactions contain both a swap that is subject to the trade execution requirement and other swap or non-swap components that are not subject to the requirement. Components not subject to the requirement include, for example, swaps not subject to the clearing requirement, *e.g.,* swaptions, and various types of securities.[336] The negotiation or arrangement of each of these components generally occurs concurrently or on a singular basis; in particular, negotiations for the pricing of such package transactions may be primarily based on the components that are not subject to the requirement. Further, the swap components in those types of transactions that are subject to the requirement often serve as hedging tools to other components. For those components not subject to the requirement, market participants may negotiate the terms away from a SEF.

The Commission believes that imposing a prohibition on swaps subject to the trade execution requirement that are part of a package transaction that includes components not subject to the requirement would inhibit the ability of counterparties to negotiate or arrange the latter components away from the SEF.[337] Given that components of package transactions are each priced or quoted together as part of one economic transaction, the Commission recognizes the impracticality of requiring communications related to the negotiation or the arrangement of the swap component that is subject to the trade execution requirement to occur on the SEF. Accordingly, an exception from the prohibition on pre-execution communications away from the SEF for swap components subject to the requirement would be appropriate in such circumstances.[338] Consistent with its intent to incorporate existing staff no-action relief into the Commission's regulations, the Commission notes that the proposed exception would codify some of the relief that currently applies to certain types of package transactions.[339]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.201(b). In particular, the Commission seeks insights regarding market participants' use of pre-execution communications and requests comment on the following questions:

(29) What are market participants' current pre-execution communication practices? How often do market participants currently engage in pre-execution communication? What level of trade detail is discussed during such pre-execution communications? What role, if any, should pre-execution communications continue to have in the SEF market structure?

(30) Is the Commission's proposal to require a SEF to prohibit market participants from conducting pre-execution communications away from a SEF with respect to swaps that are subject to the trade execution requirement appropriate? In light of the Commission's proposal to allow SEFs to offer flexible execution methods, are there any impediments for market participants to execute those swaps, in particular those that would become subject to the Commission's proposed approach to the trade execution requirement?

(31) With respect to swaps that are not subject to the trade execution requirement, is the Commission's proposal to allow SEFs to permit market participants to conduct pre-execution communications away from a SEF appropriate?

(32) Are there any technical limitations that a SEF would face to accommodate pre-execution communications that would otherwise impede the ability of market participants to trade and execute swaps on a SEF?

(33) Should the Commission allow an exception to the proposed prohibition against pre-execution communications for communications involving ''market color''? If so, how should the Commission define ''market color''? For example, should such a definition consist of views shared by market participants on the general state of the market or trading information provided on an anonymized and aggregated basis? Should such a definition exclude (i) an express or implied arrangement to execute a specified trade; (ii) non-public information regarding an order; and (iii) information about an individual trading position? Are these elements appropriate and should the Commission consider additional elements?

(34) Should the Commission allow an exception to the proposed prohibition against pre-execution communications for communications intended to discern the type of transaction—which may or may not be a swap—that a market participant may ultimately execute on a SEF? The Commission understands that these types of communications are common in the dealer-to-client market and allow a dealer to assist a client with determining which financial instruments may be best suited to manage the client's risks or to establish certain market positions. If so, please describe the nature and scope of these communications that would support an exception to the proposed prohibition.

(35) Should the Commission allow an exception to the proposed prohibition against pre-execution communications for all corrective trades intended to resolve error trades pursuant to the proposed error trade policy rules under § 37.203(e), as discussed further below? Please explain why or why not.

Commission Regulation § 37.9 and No-Action Relief for Swap Execution Facilities from Commission Regulation § 37.3(a)(2) for Swaps Executed as Part of Certain Package Transactions (Nov. 1, 2016) (''NAL No. 16–76''); CFTC Letter No. 17–55, Re: Extension of No-Action Relief from Sections 2(h)(8) and 5(d)(9) of the Commodity Exchange Act and from Commission Regulations 37.3(a)(2) and 37.9 for Swaps Executed as Part of Certain Package Transactions (Oct. 31, 2017) (''NAL No. 17–55''). To the extent that counterparties may be facilitating package transactions that involve a ''security,'' as defined in section 2(a)(1) of the Securities Act of 1933 or section 3(a)(10) of the Securities Exchange Act of 1934, or any component agreement, contract, or transaction over which the Commission does not have exclusive jurisdiction, the Commission does not opine on whether such activity complies with other applicable law and regulations.

[335] The Commission notes that it similarly defines ''package transaction'' under proposed § 36.1(d)(1) for purposes of providing an exemption to the trade execution requirement for swaps that are executed as part of package that includes a bond issued in a primary market. *See infra* Section XXI.A.4.—§ 36.1(d)—Exemption for Swaps Executed with Bond Issuance.

[336] Based on time-limited no-action relief issued by DMO, the categories of package transactions that consist of components not subject to the requirement include (i) U.S. Dollar Swap Spreads; (ii) MAT/Agency MBS; (iii) MAT/New Issuance Bond; (iv) MAT/Futures; (v) MAT/Non-MAT (Uncleared); (vi) MAT/Non-Swap Instruments; and (vii) MAT/Non-CFTC Swaps. *See supra* note 334.

[337] Package transactions composed entirely of swaps that are subject to the trade execution requirement would be subject to the prohibition of pre-execution communications under proposed § 37.201(b) and are not eligible for this proposed exception.

[338] The Commission notes that a swaps broking entity that facilitates trading in any swap component on behalf of multiple participants, regardless of whether the swap is subject to the trade execution requirement, would be subject to the SEF registration requirement. *See supra* note 333.

[339] Swap components in the following categories of package transactions are currently subject to relief from the required methods of execution under existing § 37.9: (i) MAT/Non-MAT (Uncleared); (ii) MAT/Non-Swap Instruments; and (iii) MAT/Non-CFTC Swap. NAL No. 17–55 at app. A. Pursuant to this relief, the Commission notes that SEFs have allowed market participants to negotiate or arrange the swap components away from the SEF and submit them for execution.

(36) The Commission is proposing to allow market participants to engage in pre-execution communications away from a SEF for package transactions in which at least one component is not subject to the trade execution requirement. For the swap components of some of these package transactions that are currently traded and executed on SEFs—for example, those where all other components are U.S. Treasury securities—should they not be subject to this exception? Are there other types of package transactions for which the Commission should provide an exception to the proposed prohibition on pre-execution communications?

3. § 37.201(c)—SEF Trading Specialists

The Commission notes that a number of registered SEFs—in particular, those that operate in the dealer-to-dealer market—offer voice-based or voice-assisted execution platforms that utilize natural persons to facilitate trading in varying degrees. These persons, commonly referred to as ''trading specialists'' or ''execution specialists,'' perform core functions that facilitate swaps trading and execution in a multiple-to-multiple participant environment, including disseminating trading interests to the market, *e.g.,* transmitting RFQs provided by participants; matching bids and offers; and negotiating or arranging transaction terms and conditions on behalf of participants.

Many individuals currently carry out the same functions away from a SEF as part of a swaps broking entity, such as an interdealer broker, prior to execution of the transaction on the SEF.[340] These swaps broking entities are often registered with the Commission as IBs [341] and these individuals are registered as associated persons of IBs.[342] As associated persons of IBs, these persons are subject to various regulatory requirements for intermediaries aimed at protecting customers.[343] As noted above, the Commission has proposed that these swaps broking entities be registered as a SEF, given that they facilitate trading.[344]

The Commission recognizes, however, that the current regulatory requirements for swaps broking entities do not necessarily fully address the unique functions of trading specialists on a SEF, which are broader in scope than the traditional IB functions of solicitation or acceptance of orders. SEF trading specialists serve an intermediary-type role for each market participant that accesses their SEF by facilitating fair, orderly, and efficient trading and overall market integrity. From a regulatory perspective, the Commission believes that SEF trading specialists—whether operating as part of a fully voice-based system or as a voice-assisted system with electronic-based features—are an integral part of their respective SEF's trading system or platform.

A voice-based or voice-assisted SEF trading system or platform is unique among SEF execution methods. Unlike a trading system or platform that executes orders and facilitates trading through generally automated means, trading specialists that comprise part of the voice-based or voice-assisted systems usually exercise a level of discretion and judgment in facilitating interaction between bids and offers from multiple market participants. That discretion and judgment is informed by their knowledge and understanding of market conditions, which are based upon information obtained from observing historical activity and gauging potential or actual trading interest from communications with participants.

By allowing SEFs to offer flexible methods of execution and broadening the trade execution requirement to swaps with more episodic liquidity, the Commission believes that the proposed rulemaking would lead to greater volumes of trading on voice-based trading systems or platforms that utilize discretion and judgment. The use of these methods should increase and enhance the utility of SEFs in a manner consistent with the SEF statutory intent and goals, but the Commission also believes that the expected increased role of discretion in SEF trading operations should be accompanied with a regulatory approach that aims to enhance professionalism among trading specialists and enhance market integrity. The Commission believes in particular that such a regulatory approach should address in particular the integral role that trading specialists play in exercising that discretion in a SEF's multiple-to-multiple trading environment.

Therefore, the Commission proposes to adopt a definition under § 37.201(c) that would categorize certain persons employed by a SEF as a ''SEF trading specialist'' and require a SEF to ensure that any such person (i) is not subject to a statutory disqualification under CEA sections 8a(2) or 8a(3); (ii) has met certain proficiency requirements; and (iii) undergoes ethics training on a periodic basis. The proposed regulations would further require a SEF to establish and enforce a code of conduct for its SEF trading specialists, as well as diligently supervise their activities. These proposed rules are intended to enhance professionalism in the swaps market and promote market integrity.

a. § 37.201(c)(1)—Definition of ''SEF Trading Specialist''

The Commission proposes to define a ''SEF trading specialist'' under § 37.201(c)(1) as any natural person who, acting as an employee (or in a similar capacity) of a SEF, facilitates the trading or execution of swap transactions (other than in a ministerial or clerical capacity), or who is responsible for direct supervision of such persons. This proposed definition would include both persons directly employed by the SEF and persons who are not directly employed, such as independent contractors and persons who are serving as SEF personnel pursuant to an arrangement with an affiliated broker employer, *i.e.,*

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[340] *See supra* Section IV.C.1.c.(1)—Structure and Operations of Swaps Broking Entities, Including Interdealer Brokers.

[341] The Commission notes above that IBs are registered with the Commission pursuant to CEA section 4f. *See supra* note 93 and accompanying discussion. IBs and their associated persons are required to register pursuant to registration procedures set forth by the NFA. 17 CFR 3.10, 3.12. Section 170.17 requires that each IB becomes and remains a member of at least one registered futures association, *e.g.,* the NFA. 17 CFR 170.17. Pursuant to CEA sections 4p and 17(p), such entities are subject to, among other requirements administered by the registered futures association, training standards and proficiency testing. 7 U.S.C. 6p, 21(p). Depending on the category of intermediary, registrants may be subject to various financial and reporting requirements, *e.g.,* 17 CFR 1.10 (financial reports of FCMs and IBs), 1.17 (minimum financial requirements for FCMs and IBs), as well as trading standards, *e.g.,* 17 CFR part 155 (trading standards for floor brokers, FCMs, and IBs). Pursuant to CEA section 6c and part 180, all registrants are subject to prohibitions against fraud and manipulation. 7 U.S.C. 9; 17 CFR part 180. Applicants for registration are subject to statutory disqualifications from registration pursuant to CEA section 8a(2) based on related past convictions that involve fraud or other acts of malfeasance. 7 U.S.C. 12a(2).

[342] Section 1.3 defines an ''associated person'' of an IB as any natural person who is associated with an introducing broker as a partner, officer, employee, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves the solicitation or acceptance of customers' orders (other than in a clerical capacity) or the supervision of any person or persons so engaged. 17 CFR 1.3.

[343] *See supra* note 341. *See also* NFA Registration Rules part 400 (proficiency requirements established by the NFA for various registered entities and associated person).

[344] Upon adoption of the SEF Core Principles Final Rule, some swaps broking entities, in particular interdealer brokers, registered their operations or components of their operations, *i.e.,* trading systems or platforms, as SEFs. *See supra* Section IV.C.1.c.(1)—Structure and Operations of Swaps Broking Entities, Including Interdealer Brokers. As part of this process, the Commission understands that some specialists have transitioned to the SEF from affiliated broker entities, in either a permanent capacity or pursuant to a secondment arrangement.

''seconded'' persons. Based on the Commission's proposed application of the SEF registration requirement, as described above, the Commission notes that this definition would also apply to those persons who facilitate swaps trading through swaps broking entities, including interdealer brokers, who would be subject to SEF registration.[345] As noted above, facilitating the ''trading'' of swaps means the negotiating or arranging swaps transactions;[346] negotiating or arranging consists of facilitating the interaction of bids and offers.[347] The proposed definition, however, would exclude SEF personnel who facilitate trading solely in a ministerial or clerical capacity because the activities of such employees do not involve the level of discretion and judgement as the activities of SEF trading specialists and, thus, do not implicate the same regulatory concerns.[348]

b. § 37.201(c)(2)—Fitness

In light of the activities of SEF trading specialists and the regulatory considerations discussed above, the Commission proposes § 37.201(c)(2)(i) to prohibit a SEF from permitting any person who is subject to a statutory disqualification under CEA sections 8a(2) or 8a(3) to serve as a SEF trading specialist if the SEF knows, or in the exercise of reasonable care should know, of the person's statutory disqualification.[349] CEA sections 8a(2) and 8a(3) set forth numerous bases upon which the Commission may refuse to register a person, including, without limitation, felony convictions, commodities or securities law violations, and bars or other adverse actions taken by financial regulators.[350] While SEF trading specialists would not be required to register with the Commission, the Commission believes that given the nature of their interaction with market participants in facilitating swaps trading and execution, as well as the central role they play in maintaining market integrity and orderly trading, a SEF should not be permitted to employ those who are subject to such a statutory disqualification.

The Commission, however, also proposes two exceptions to the proposed prohibition. Under proposed § 37.201(c)(2)(ii)(A), the prohibition would not apply where a person is listed as a principal [351] or is registered with the Commission as an AP of a Commission registrant or as a floor trader or floor broker, notwithstanding that the person is subject to a disqualification from registration under sections 8a(2) or 8a(3) of the Act. Pursuant to authority delegated to it by the Commission,[352] the NFA has permitted a person to be listed as a principal or registered with the Commission where, in its discretion, the NFA has determined that the incident giving rise to a statutory disqualification is insufficiently serious, recent, or otherwise relevant to evaluating the person's fitness. Under proposed § 37.201(c)(2)(ii)(B), the prohibition also would not apply where a person subject to a statutory disqualification is not registered with the Commission, but provides a written notice from a registered futures association (''RFA'') stating that if the person were to apply for registration as an AP, then the RFA would not deny the application on the basis of the statutory disqualification. The Commission believes that a statutory disqualification that has not or would not prevent a person from being listed as a principal or from registering with the Commission because it is insufficiently serious, recent, or otherwise relevant to evaluating the person's fitness for registration with the Commission, as determined by an RFA, should not be a basis for prohibiting a SEF from employing the person as a SEF trading specialist.

c. § 37.201(c)(3)—Proficiency Requirements

The Commission proposes to require a SEF to maintain proficiency standards for SEF trading specialists. Proposed § 37.201(c)(3)(i) would require a SEF to establish and enforce standards and procedures to ensure that its SEF trading specialists have the proficiency and knowledge necessary to fulfill their responsibilities to the SEF and to comply with the Act, applicable Commission regulations, and the SEF's rules. Further, the Commission proposes under proposed § 37.201(c)(3)(ii) to mandate that a SEF require any person employed as a SEF trading specialist to have taken and passed a swaps proficiency examination as administered by an RFA.[353] Accordingly, SEFs would not have to comply with the examination requirement until an RFA, such as the NFA, completes development of the exam and establishes an administration process. Pursuant to proposed § 37.201(c)(3)(iii), a SEF's compliance with the proficiency examination requirement would constitute compliance with the general proficiency requirements upon establishment of an exam and administration process by the RFA.[354] Additionally, a SEF would satisfy the examination requirement if a SEF trading specialist took and passed the examination once without any further testing, unless the person has

[345] *See supra* Section IV.C.1.c.(2)—SEF Registration Requirement for Swaps Broking Entities, Including Interdealer Brokers and Section IV.C.1.d.—Foreign Swaps Broking Entities and Other Foreign Multilateral Swaps Trading Facilities.

[346] *See supra* Section IV.C.1.c.(2)—SEF Registration Requirement for Swaps Broking Entities, Including Interdealer Brokers.

[347] *Id.*

[348] The Commission notes that persons acting in a ministerial or clerical capacity are subject to exceptions from other Commission requirements. For example, the definition of ''associated person'' under § 1.3 excludes a person who solicits or accepts customer orders in a clerical capacity on behalf of an FCM or IB, or who solicits or accepts swaps in a clerical or ministerial capacity on behalf of an SD or MSP. 17 CFR 1.3.

[349] The Commission notes that CEA section 4s(b)(6) makes it unlawful for an SD or MSP to permit any person associated with the SD or MSP who is subject to a statutory disqualification to effect or be involved in effecting swaps on behalf of the SD or MSP, if the SD or MSP knew, or in the exercise of reasonable care should have known, of the statutory disqualification. 7 U.S.C. 6s(b)(6). This prohibition applies with respect to an AP of an SD or MSP, but does not include an individual employed in a clerical or ministerial capacity. 17 CFR 23.22(a) (definition of ''person'' applicable to the prohibition).

[350] 7 U.S.C. 12a(2)–(3).

[351] Section 3.10(a)(2) requires each natural person who is a principal of an applicant for registration to execute a Form 8–R to, among other things, be listed as a principal of a registrant. 17 CFR 3.10(a)(2).

[352] CEA section 8a(10) enables the Commission to authorize any person to perform any portion of the registration functions under the Act. 7 U.S.C. 12(a)(10). The Commission has delegated to the NFA the authority to perform the full range of registration functions, including vetting of applicants for statutory disqualifications. *See, e.g.,* 50 FR 34885 (Aug. 28, 1985); 57 FR 23136 (Jun. 2, 1992).

[353] As proposed, the swaps proficiency examination would have to be developed and administered by an RFA. The NFA currently requires persons seeking to become members or associate members of the NFA, or persons seeking to register with the Commission as an AP to take and pass the National Commodity Futures Examination (''Series 3 Exam''), which is administered by FINRA, subject to certain exceptions. The Series 3 Exam does not test for swaps proficiency. As a result, NFA Registration Rule 401(e) currently provides an exception to the NFA's qualification testing requirement for a person applying for registration with the Commission as an AP, if the applicant's sole activities subject to regulation by the Commission are swaps-related. NFA Registration Rule 401(e). The Commission is aware that the NFA recently announced that it would develop a swaps proficiency requirements program for all APs engaging in swaps activities, including those of FCMs, IBs, commodity pool operators (''CPOs''), commodity trading advisors (''CTAs''), and individuals who act as APs at SDs. NFA, NFA to Develop Swaps Proficiency Requirements Program,'' *https://www.nfa.futures.org/news/newsRel.asp?ArticleID=5014* (Jun. 5, 2018).

[354] The Commission clarifies, however, that in the absence of an available examination that meets the Commission's requirements, SEFs would still be required to ensure that their SEF trading specialists meet the general proficiency requirements set forth under proposed § 37.201(c)(3)(i).

not served in such a capacity for a continuous two-year period. In that case, the SEF trading specialist would have to retake and pass the examination.

Given the level of discretion and judgement that SEF trading specialists exercise in facilitating swaps trading and execution, as well as the size and complexity of the transactions often executed on a SEF, the Commission believes that it is essential that a SEF ensure that its SEF trading specialists possess appropriate skills and knowledge. Accordingly, the Commission believes that demonstrating such skills and knowledge would be best achieved through a swaps proficiency examination regime. The Commission notes that persons who intermediate transactions in the futures markets and securities markets are already subject to proficiency requirements that include examinations.[355] The Commission believes that requiring SEFs to ensure that their SEF trading specialists have the necessary skills and proficiency to perform the key functions of a SEF would similarly enhance the level of professionalism and market integrity in the swaps market.[356]

d. § 37.201(c)(4)—Ethics Training

The Commission proposes § 37.201(c)(4) to require a SEF to establish and enforce policies and procedures to ensure that its SEF trading specialists receive ethics training on a periodic basis. Given each trading specialist's obligation to promote a fair and orderly market in facilitating trading and execution while also using discretion in handling orders on behalf of individual market participants, a SEF must maintain a training program to ensure that its trading specialists are aware of and understand the relevant professional and ethical standards established by the SEF.[357] Proposed § 37.201(c)(4) is consistent with and would further a SEF's existing obligation under Core Principle 12 to establish and enforce rules that minimize conflicts of interest.[358] Additionally, the proposed rule corresponds to the existing requirement under § 37.1501 that a SEF CCO establish and administer a written code of ethics for the SEF that is designed to prevent ethical violations and promote honesty and ethical conduct by the SEF's personnel.[359] The Commission also views ethics training as a necessary element of a SEF's adequate supervision of its trading specialists and, accordingly, proposes to require such supervision under § 37.201(c)(6), as described below.[360] The Commission believes that the proposed requirement would enhance professionalism in the overall swaps market and promote swaps market integrity.

(1) Guidance to Core Principle 2 in Appendix B—Ethics Training

The Commission also proposes new guidance to Core Principle 2 in Appendix B that would provide the general objectives for an ethics training program and examples of topics that should be addressed.[361] The guidance provides SEFs with the latitude to determine the appropriate frequency, duration, and format of ethics training for its trading specialists, including the use of qualified third-party providers and various forms of technology and media. The proposed guidance, however, specifies that an ethics training program is essential to enable SEF trading specialists to remain current with respect to the ethical and regulatory implications of evolving technology, trading practices, products, and other relevant changes. For example, if a SEF's trading protocols or operations continue to develop, *e.g.,* the SEF adopts a new discretionary approach to prioritizing or managing competing bids on its voice-based or voice-assisted trading system, then the SEF's ethics training should address how its trading specialists should appropriately conduct themselves under such new protocols. This approach is generally consistent with the Commission's implementation of the training requirements applicable to Commission registrants under CEA section 4p(b), as set forth in acceptable practices established by the Commission for ethics training for registered persons under part 3 of the Commission's regulations.[362]

e. § 37.201(c)(5)—Standards of Conduct

The Commission proposes to require a SEF to establish and enforce a code of conduct for its SEF trading specialists. Like the proposed ethics training requirement under § 37.201(c)(4), the proposed code of conduct requirement aims to ensure that SEFs foster and maintain a high level of professionalism, integrity, and ethical conduct among their trading specialists when dealing with market participants and facilitating trading and execution. A SEF's code of conduct may provide that, among other things, a SEF trading specialist should (i) act in an honest and ethical manner and observe high standards of professionalism; (ii) handle orders with fairness and transparency; and (iii) not engage in fraudulent, manipulative, or disruptive conduct. The Commission includes these items for SEF consideration, but a SEF may include different or additional standards as well. These proposed standards of conduct are intended to be general and principles-based, given the many unique aspects of a SEF trading specialist's role in facilitating trading and execution as part of the SEF's particular trading system or platform.

f. § 37.201(c)(6)—Duty To Supervise

To help promote compliance with a SEF's professionalism requirements, including ethics requirements and standards of conduct, the Commission also proposes § 37.201(c)(6) to require a SEF to diligently supervise the activities of its trading specialists in facilitating trading and execution on the SEF. While a SEF is generally responsible for the actions of its agents pursuant to CEA section 2(a)(1)(B) and § 1.2,[363] proposed § 37.201(c)(6) would impose an affirmative duty of supervision on each SEF. Given the dynamic manner in

[355] In addition to the Series 3 Exam, which applies to persons seeking membership with the NFA as an AP of a registered entity with respect to futures and options on futures, *see supra* note 353, persons who seek registration as a securities professional must also pass various qualification exams to demonstrate competency in particular securities-related areas. *See generally* FINRA, Registrations and Qualifications, *www.finra.org/industry/registration-qualification.*

[356] The Commission notes that this proposed requirement is analogous to the principles set forth in the FX Global Code regarding ethics. The code specifies, among other recommendations, that operators of trading systems or platforms and their personnel, have sufficient knowledge of, and comply with, applicable law and have sufficient relevant experience, technical knowledge, and qualifications. FX Global Code at 6–7.

[357] As discussed above, this proposed requirement is similar to one of the leading principles set forth in the Global FX Code regarding ethical standards. The Global FX Code states, in part, that firms should promote ethical values and behavior, support efforts to promote such ethical standards in the wider FX market, and encourage involvement by personnel in such efforts. FX Global Code at 6–7.

[358] 7 U.S.C. 7b–3(f)(12).

[359] *See infra* Section XX.A.3.—§ 37.1501(c)—Duties of Chief Compliance Officer (requirement under proposed § 37.1501(c)(6)).

[360] *See infra* Section VI.A.3.f.—§ 37.201(c)(6)—Duty to Supervise.

[361] The Commission proposes to add this guidance as a new paragraph (a)(1) and eliminate existing paragraph (a)(1), which states that a SEF's rules may authorize its compliance staff to issue warning letters or recommend that a disciplinary panel take such action. *See infra* note 456 (discussing proposed changes to the existing SEF warning letter requirements).

[362] 17 CFR part 3 app. B (Statement of Acceptable Practices With Respect to Ethics Training).

[363] CEA section 2(a)(1)(B) and § 1.2 establish that the act, omission, or failure of any official, agent, or other person acting for a principal within the scope of his employment or office is imputed to the principal. 7 U.S.C. 2(a)(1)(B); 17 CFR 1.2.

which SEF trading specialists may use discretion to facilitate swaps trading and execution on behalf of market participants, a SEF should have an affirmative obligation to supervise its trading specialists. The Commission notes that a similar customer protection rule currently applies to registered entities, including IBs—§ 166.3 requires each Commission registrant to diligently supervise all the activities of its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) relating to its business as a Commission registrant.[364] Therefore, to the extent that some of these SEFs were previously registered with the Commission and operated as IBs, the Commission believes that proposed § 37.201(c)(6) would impose certain analogous requirements.

g. § 37.201(c)(7)—Additional Sources for Compliance

The Commission is proposing § 37.201(c)(7) to refer SEFs to the new guidance to Core Principle 2 in Appendix B as discussed above.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.201(c). In particular, the Commission requests comment on the following questions:

(37) Is the proposed definition of the term ''SEF trading specialist'' overly broad or too narrow? Are there additional activities that SEF trading specialists engage in that should be reflected in the definition? Are there additional natural persons who should be captured by the proposed definition?

(38) Are the exceptions to the fitness requirement for SEF trading specialists under proposed § 37.201(c)(2)(ii) appropriate? Should the Commission prohibit a SEF from employing persons other than those subject to a statutory disqualification under CEA sections 8a(2) or 8a(3)? If so, what additional disqualification factors should the Commission use? In this connection, should the Commission not rely on any of the disqualification factors in CEA sections 8a(2) or 8a(3)?

(39) Should the qualification testing requirement under proposed § 37.201(c)(3)(ii) be broadened to allow a SEF to employ persons who have taken and passed a swaps proficiency examination developed and administered by parties other than an RFA? If so, should the Commission then adopt standards to ensure that such testing adequately ensures proficiency? How could the Commission ensure that the examination meets appropriate standards and consistency, such that it could be recognized by all SEFs? Should the Commission approve each examination to ensure appropriate standards are met and consistency is achieved across different examinations?

(40) Are the ethics training and standards of conduct requirements under proposed §§ 37.201(c)(4)–(5), respectively, overly prescriptive or too flexible? Should the Commission provide greater specificity regarding the standards of conduct that a SEF must enforce? Are there particular subjects that should be specifically required as part of ethics training?

VII. Additional Part 37 Regulations—Subpart C: Core Principle 2 (Compliance With Rules)

In addition to requiring a SEF to establish and enforce rules that govern its facility, Core Principle 2 requires a SEF to adopt trading, trade processing, and participation rules that provide participants with impartial access to the market and deter abuses; and establish and enforce compliance with any limitation on access.[365] Further, Core Principle 2 requires a SEF to have the capacity to detect, investigate, and enforce those rules, including the means to capture information that may be used in identifying rule violations.[366] The Commission adopted many detailed regulations in part 37 to further implement these requirements, including impartial access requirements under § 37.202; rule enforcement program requirements under § 37.203; third-party service provider requirements under § 37.204; audit trail requirements under § 37.205; and disciplinary procedures and sanctions requirements under § 37.206.

The Commission is proposing several new rules and rule amendments under Core Principle 2, including clarifications of existing rules where appropriate, to implement its proposed swaps regulatory framework. These proposed amendments would streamline the SEF rules and allow SEFs to account for technological developments, existing market practices, and costs in their trading and market operations. Further, the amendments would codify no-action relief that has been provided under several existing Commission staff no-action letters. Among these changes, the Commission is proposing a modification to the impartial access requirements under § 37.202 and several corresponding amendments, which would provide a SEF with the ability to devise its participation criteria based on its own trading operations and market focus. Further, the Commission is proposing several amendments to §§ 37.203–206 that would allow a SEF to better tailor its own compliance and regulatory oversight rules to its trading operations and markets, while still maintaining a robust compliance program.

A. § 37.202 Access Requirements

The Commission implemented the statutory impartial access requirement by adopting § 37.202. Existing § 37.202(a)(1) requires a SEF to provide any ECP and any independent software vendor (''ISV'') with impartial access to its market(s) and market services, including indicative quote screens or any similar pricing data displays, provided that the facility has, among other things, criteria governing such access that are ''impartial, transparent, and applied in a fair and non-discriminatory manner.'' [367] In the preamble to the SEF Core Principles Final Rule, the Commission stated that ''impartial'' means ''fair, unbiased, and unprejudiced.'' [368] The Commission further stated that the impartial access requirement allows ECPs to ''compete on a level playing field'' [369] and does not allow a SEF to ''limit access . . . to certain types of ECPs or ISVs.'' [370] The Commission also noted that each similarly situated group of ECPs and ISVs must be treated similarly.[371] The Commission believed that this approach would increase the number of market participants on SEFs, which in turn would increase SEF trading, thereby improving liquidity and price discovery in the swaps market.[372]

Core Principle 2, however, also allows a SEF to establish and enforce compliance with any rule of the SEF, including any limitation on access to the SEF.[373] Accordingly, existing § 37.202(c) requires a SEF to establish and impartially enforce rules that govern the SEF's decision to allow, deny, suspend, or permanently bar ECPs' access to the SEF, including when such decisions are made as part of a disciplinary or emergency action by the SEF.[374] The Commission further stated that a SEF may establish different access criteria for each of its markets, provided that the criteria are impartial and are not

[364] 17 CFR 166.3.

[365] 7 U.S.C. 7b–3(f)(2)(B)(i).

[366] 7 U.S.C. 7b–3(f)(2)(B)(ii).

[367] 17 CFR 37.202(a)(1).

[368] SEF Core Principles Final Rule at 33508.

[369] *Id.*

[370] *Id.*

[371] *Id.*

[372] *Id.*

[373] 7 U.S.C. 7b–3(f)(2)(A)(ii).

[374] 17 CFR 37.202(c).

used as a competitive tool against certain ECPs and ISVs.[375] Subject to these requirements, the Commission stated that a SEF may ''use its own reasonable discretion to determine its access criteria, provided that the criteria are impartial, transparent and applied in a fair and non-discriminatory manner, and are not anti-competitive.'' [376]

Existing § 37.202(a)(3) requires a SEF to have a comparable fee structure for ECPs and ISVs receiving comparable access to, or services from, the SEF.[377] The Commission clarified that this requirement neither sets nor limits fees that a SEF may charge.[378] The Commission further clarified that a SEF may establish different categories of ECPs and ISVs seeking access to, or services from, the SEF, but may not discriminate with respect to fees within a particular category.[379] The Commission stated that existing § 37.202(a)(3) is not intended to be a ''rigid requirement that fails to take into account legitimate business justifications for offering different fees to different categories of entities seeking access to the SEF.'' [380]

Finally, existing § 37.202(a)(2) requires SEFs to have procedures for ECPs to provide written or electronic confirmation of their ECP status with the SEF prior to obtaining access.[381] Under existing § 37.202(b), an ECP must consent to a SEF's jurisdiction prior to obtaining access to the SEF.[382]

1. § 37.202(a)—Impartial Access to Markets, Market Services, and Execution Methods [383]

The Commission has applied the impartial access requirements to various areas of a SEF's operations that concern participant access to the market. These features include (i) eligibility or onboarding criteria; (ii) a participant's ability to access the SEF's functionalities, *i.e.,* trade and execute on a SEF's execution methods; (iii) the manner in which a SEF's execution methods treat market participants' bids and offers, in particular the use of discretion; and (iv) participation fee structures. The Commission's current approach to impartial access in these areas, however, has raised two issues that have led to certain inconsistencies in implementation of the requirement.

First, the existing approach has created uncertainty for SEFs seeking to establish and apply access criteria in a consistent manner. The Commission recognizes that SEF Core Principle 2 requires a SEF to provide impartial access, but also allows a SEF to establish limitations on access. Accordingly, the Commission has allowed SEFs to establish different access criteria for different markets, but has also required each ''similarly situated'' group of ECPs and ISVs to be treated in the same manner.[384] The preamble to the SEF Core Principles Final Rule also states that SEFs can use their own reasonable discretion to determine their access criteria, provided that they are impartial. In practice, implementation of the rule has led to some uncertainty by SEFs as to whether different access criteria for their markets, market services, and execution methods would be allowed or not allowed under § 37.202.

Second, the manner in which the Commission has implemented the existing approach has often favored the promotion of an ''all-to-all'' trading environment and has, thus, limited the ability of SEFs to adapt their operations to the characteristics and dynamics of the swaps market.[385] All-to-all trading environments, such as futures markets, are generally marked by smaller-sized products with standardized terms and conditions that appeal to a broad range of market participants, including retail customers. These same characteristics are also more conducive to continuous and liquid trading. By contrast, swaps trading often occurs between a limited number of ECPs in a broad array of unique, larger-sized products with more variable terms that are customized to address specific and unique hedging risks. These characteristics result in episodic market liquidity in many swaps markets, in contrast to the continuous liquidity found in all-to-all trading environments. The Commission believes that the imposition of features found in an ''all-to-all'' trading environment upon swaps markets is at odds with general market characteristics and dynamics of swaps trading.

a. § 37.202(a)(1)—Impartial Access Criteria

Based on its experience with implementing part 37, the Commission proposes to modify its approach to applying the impartial access requirement. In doing so, the Commission proposes to streamline and consolidate the existing language and relevant preamble discussion from the SEF Core Principles Final Rule, including the Commission's view of ''impartial'' and the concept of ''similarly situated,'' to establish a revised impartial access requirement. Under proposed § 37.202(a)(1), a SEF would be required to establish rules that set forth impartial access criteria for accessing its markets, market services, and execution methods, including any indicative quote screens or any similar pricing data displays. Such impartial access criteria must be transparent, fair and non-discriminatory and applied to all or similarly situated market participants.

In proposing this approach, the Commission believes that criteria that are ''fair and non-discriminatory'' would inherently be ''fair, unbiased, and unprejudiced,'' which the Commission previously defined as ''impartial.'' The Commission also believes that the proposed rule clarifies that this criteria must be applied to market participants in a fair and non-discriminatory manner, as currently required under the existing requirements of § 37.202(a)(1). Finally, proposed § 37.202(a)(1) would continue to allow each SEF to determine which market participants are ''similarly situated'' in its market and configure appropriate access criteria, provided that such criteria are transparent, fair, and non-discriminatory to participants. Applying access criteria in a ''fair and non-discriminatory'' manner means that a SEF should permit or deny access to a market participant on a non-arbitrary basis, based on objective, pre-established requirements or limitations. The Commission emphasizes, however, that this streamlined approach does not mean that a SEF must create an ''all-to-all'' trading environment.

The Commission acknowledges that it has often applied the impartial access requirement to promote an ''all-to-all'' trading environment, which is neither required under Core Principle 2 nor is consistent with swaps market structure. Under the proposed approach, the Commission would not seek to apply the requirement to mandate that all participants have access to all SEFs, which may have circumscribed a SEF's ability under Core Principle 2 to set access limitations. Rather, to allow SEFs to serve different types of market participants or have different access criteria for different execution methods, the Commission would allow SEFs to apply access limitations, as long as they

[375] SEF Core Principles Final Rule at 33508.

[376] *Id.*

[377] 17 CFR 37.202(a)(3).

[378] SEF Core Principles Final Rule at 33509.

[379] *Id.*

[380] *Id.*

[381] 17 CFR 37.202(a)(2).

[382] 17 CFR 37.202(b).

[383] The Commission proposes to retitle § 37.202(a) to ''Impartial access to markets, market services, and execution methods'' from ''Impartial access to markets and market services'' based on the proposed changes described below.

[384] SEF Core Principles Final Rule at 33508.

[385] *Id.*

are applied in a fair and non-discriminatory manner.

This approach would also align with swaps market characteristics—in particular, the episodic nature of swaps liquidity—that have led to the overall swaps market being made up of both dealer-to-client and dealer-to-dealer markets, as described below. The Commission believes that the structure of the swaps market is a natural outgrowth of certain fundamental features of swaps trading. The Commission further believes that all-to-all markets are inimical to these fundamental swaps trading features; therefore, imposing all-to-all, market-derived requirements on swaps markets ultimately detracts from achieving the statutory SEF goals of promoting swaps trading on SEFs and pre-trade price transparency in the swaps market. Accordingly, the Commission believes that each SEF should be able to use access criteria to develop its business in a manner that is both consistent with the characteristics of swaps markets and accommodating of the types of participants that comprise the SEF's intended market.

The Commission still believes that any access criteria intended to prevent or reduce competition among similarly situated market participants would be unfair and discriminatory and, therefore, inconsistent with proposed § 37.202(a)(1). If a market participant is willing or able to meet the objective, pre-established, and transparent criteria for eligibility to onboard to a SEF or gain additional access to a SEF's trading mechanisms, then the SEF should not preclude that market participant from onboarding to the SEF or using its functionalities. Accordingly, such a market participant should not be subject to access criteria that are unfair and discriminatory and are intended to prevent or dis-incentivize that market participant's participation on the SEF.[386]

The Commission emphasizes that under proposed § 37.202(a)(1), any access criteria—whether it concerns eligibility or onboarding criteria, prerequisites for using certain trading functionalities, or fee schedules—constitutes a ''rule,'' as that term is defined under § 40.1(i), that would be subject to rule approval or self-certification procedures under part 40.[387] Through the part 40 rule review process, the Commission would continue to evaluate a SEF's compliance with the impartial access requirements as proposed.

The Commission also proposes to eliminate the reference to ''ISVs,'' which the Commission notes is not required under Core Principle 2. Given that a SEF should be able to set its access criteria to develop its business based on its desired market and participant needs, the Commission also believes that a SEF should be able to determine an ISV's level of access to the SEF. The Commission previously applied the impartial access requirement to ISVs on the basis that such types of vendors would provide various benefits to the swaps market and market participants, such as enhanced transparency and trading efficiency through the consolidation of trading data from multiple venues, analytics, and best displayed prices.[388] Based on the Commission's experience and notwithstanding the existing impartial access requirement, ISVs have not established a significant level of participation on SEFs, nor have they achieved a broad level of adoption among market participants. Rather, the Commission has observed that most participants access SEFs through means other than ISV services.[389] Therefore, the Commission believes that the impartial access requirement should apply to market participants who are accessing SEF trading systems or platforms to trade swaps, rather than establish requirements for a separate set of entities that are merely providing ancillary market services.

(1) Application of Impartial Access Requirement

Based on the areas in which the Commission has applied the existing impartial access requirement to various aspects of a SEF's operation during the part 37 implementation, the Commission discusses below how the proposed impartial access approach would apply to these areas to provide further clarity, including (i) eligibility and onboarding; (ii) execution methods; and (iii) SEF use of discretion.

(i) Eligibility and Onboarding Criteria

The Commission has applied the impartial access requirement to assess a SEF's eligibility and onboarding criteria. In the preamble to the SEF Core Principles Final Rule, the Commission prospectively identified whether or not certain hypothetical arrangements would comply with the rulemaking's approach to impartial access. Certain criteria were deemed non-compliant, such as platforms whose participants were limited to wholesale liquidity providers;[390] platforms that imposed participation limits based on maintaining financial integrity and operational safety;[391] platforms that established objective minimum capital or credit requirements;[392] and platforms that limited participation to sophisticated market participants.[393] The Commission generally characterized these types of criteria as inconsistent with Core Principle 2 because they would inherently limit access to certain types of ECPs and ISVs.[394] Subsequent Commission staff guidance further identified other eligibility criteria that Commission staff viewed as inconsistent with impartial access, based on the view that limiting access to a SEF's trading systems or platforms to certain types of ECPs or ISVs is inconsistent with Core Principle 2.[395]

The Commission has realized from experience that certain criteria developed by SEFs reflect fundamental swap market segments. In particular, the swaps market consists of both a dealer-to-client market segment and a dealer-to-dealer market segment that are related, but also differ in important respects. In the dealer-to-client segment, corporate end-users and other buy-side participants access and utilize the swaps market to manage risk positions

[386] The Commission also notes that such criteria may be inconsistent with Core Principle 11. Core Principle 11 prohibits a SEF from adopting measures that result in any unreasonable restraint of trade or impose any material anticompetitive burdens on trading or clearing, unless they are necessary or appropriate to achieve the purposes of the CEA and are otherwise consistent with the CEA and the Commission's regulations. 17 CFR 37.1100.

[387] 17 CFR 40.5–6.

[388] The Commission previously cited examples of ISVs that included smart order routers, trading software companies that develop front-end trading applications, and aggregator platforms. SEF Core Principles Final Rule at 33508 n.423.

[389] *See supra* notes 52–54 (describing the various modes of participation on SEFs by market participants).

[390] SEF Core Principles Final Rule at 33507–08.

[391] *Id.*

[392] *Id.* at 33507.

[393] *Id.*

[394] *Id.* at 33508.

[395] These criteria included (i) not providing access to an ECP that is both a liquidity provider and taker; (ii) prohibiting individuals from obtaining access despite their meeting the requirements to be an ECP; (iii) limiting access to ECPs that satisfy minimum transaction volume level requirements; and (iv) requiring an ECP to be a clearing member or to have an agreement with a clearing member to access the SEF, even if only for the purpose of trading swaps that are not intended to be cleared. Commission staff also expressed concern that SEFs allowing only either intermediated access or direct access may impede impartial access in certain instances. Division of Clearing and Risk, Division of Market Oversight and Division of Swap Dealer and Intermediary Oversight Guidance on Application of Certain Commission Regulations to Swap Execution Facilities (Nov. 14, 2013) (''2013 Staff Impartial Access Guidance'').

that are unique to their particular circumstances. Swap dealers provide liquidity to the participants within this market segment for a fee, which participants are willing to pay, that reflects the risks incurred by dealers from the episodic or relative lack of liquidity in the swaps market for many specific swaps. The swap dealers subsequently offset positions established through the dealer-to-client market segment by hedging their swaps inventories on a portfolio basis in the dealer-to-dealer market, which is wholesale in nature. Those dealer-to-dealer markets consist of other primary dealers and sophisticated market-making participants seeking to fulfill similar objectives through competitive execution of large-sized transactions. In pricing a customer trade, dealers base their prices on the cost of hedging those trades in the dealer-to-dealer markets.

The dealer-to-dealer market may provide benefits to the swaps markets, in particular to non-dealer clients, by allowing dealers who provide liquidity to offload risk from clients. Without this market, liquidity in the dealer-to-client market may suffer because the inherent risks of holding swaps inventory could arguably dis-incentivize participation by dealers in the dealer-to-client market or otherwise require dealers to charge their customers higher prices for taking on this risk. Absent the supply of liquidity providers, non-dealers who are liquidity takers would have difficulty executing swaps at competitive pricing. SEFs that serve the wholesale, dealer-to-dealer market have stated that using eligibility or participation criteria to maintain a dealer-to-dealer market is beneficial, given that it allows participants who share similar profiles and trading interests to interact with each another, thereby helping to promote liquid markets with tight pricing.

For the reasons stated above, the Commission believes that SEF eligibility and onboarding criteria that would serve to maintain this market structure would be appropriate and consistent with existing market dynamics and may provide the benefits discussed above. Accordingly, a SEF could premise these criteria in different ways, such as limiting access upon the type of the market participant or the swap product itself. For example, a SEF would be able to calibrate access to serve market participants within a particular market segment, such as dealers trading in a wholesale swaps market, who may be categorized as ''similarly situated.''

(ii) Access to Execution Methods

In addition to assessing SEF onboarding and eligibility, the Commission has also applied the current impartial access standard to evaluate various SEF-established prerequisites for trading on certain platforms or interacting with certain participants. Some of those prerequisites reflect the nature of the swap involved, *e.g.,* whether the swap is submitted for clearing or is uncleared, which determines whether certain market participants are eligible to trade with one another.[396] When a SEF lists a swap that is traded as a component of a transaction with other non-swap legs, the SEF might also establish trading eligibility criteria that take account of a participant's ability to trade the non-swap leg components of such swaps.[397] Other prerequisites may be based upon the prior or ongoing level of trading activity generated by a particular participant, *e.g.,* whether the participant has been actively submitting bids and offers. During the implementation of part 37, the Commission has deemed appropriate certain criteria based on business or operational justifications, but also deemed other criteria as inconsistent with impartial access. For example, platform access criteria that require a market participant to contribute a certain amount of liquidity, *e.g.,* provide a minimum number of bids and offers, have been prohibited, despite the business or operational justifications offered by SEFs.

SEFs have also argued that requiring market participants to meet trading prerequisites or participation criteria to access certain platforms or trade certain products can be beneficial to promoting effective trading markets on SEFs. In implementing part 37, the Commission has acknowledged that such criteria may be beneficial toward maintaining and promoting orderly trading for uncleared swaps on SEFs—for example, where participants must have certain trading enablements in place prior to trading uncleared swaps with other participants on the platform.[398] Specifically, the Commission has allowed such types of enablements, *e.g.,* trading relationship documentation with a minimum percentage of trading participants prior to posting bids and offers or trading in certain established minimum sizes, to promote a more dynamic and liquid trading environment for uncleared swaps with active participation.[399]

The Commission's current approach to impartial access, however, has led to confusion as to whether these types of criteria are inappropriate because they do not ensure equal participation by all market participants; or as to whether they are appropriate because they reflect a SEF's ability to impose limitations on access and are consistent with the view that SEFs should have the discretion to determine the most suitable way to promote trading on their platforms. Specifically, the Commission recognizes that requiring impartial access for ''similarly situated'' groups of market participants has currently been interpreted to require that a SEF allow all participants in that group to be able to interact with one another in the same manner and degree.

The Commission clarifies that a SEF must have impartial access criteria, *i.e.,* transparent, fair, and non-discriminatory, for trading prerequisites or participation criteria prior to accessing certain platforms or trading certain products. As long as these access criteria are impartial, such that any market participant who meets the criteria is able to utilize a certain execution method or trade a certain product, then they would be allowed to do so under the proposed approach. For example, if a SEF established a minimum trade size for its order book that applied to a market participant's orders, then such criteria would be allowed if any of its market participants who met these criteria could trade on the order book. As noted above, Core Principle 2 does not require a SEF to create an ''all-to-all'' marketplace, and the Commission believes that SEFs should be allowed to establish criteria that would facilitate trading based on its products and the intended trading environment. As long as a SEF also

[396] Such a situation might result in a SEF limiting trading access to uncleared swaps to only those market participants who have existing underlying documentation to execute such swaps with other potential counterparties.

[397] For example, a SEF could require market participants (or their clearing members) to have membership in a particular clearing organization, *e.g.,* membership with the Fixed Income Clearing Corporation (''FICC''), in order to access a method of execution in which counterparties execute a package transaction with a non-swap leg that FICC must clear.

[398] The Commission notes that Commission staff previously used the term ''enablement mechanism'' in guidance to refer to ''any mechanism, scheme, functionality, counterparty filter, or other arrangement that prevents a market participant from interacting or trading with, or viewing the bids and offers (firm or indicative) displayed by any other market participant on that SEF, whether by means of any condition or restriction on its ability or authority to display a quote to any other market participant or to respond to any quote issued by any other market participant on that SEF, or otherwise.'' 2013 Staff Impartial Access Guidance at 1.

[399] The Commission notes that Commission staff previously viewed a SEF's application or support otherwise for enablement mechanisms with respect to swaps that were intended to be cleared as ''prohibited discriminatory treatment,'' that is inconsistent with the existing impartial access requirement under § 37.202. *Id.* at 1–2.

applies its impartial access criteria in a fair and non-discriminatory manner, as described above, the Commission believes that such criteria would comply with § 37.202(a)(1).

(iii) Use of Discretion

The Commission has also previously determined whether a SEF complies with the impartial access requirement based on how the SEF's trading systems or platforms handle participant orders. For example, a SEF's voice-based or voice-assisted execution methods involve the exercise of ''discretion'' by a SEF trading specialist in managing the interaction of multiple bids and offers from multiple participants. As described above, SEF trading specialists solicit orders on behalf of the SEF and seek to arrange transactions by matching those orders with reciprocal trading interests.[400] Given the variability in how participant orders may be handled through the use of discretion, the Commission has sought to ensure that market participants are receiving ''impartial access'' in the manner in which their orders are handled while also acknowledging that discretion is inherent to these types of systems or platforms.

The Commission also recognizes that its current approach to impartial access may be in tension with its proposal to allow more flexible execution methods on SEFs, particularly those that involve discretion and are prevalent in the dealer-to-dealer market. While some SEF execution methods facilitate trading and execution on a non-discretionary basis, *e.g.,* electronic trading systems, including Order Books and RFQ Systems, some execution methods rely upon the ability of a SEF trading specialist to ascertain liquidity for particular products and manage multiple competing bids and offers, *e.g.,* voice-based platforms. To facilitate trading and execution in such a trading environment, SEF trading specialists must account for a host of changing market conditions, such as available pricing, product complexity, prevailing trade sizes, and market participant needs. The Commission recognizes that SEF trading specialists may apply these factors differently among different participants during different periods of trading. In contrast to prevailing practices among swaps broking entities, such as interdealer brokers that have operated outside of the SEF regulatory framework,[401] the Commission has scrutinized similar practices on SEF voice-based platforms against the impartial access requirements. The Commission acknowledges that its application of impartial access at times has constrained the ability of SEFs to establish trading systems or platforms that serve particular segments of the swaps marketplace.

The Commission also believes that the trading discretion exercised by SEF trading specialists may affect the manner in which market participants are treated on a facility, but would not necessarily be inconsistent with the Commission's proposed approach to impartial access. The Commission believes that to the extent that the exercise of discretion furthers a SEF's ability to facilitate trading and execution on its system or platform—including identifying trading interest in a discrete manner or managing bids and offers to maintain accurate market pricing—it should be viewed as being consistent with impartial access. The Commission also notes that proposed § 37.201(a)(2) would support the use of discretion in a manner consistent with impartial access; as discussed above, the proposed rule would provide transparency into the use of discretion by requiring each SEF to disclose the general manner and circumstances behind its use within each execution method.[402] Notwithstanding proposed § 37.201(a)(2), however, the Commission emphasizes that a SEF would still be required to ensure that any use of trading discretion occurs in a fair and non-discriminatory manner.

b. § 37.202(a)(2)—Fees

Based on its experience in reviewing fee structures for SEFs, the Commission proposes to eliminate the requirement under § 37.202(a)(3) that a SEF must establish ''comparable fee structures'' for ECPs and ISVs receiving ''comparable access'' to the SEF or services from the SEF. In practice, this requirement has not fully accounted for the market practices described above. Instead, the Commission proposes § 37.202(a)(2) to require a SEF to establish and apply fee structures and fee practices in a fair and non-discriminatory manner to its market participants.[403]

Currently, SEFs have established different fee levels for different categories of market participants or different types of trading activity, whether imposed directly through a trading fee schedule or indirectly through the use of trading incentive or discount programs.[404] The Commission has observed that SEFs have generally based their fees or discounts on a host of different considerations, such as technological costs attributable to facilitating a particular method of accessing the platform or a listed product's complexity. In particular, fee-setting arrangements for swaps trading in the dealer-to-dealer segment, which includes interdealer broker operations that would become subject to the proposed SEF registration requirement,[405] may differ, even in instances where market participants are receiving comparable access or services from the SEF. Rather, fee arrangements in the dealer-to-dealer market are often subject to individualized negotiations between a particular market participant and its broker, often involving a combination of different factors and business considerations that can lead to different fees for market participants who could otherwise be characterized as similarly situated.[406] The Commission has observed that these factors or considerations may include discounts based on past or current trading volume attributable to the market participant, market maker participation, or pricing arrangements related to services

[400] For the Commission's previous description of the role of SEF trading specialists, who function as part of a SEF's voice-based or voice-assisted trading system or platform, and their use of discretion, *see supra* Section VI.A.1.b.—§ 37.201(a)(2)—Discretion and Section VI.A.3.—§ 37.201(c)—SEF Trading Specialists.

[401] As discussed above, the Commission is clarifying the application of the SEF registration requirement in this notice to specify that these types of entities are subject to SEF registration based on their activity in facilitating trading and execution in swaps on a multiple-to-multiple basis between market participants. *See supra* Section IV.C.1.c.(2)—SEF Registration Requirement for Swaps Broking Entities, Including Interdealer Brokers.

[402] *See supra* Section VI.A.1.b.—§ 37.201(a)(2)—Discretion and Section VI.A.3.—§ 37.201(c)—SEF Trading Specialists.

[403] To further streamline the other existing impartial access requirements, the Commission proposes to renumber existing paragraph (a)(2), which requires confirmation of a participant's ECP status, to subsection (c); and to renumber existing paragraph (a)(3), which addresses SEF fee requirements, to paragraph (a)(2). The Commission also proposes to renumber subsection (c)—''Limitations on access''—to subsection (b) and to amend that existing language, as described below. Accordingly, the Commission also proposes to renumber existing subsection (b)—''Jurisdiction''—to subsection (d).

[404] With respect to trading incentive or discount programs, the Commission has observed various types of arrangements, such as discounts from trading fees that vary in size and scope based on the method of execution utilized and the relative rank of a SEF participant vis a vis other participants in terms of quoting frequency and number of products quoted.

[405] *See supra* Section IV.C.1.c.(2)—SEF Registration Requirement for Swaps Broking Entities, Including Interdealer Brokers.

[406] In some instances, swap trading fees comprise part of a larger overall negotiated fee that is agreed upon between a market participant and a broker for broking services in a broad range of other products, including other fixed income instruments and equities.

provided by a SEF-affiliated entity involving other non-swap products. The confluence of such factors, and the varying degrees to which they help inform swap trading fee determinations, have been difficult to distill into fee structures applicable to categories of market participants.

Based on this practical difficulty, the Commission is proposing to allow SEFs and market participants the flexibility to determine fees based on legitimate business negotiations. In this proposal, the Commission does not intend to limit the scope of business-related factors that a SEF may continue to consider in establishing participation fee arrangements. Proposed § 37.202(a)(2) is intended to provide market participants and SEFs with the flexibility to negotiate fee arrangements on an individualized basis based on legitimate business justifications. The Commission emphasizes, however, that consistent with the impartial access requirement under proposed § 37.202(a)(1), a SEF should not use fees to discriminate against certain market participants.

2. § 37.202(b)—Limitations on Access

The Commission proposes to require a SEF to maintain documentation of any decision to deny, suspend, permanently bar, or otherwise limit a market participant's access to the SEF.[407] The Commission believes that such documentation is important to assisting a SEF's CCO in reviewing the SEF's adherence to its access criteria rules and determining whether the SEF is applying its access criteria in a manner that meets § 37.202. This documentation can further assist the Commission in reviewing any limitation on access determinations for a market participant during rule enforcement reviews or in the event that a market participant or the Commission challenges a SEF's access decision.

The Commission also proposes non-substantive amendments to the existing provision, including amending the existing reference to ''eligible contract participant'' to ''market participant'' to provide greater clarity.

3. § 37.202(c)—Eligibility

The Commission proposes under § 37.202(c) to maintain the existing requirement that a SEF must require its market participants to provide a written confirmation (electronic or otherwise) of their ECP status prior to obtaining access to the SEF. The Commission also proposes to make minor non-substantive revisions to the current language.[408]

4. § 37.202(d)—Jurisdiction

The Commission proposes under § 37.202(d) to maintain the existing requirement that a SEF must require that a market participant consent to its jurisdiction prior to granting any market participant access to its facilities. The Commission also proposes to make minor non-substantive revisions to the current language.[409] In addition, the Commission confirms that consistent with prior Commission staff guidance, a SEF does not need to obtain consent to its jurisdiction through an affirmative writing, and a SEF may obtain consent through a notification in its rulebook.[410]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.202. In particular, the Commission requests comment on the following questions:

(41) Should the Commission specify a basis for how it would determine that a SEF's access criteria are unfair and discriminatory? Should a SEF be limited in the type of justifications that it may provide for its access criteria to demonstrate that they are impartial, *e.g.,* such criteria are intended to promote participation and/or liquidity? If so, what would those justifications be?

(42) What should be the bases or factors for determining whether market participants are ''similarly situated''?

(43) Should enablements be allowed as a type of access criteria for cleared swaps, in addition to their usage for uncleared swaps? Is this consistent with the Commission's proposed approach to impartial access? Why or why not? If so, please provide examples of enablements for cleared swaps that are consistent with the Commission's proposed approach to impartial access.

B. § 37.203—Rule Enforcement Program

Section 37.203 implements certain aspects of Core Principle 2, which requires a SEF to (i) establish and enforce trading, trade processing, and participation rules to deter abuses; and (ii) have the capacity to detect, investigate, and enforce those rules, including the ability to capture information to identify rule violations.[411] The regulation sets forth the requirements of an acceptable SEF rule enforcement program, including requirements related to prohibiting abusive trading practices; detecting and investigating rule violations; maintaining sufficient staffing and resources; maintaining an automated trade surveillance system; conducting real-time market monitoring; and conducting investigations.

During the part 37 implementation process, the Commission has acquired greater experience with the swaps markets, in particular related to SEF compliance and regulatory oversight requirements. The Commission acknowledges that the existing swaps regulatory framework was developed based in part on the futures regulatory framework. As a result, the current part 37 regulations do not sufficiently account for differences between futures and swaps markets, in particular the differences in the complexity and size of transactions, the number and sophistication of market participants,[412] and the variations in the methods of execution offered. Within the swaps market, the Commission also recognizes that product offerings, execution methods, types of market participants, and liquidity may even vary among SEFs.

Accordingly, the Commission believes that instead of prescribing a limited approach to compliance and regulatory oversight requirements, a SEF should be enabled to tailor its compliance and oversight program to fit its respective operations and market.[413] Further, the Commission seeks to ensure that SEF rule enforcement requirements are consistent with the ability of a SEF to offer flexible execution methods for any of its listed swaps. Therefore, as described below, the Commission proposes to amend § 37.203 to enable a SEF to establish a rule enforcement program that is best suited to its trading systems and platforms, as well as its market participants, while still ensuring the ability to fulfill its self-regulatory obligations. The Commission believes that these proposed amendments would also reduce certain complexities, costs, and burdens, while still continuing to implement the Core Principle 2 requirements and require a robust compliance program.

[407] The Commission proposes to renumber existing subsection (c)—''Limitations on access''—to subsection (b) and amend the requirement as described above.

[408] The Commission proposes to renumber existing paragraph (a)(2) to subsection (c) and adopt a new title—''Eligibility.''

[409] The Commission proposes to renumber existing subsection (b)—''Jurisdiction'' to subsection (d).

[410] 2014 Staff Jurisdiction Guidance at 2.

[411] 7 U.S.C. 7b–3(f)(2).

[412] The Commission notes that CEA section 2(e) limits swaps trading to ECPs, as defined by section 1a(18) of the Act. 7 U.S.C. 2(e).

[413] The Commission proposes to eliminate the introductory sentence under § 37.203, which states that a SEF shall establish and enforce trading, trade processing, and participation rules that will deter abuses and it shall have the capacity to detect, investigate, and enforce those rules. This language is duplicative of the existing requirements under Core Principle 2.

1. § 37.203(a)—Abusive Trading Practices Prohibited

Section 37.203(a) requires a SEF to generally prohibit abusive trading practices on its markets by members and market participants, but also enumerates specific practices that a SEF must specifically prohibit, including front-running, wash trading, pre-arranged trading (except for block trades or other types of transactions certified or approved by the Commission under part 40), fraudulent trading, money passes, and any other trading practice that the SEF deems to be abusive.[414] Section 37.203(a) further requires a SEF to prohibit any other manipulative or disruptive trading practices prohibited by the Act or Commission regulations. SEFs permitting intermediation must also prohibit customer-related abuses, such as trading ahead of customer orders, trading against customer orders, accommodation trading, and improper cross trading.

The Commission proposes a non-substantive amendment to § 37.203(a) to eliminate the term ''members.'' The Commission notes that its proposed definition of ''market participant'' under § 37.2(b) would capture the universe of persons and entities that could engage in abusive trading practices, including a SEF's members.[415]

As discussed above in conjunction with the proposed prohibition on pre-execution communications under § 37.201(b), the Commission is also proposing to eliminate exceptions to the pre-arranged trading prohibition under § 37.203(a).[416]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.203(a). In particular, the Commission requests comment on the following questions:

(44) Are there any abusive trading practices enumerated under proposed § 37.203(a) that are not applicable to swaps trading on a SEF, on certain SEF markets, or through certain methods of execution?

(45) Are there other abusive trading practices that could potentially occur in the swaps markets that the Commission should enumerate as a required prohibition under § 37.203(a), *e.g.,* intradesk and intracompany trading; order flashing; a failure to honor firm prices; attempting to change the general conditions of a swap transaction after price has been agreed upon; or potential abuses at those points in the day when options are settled against swaps levels?

2. § 37.203(b)—Authority To Collect Information [417]

Section 37.203(b) currently requires a SEF to have arrangements and resources for effective enforcement of its rules, which includes the authority to collect information and examine books and records of SEF members and persons under investigation. A SEF must also facilitate direct supervision of the market and analysis of data collected to determine whether a rule violation has occurred.[418]

The Commission proposes several amendments to the existing requirements. First, the Commission proposes to eliminate the requirement that a SEF's arrangements and resources must facilitate the direct supervision of the market and the analysis of data collected to determine whether a rule violation has occurred. The Commission views the language of this requirement as superfluous because other regulations already set forth these requirements in greater specificity, such as § 37.203(d), which requires a SEF to maintain an automated trade surveillance system that is capable of detecting and reconstructing potential trade practice violations.[419]

Second, the Commission proposes to eliminate the requirements that SEFs have the authority to collect documents on a routine and non-routine basis and examine books and records kept by members and persons under investigation. Instead, the Commission proposes to require that each SEF have the authority to collect information required to be kept by persons subject to the SEF's recordkeeping rules.[420] The Commission recognizes that the existing requirement does not provide clarity as to the meaning of collecting of documents on a ''routine and non-routine'' basis and how a SEF can collect information from ''persons under investigation.'' [421] Based on the Commission's experience in implementing part 37, the Commission believes that SEFs are better suited to determine what recordkeeping rules are appropriate based on the products that it offers for trading and the types of participants on its market, among other considerations.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.203(b).

3. § 37.203(c)—Compliance Staff and Resources

Section 37.203(c) currently requires a SEF to establish and maintain sufficient compliance staff and resources to conduct a number of enumerated tasks, such as audit trail reviews, trade practice surveillance, market surveillance, and real-time monitoring. The rule further requires that such staff must be sufficient to address unusual market or trading events and to conduct investigations in a timely manner.[422]

The Commission proposes to eliminate the enumerated tasks and replace them with the phrase ''self-regulatory obligations under the Act and Commission regulations.'' The proposed amendment is intended to apply the requirement to all of the SEF's applicable self-regulatory functions and clarify that the existing requirement is not limited to the enumerated tasks. Similarly, the Commission also proposes to eliminate the language that requires staffing to be sufficient to address unusual market or trading events and to complete investigations in a timely manner, given that these enumerated requirements are an inherent part of a SEF's existing self-regulation obligations. As the Commission noted in the SEF Core Principles Final Rule, a SEF may also take into account the staff and resources of any third-party entities it uses under § 37.204 to provide regulatory services when evaluating the sufficiency of its compliance staff.[423] Further, the Commission reiterates that as stated in the preamble to the SEF Core Principles

[414] 17 CFR 37.203(a).

[415] *See supra* Section IV.B.2.—§ 37.2(b)—Definition of ''Market Participant.''

[416] *See supra* Section VI.A.2.a.—§ 37.201(b)—Pre-Execution Communications.

[417] The Commission proposes to retitle § 37.203(b) to ''Authority to collect information'' from ''Capacity to detect and investigate rule violations'' based on the proposed changes described below.

[418] 17 CFR 37.203(b).

[419] 17 CFR 37.203(d). The Commission also notes that other part 37 regulations require a SEF to supervise the market and analyze data, including regulations that implement Core Principle 4. As amended, § 37.401(a) would require a SEF to conduct real-time market monitoring of all trading activity on the SEF to identify disorderly trading, any market or system anomalies, and instances or threats of manipulation, price distortion, and disruption. *See infra* Section IX.A.—§ 37.401—General Requirements.

[420] A SEF's recordkeeping rules are established by, among other provisions, § 37.404(b), which requires a SEF to have rules that require its market participants to keep records of their trading. 17 CFR 37.404(b).

[421] The Commission notes that this lack of clarity existed during the adoption of part 37. For example, one commenter previously requested clarity regarding the scope of the rule. SEF Core Principles Final Rule at 33511.

[422] 17 CFR 37.203(c).

[423] The Commission notes that a SEF must, at all times, maintain sufficient internal compliance staff to oversee the quality and effectiveness of the regulatory services provided, as required by § 37.204. As discussed below, the Commission proposes to expand § 37.204(a) to allow a SEF to use a non-registered entity approved by the Commission for the provision of regulatory services.

Final Rule, some SEF compliance staff can be shared among affiliated entities as appropriate.[424]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.203(c).

4. § 37.203(d)—Automated Trade Surveillance System

Section 37.203(d) requires a SEF to maintain an automated trade surveillance system capable of detecting potential trade practice violations.[425] The rule also requires that the system load and process daily orders and trades no later than twenty-four hours after the completion of the trading day. Given that this requirement applies to all orders and trades regardless of the type of execution method, § 37.203(d) requires orders that are not submitted to an electronic trading system, *e.g.,* orders submitted by voice or certain other electronic communications, such as instant messaging and email, also be loaded and processed into an automated trade surveillance system. Such a system, among other requirements, must have the capability to detect and flag specific trade execution patterns and trade anomalies; compute, retain, and compare trading statistics; compute trading gains and losses and swap-equivalent positions; and reconstruct the sequence of trading activity.

The Commission proposes to eliminate the specific automated trade surveillance system capabilities enumerated under § 37.203(d), except for the ability of a SEF to reconstruct the sequence of market activity. Specifically, the Commission proposes to retain this concept by amending the remaining rule language to require that a SEF's automated trade surveillance system be capable of detecting potential trade practice violations and reconstructing the sequence of market activity and trading. The Commission believes that an automated trade surveillance system must be able to reconstruct both the sequence of market activity and trading in order to detect such violations.

The Commission recognizes based on its experience with implementing the existing requirement that a SEF's automated trade surveillance system cannot perform all of the enumerated capabilities under the existing rule, such as computing trade gains, losses, and swap equivalent positions. The Commission also acknowledges that it has not clarified the enumerated capabilities, which has led to some confusion.[426] As amended, the rule would provide each SEF with the ability to tailor its automated trade surveillance system requirements as needed to fulfill its compliance responsibilities, thereby allowing the SEF to account for the nature of its trading systems or platforms. The Commission believes that this proposed approach is consistent with the reasonable discretion given to a SEF under Core Principle 1 to establish the manner in which it complies with the SEF core principles.

The Commission also proposes to amend § 37.203(d) to clarify that all trades executed by voice or by entry into a SEF's electronic trading system or platform, as well as orders that are ''entered into an electronic trading system or platform,'' must be loaded and processed into the automated trade surveillance system. This proposed amendment reflects the Commission's recognition that no cost-effective and efficient means currently exists that would provide a SEF with the capability to load and process orders that are not initially entered into an electronic trading system or platform, *e.g.,* orders entered by voice or certain other electronic communications, such as instant messaging and email, given that those orders are in different formats. The Commission notes that this proposed change is consistent with the proposed amendments to §§ 37.205(b)(2)–(3), as discussed below, that would similarly limit a SEF's electronic transaction history database and electronic analysis capability requirements.[427] The Commission, however, emphasizes that a SEF must continue to have the capability to load and process all executed trades, including those resulting from orders entered by voice or certain other electronic communications, such as instant messaging and email. The Commission also emphasizes that under proposed § 37.205(a), a SEF must continue to capture all orders entered by voice (*i.e.,* oral communications) or certain other electronic communications, such as instant messaging and email.

Finally, the Commission proposes to clarify that the term ''trading day''—on which such data must be loaded into the automated trade surveillance system—means the day ''on which such trade was executed or such order was entered.''

Request for Comment

The Commission requests comment on all aspects of proposed § 37.203(d).

5. § 37.203(e)—Error Trade Policy[428]

Section 37.203(e) currently requires a SEF to conduct real-time market monitoring of all trading activity on its system(s) or platform(s) to identify disorderly trading and any market or system anomalies.[429] The regulation further requires a SEF to have the authority to adjust prices and cancel trades when needed to mitigate ''market disrupting events'' caused by SEF trading system or platform malfunctions or errors in orders submitted by market participants. Further, any trade price adjustments or trade cancellations must be transparent to the market and subject to standards that are clear, fair, and publicly available.

a. Error Trades—Swaps Submitted for Clearing

In 2013, the Division of Clearing and Risk (''DCR'') and DMO (together, the ''Divisions'') issued guidance (the ''2013 Staff STP Guidance'') to address ''straight-through processing'' requirements that, among other things, expressed the view that SEFs should have rules stating that trades that are rejected from clearing are ''void *ab initio*.''[430] According to the Divisions, swap transactions that are executed and subsequently rejected by the DCO from clearing would be considered void, even where the rejection is attributable to an operational or clerical error from the SEF or market participants.[431]

[424] SEF Core Principles Final Rule at 33511.

[425] 17 CFR 37.203(d).

[426] The Commission notes that some commenters previously expressed concern about the clarity of the enumerated capabilities. SEF Core Principles Final Rule at 33512.

[427] *See infra* Section VII.D.2.a.—§ 37.205(b)(1)—Original Source Documents; § 37.205(b)(2)—Transaction History Database; § 37.205(b)(3)—Electronic Analysis Capability.

[428] The Commission also proposes to retitle § 37.203(e) to ''Error trade policy'' from ''Real-time market monitoring'' based on the proposed changes described below.

[429] 17 CFR 37.203(e).

[430] Staff Guidance on Swaps Straight-Through Processing at 5 (Sept. 26, 2013) (''2013 Staff STP Guidance''). In addition to discussing the void *ab initio* concept, as discussed below, the 2013 Staff STP Guidance also discussed ''straight-through processing'' for swap transactions. *See infra* Section XII.B.2.—§ 37.702(b) and § 39.12(b)(7)—Time Frame for Clearing. The Commission notes that to the extent that error trades leading to a rejection from clearing could be corrected without the execution of a new trade, such methods would depart from the void *ab initio* concept articulated by the Divisions.

[431] As previously stated by Commission staff for purposes of granting time-limited no-action relief, an operational or clerical error is any type of error other than a rejection from clearing due to credit reasons. CFTC Letter No. 17–27, Re: No-Action Relief for Swap Execution Facilities and Designated Contract Markets in Connection with Swaps with Operational or Clerical Errors Executed on a Swap Execution Facility or Designated Contract Market (May 30, 2017) at 1 n.2 (''NAL No. 17–27'').

SEFs and market participants raised concerns that considering such transactions to be void *ab initio* under the guidance would impede their ability to correct trades that were rejected from clearing at the DCO on the basis of such errors. For example, some transactions submitted for clearing may fail to match a specified term due to a clerical error, *e.g.,* counterparty names; as a result, the trades would be rejected from clearing and deemed void *ab initio,* even though the error would be readily correctable.[432] The Divisions' view on void *ab initio* would compel counterparties to execute a new trade with the corrected terms, rather than allow a SEF to identify and correct the error through other established protocols and procedures.

For those SEFs that apply the concept of void *ab initio,* however, the Commission's current execution method requirements have inhibited the ability to correct errors through subsequent trades, where a swap has been rejected from clearing due to the error or where a swap containing an error has been accepted for clearing by a DCO. For swaps that are Required Transactions, market participants have been otherwise prohibited from determining how to resolve the error between themselves by entering into an offsetting trade or a new trade with the correct terms due to (i) the execution method requirements under § 37.9(a)(2), which requires that all Required Transactions be traded via either an Order Book or RFQ System; and (ii) the corresponding prohibition on pre-arranged trading under § 37.203(a). In response to these concerns related to void *ab initio,* Commission staff has provided time-limited no-action relief.[433]

Based on this no-action relief, SEFs have allowed market participants to pre-arrange corrective trades for execution and submission to a DCO for clearing through means not prescribed under § 37.9 for Required Transactions. Such trades include a new trade with the corrected terms, where an error trade has been rejected from clearing. Such trades also include a new trade to offset an error trade accepted for clearing and a second subsequent trade with the corrected terms, as originally intended between the counterparties. This relief has enabled counterparties to address error trades, but has required SEFs to adopt mechanisms to identify these corrective trades and additional related rules and procedures for their respective market participants.

In light of the challenges described above, the Commission proposes clarifications and amendments to address the role of void *ab initio* with respect to error trades for SEFs as described below.[434] The Commission notes that void *ab initio* is a determination made by a SEF, and not by a DCO, which merely accepts or rejects a trade from clearing. Additionally, consistent with the 2013 Staff STP Guidance,[435] the Commission notes that void *ab initio* does not apply to back-loaded trades, *i.e.,* trades originally executed without an intent to clear, which the parties subsequently decided to clear.

b. Current SEF Error Trade Policies

SEFs have adopted rules and protocols to address other general aspects of correcting an error trade. These factors, among the many specified across all SEFs, include a definition of ''error trade''; the circumstances to which the SEF's error trade rules would apply; the process for a market participant to report an alleged error trade; the process through which a SEF may review and determine that an error trade has occurred; notification procedures; and the possible courses of action that a SEF may take (or allow its market participants to take) to correct the error trade. The Commission believes that the adoption of such error trade policies by SEFs reflects their understanding that such policies are a beneficial practice that promotes a fair and orderly trading market for their market participants.[436]

Notwithstanding the existence of error trade rules and protocols across different SEFs, market participants have stated that those rules and protocols, and the manner in which they are applied, have been inconsistent in some respects. Participants have cited a number of such examples, including inconsistent approaches to notifying SEFs of alleged error trades; the varying factors that SEFs consider in evaluating alleged error trades; and the level of notification provided to other market participants regarding alleged errors. Therefore, some market participants—particularly those that are participants of multiple SEFs—have recommended that the Commission adopt some general error trade policy requirements to promote a more consistent approach. Based on the feedback received and its own observations during the part 37 implementation, the Commission proposes to refine its approach to SEF error trade policies in a manner that would benefit market participants.

c. § 37.203(e)—Error Trade Policy [437]

The Commission proposes to eliminate the real-time market monitoring requirement, which is duplicative of Core Principle 4, and adopt a refined approach to SEF error trade policies under proposed § 37.203(e) that would allow a SEF to implement its own protocols and processes to correct error trades with respect to swaps (i) rejected by a DCO due to an operational or clerical error or (ii) accepted for clearing by a DCO that contains an operational or clerical error.[438] Therefore, the Commission's

[432] The Commission understands that when a swap trade that is intended to be cleared has an operational or clerical error, a DCO will reject that trade, even if it otherwise complies with the risk-based limits established for the respective counterparties. As DCOs do not distinguish clearing rejections for credit reasons from clearing rejections due to clerical or operational errors, error trades are treated as void *ab initio.*

[433] CFTC Letter No. 13–66, Time-Limited No-Action Relief for Swap Execution Facilities from Compliance With Certain Requirements of Commission Regulation 37.9(a)(2) and 37.203(a) (Oct. 25, 2013) (''NAL No. 13–66''). In April 2015, staff issued additional no-action relief, which reinstated the previous time-limited no-action relief from NAL No. 13–66 for SEFs from § 37.9(a)(2) and § 37.203(a) for swaps rejected from clearing due to an operational or clerical error. Under the expanded no-action relief, SEF market participants have resolved error trades accepted for clearing at the DCO, among other types of transaction. CFTC Letter No. 15–24, Re: No-Action Relief for Swap Execution Facilities and Designated Contract Markets in Connection with Swaps with Operational or Clerical Errors Executed on a Swap Execution Facility or Designated Contract Market (Apr. 22, 2015) (''NAL No. 15–24''). Commission staff subsequently extended the relief provided in NAL No. 15–24 in June 2016. CFTC Letter No. 16–58, Re: No-Action Relief for Swap Execution Facilities and Designated Contract Markets in Connection with Swaps with Operational or Clerical Errors Executed on a Swap Execution Facility or Designated Contract Market (June 12, 2016). This relief has been most recently extended by NAL No. 17–27 in May 2017.

[434] The Commission notes that it is also proposing certain clarifications and amendments related to the 2013 Staff STP Guidance with respect to straight-through processing of swaps. *See infra* Section XII.B.2.b.—Proposed Approach to Straight-Through Processing.

[435] 2013 Staff STP Guidance at 5.

[436] The Commission notes that the guidance to Core Principle 4 in Appendix B cites ''clear error-trade and order-cancellation'' policies as a type of trading risk control that could be part of an acceptable program for preventing market disruptions. 17 CFR part 37 app. B (guidance to Core Principle 4—paragraph (a)(5)—''Risk controls for trading'').

[437] The Commission proposes to retitle § 37.203(e) to ''Error trade policy'' from ''Real-time market monitoring.''

[438] The Commission notes that the real-time market monitoring requirement is duplicative of Core Principle 4, which requires a SEF to conduct real-time monitoring of trading and comprehensive and accurate trade reconstructions. To account for the minor difference between the real-time monitoring requirements under § 37.203(e), which requires a SEF's monitoring to ''identify disorderly trading,'' and § 37.401, which currently does not specify that requirement, the Commission is proposing to amend § 37.401 to incorporate this requirement. *See infra* Section IX.A.—§ 37.401—General Requirements.

proposal would explicitly permit a SEF to establish its own rules regarding error trades rejected from clearing, which the Commission believes would facilitate a SEF's ability to establish its own error trade procedures that it believes is best suited to its particular market, including whether to maintain an approach based on the void *ab initio* concept for trades rejected from clearing due to non-credit related errors.

Consistent with proposed § 37.702(b)(1),[439] however, the Commission notes that SEFs would now be required to deem any swap submitted for clearing as void *ab initio* if a DCO rejects the trade from clearing due to credit reasons. Under this scenario, clearing members for the executing counterparties to the rejected trade must resolve the outstanding credit issue that prevented a DCO from accepting the trade for clearing. The ability for a clearing member to resolve credit issues, a process which is outside of a SEF's purview, is inconsistent with the SEF's ability to provide for the financial integrity of swaps entered into on the SEF in contravention of Core Principle 7 and proposed § 37.702(b)(1), which would require a SEF to coordinate with a DCO to facilitate prompt, efficient, and accurate processing and routing of transactions to the DCO.[440] In contrast, a SEF's role in this context is limited to controlling the process of correcting an operational or clerical error within the terms of a swap using the SEF's error trade-related rules and procedures. Therefore, a SEF should not rely upon a clearing member to resolve such credit issues, but instead must declare a swap that is rejected from clearing for credit reasons as void *ab initio.*

In addition to allowing a SEF to configure an approach to correcting non-credit related error trade swaps submitted to a DCO for clearing, however, the Commission emphasizes that proposed § 37.203(e) would generally require a SEF to establish baseline procedural requirements for an error trade policy for all swaps executed on its facility. The proposed approach would permit a SEF to develop and adopt a more efficient approach based on the nature of the transaction and error, as well as the SEF's own operational and technological capabilities.[441] Given that market participants often execute subsequent swaps to hedge the risk of an initial transaction, this approach would help mitigate the potential exposure to market and execution risk that arises if such hedge positions are established against a swap that has been deemed void *ab initio.* Accordingly, a SEF may reduce that risk by facilitating a more targeted and timely correction of errors in the initial transaction that would not necessitate the resubmission of an entire transaction that has been voided.[442]

The proposed approach, in conjunction with the proposed adoption of more flexible methods of execution, would also render the current no-action relief unnecessary for those SEFs that choose to deem error trades as void *ab initio.*[443] For example, if a SEF maintains an approach similar to the current no-action relief, then the elimination of the prescriptive execution methods under § 37.9 would allow counterparties to execute a corrective trade via flexible methods of execution offered by the SEF.[444] Under the proposed approach, however, a SEF also may not choose to follow the void *ab initio* approach for non-credit related errors and instead adopt operational protocols or procedures to resolve an error trade that do not require the execution or resubmission of a corrective trade. Relief from the pre-arranged trading prohibition under § 37.203(a) would also be unnecessary; under the proposed approach, a SEF could allow counterparties to use flexible means of execution to execute a corrective trade.[445]

In conjunction with the proposed flexibility to correcting error trades, § 37.203 would also set forth general requirements that are intended to create a baseline consistency among SEF error trade policies. Proposed § 37.203(e)(1) defines an ''error trade'' as any swap transaction executed on a SEF that contains an error in any term, including price, size, or direction.[446] Proposed § 37.203(e)(2) would require a SEF to establish and maintain rules and procedures to help resolve error trades in a ''fair, transparent, consistent, and timely manner.'' At a minimum, such rules would be required to provide the SEF with the authority to adjust trade terms and cancel trades; and specify the rules and procedures for market participants to notify the SEF of an error trade, including any time limits for notification. While the Commission is providing SEFs with flexibility in designing their error trade policies, the Commission believes that fairness, transparency, consistency, and timeliness should be key principles in a SEF's error trade policy.

Further, proposed § 37.203(e)(3) would establish a minimum set of notification requirements for a SEF. A SEF would be required to notify all of its market participants, as soon as practicable, of (i) any swap transaction that is under review pursuant to the SEF's error trade rules and procedures; (ii) a determination that the trade under review is or is not an error trade; and (iii) the resolution of any error trade, including any trade term adjustment or cancellation. The Commission proposes an ''as soon as practicable'' standard based on competing considerations, such as the need to maintain orderly trading versus the need for timely transparency. Under this proposed approach, a SEF may determine that making error trade information available at a particular point in time is not practicable, given the countervailing concerns of potential market disruptions caused by the announcement of a potentially erroneous trade that has been disseminated to the SEF's participants.

Proposed § 37.203(e)(4) would allow a SEF to establish non-reviewable ranges.

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[439] The Commission proposes to renumber § 37.702(b)(2) to § 37.702(b)(1). *See infra* Section XII.B.2.b.(1)—§ 37.702(b)(1) and § 39.12(b)(7)(i)(A)—''Prompt, Efficient, and Accurate'' Standard.

[440] In some cases, clearing members and the DCO may not be able to resolve an outstanding credit issue, but the swap nevertheless remains void *ab initio.*

[441] *See* 17 CFR part 37 app. B (guidance to Core Principle 4—paragraph (a)(5)—''Risk controls for trading'') (noting that risk controls such as error trade policies should be adapted to the unique characteristics of the trading platform and of the markets to which they apply). The Commission notes that based on its proposal to adopt separate error trade policy rules under § 37.205(e), it also proposes to eliminate the guidance to Core Principle 4 in Appendix B that specifies error trade policies as a type of risk control that a SEF may adopt. *See infra* Section IX.E.—§ 37.405—Risk Controls for Trading.

[442] The Commission notes, however, that to the extent that a DCO has its own protocols and policies for resolving error trades—both for error trades that are rejected for clearing due to non-credit related errors and for error trades that have been accepted for clearing—a SEF should coordinate its own approach with the DCO, pursuant to the requirements of proposed § 37.702(b)(1) (existing § 37.702(b)(2)), which requires a SEF to coordinate with a DCO, to which it submits transactions for clearing, to develop rules and procedures to facilitate prompt and efficient transaction processing in accordance with § 39.12(b)(7).

[443] NAL No. 17–27.

[444] To the extent that a SEF currently maintains a similar approach as set forth in the no-action relief, however, the Commission clarifies that a SEF could maintain those protocols and procedures, notwithstanding the adoption of the proposed version of § 37.203(e).

[445] *See infra* note 319 and accompanying discussion (noting that the pre-arranged trading prohibition is intended to maintain the integrity of price competition and market risk that is incident to trading in the market).

[446] This definition, however, would not include a swap trade that is rejected from clearing for credit reasons, as discussed above. Therefore, the Commission notes that proposed § 37.203(e) would not apply to such trades.

The Commission has observed that in the interests of minimizing market disruption and maintaining orderly trading, many SEFs have established non-reviewable ranges during the course of trading. Therefore, the Commission believes that to allow SEFs to maintain existing beneficial market practices, a SEF should continue to be able to establish such ranges, which may be adjusted based on market conditions. Pursuant to proposed § 37.203(e)(2), however, the Commission emphasizes that such ranges must be established and administered in a fair, transparent, consistent, and timely manner.

The Commission recognizes that identifying and resolving error trades in a timely manner is important to promote market integrity and efficiency and ensure that trade data, which market participants rely upon to inform their swaps trading decisions, accurately reflects prevailing market pricing at any given time. The Commission believes that proposed § 37.203(e) would accomplish these goals for market participants and the market as a whole.

Request for Comment

The Commission requests comments on all aspects of proposed § 37.203(e). The Commission may consider alternatives to its proposed error trade policy requirements and requests comment on the following questions:

(46) Does the lack of a void *ab initio* requirement for non-credit related errors create concerns about market risk with respect to error trades that have been executed, but have not been voided despite the rejection from clearing? If so, should a SEF be limited in the types of errors that may be corrected without void *ab initio, e.g.,* errors that do not create market risk? Should the Commission adopt a mandatory void *ab initio* requirement that certain types of errors, *e.g.,* those that do cause market risk, must be resolved via a corrective trade approach? Or should counterparties otherwise have the ability to maintain breakage agreements to address such risks?

(47) Is the Commission's proposed definition of ''error trade'' overly broad or narrow? Should the definition or requirement specifically address certain types of errors, such as the wrong affiliate counterparty or the wrong product identified?

(48) Is the Commission's proposed definition of ''error trade'' sufficient to include those trades where an incorrect term (*e.g.,* incorrect notional amount) results in a rejection by a DCO ostensibly due to credit reasons, but where the DCO otherwise would have accepted the trade had the trade included the correct terms? If not, then how should the term ''error trade'' be defined to better discern this situation from a situation where a true rejection for credit reasons has occurred? Similarly, is the Commission's proposed definition of ''error trade'' sufficiently clear so that the SEF knows which errors are required to be treated as error trades and which errors are required to be treated as void *ab initio*? If not, please explain. Should the Commission's definition of ''error trade'' specifically state that it does not include rejections from clearing for credit reasons?

(49) Should trades that are rejected by a DCO for insufficient credit be required to be deemed to be void *ab initio* by SEFs? If so, should the Commission codify such a requirement under proposed § 37.203(e) or elsewhere in the Commission's regulations?

(50) Are SEFs and DCOs able to distinguish between trades that are rejected from clearing due to insufficient credit from those trades that are rejected because they are error trades? Why or why not?

(51) The proposed regulations require that error trades be resolved in a timely manner, recognizing that a SEF may not be in a position to resolve every error trade within a specific time frame. Would requiring resolution of an error trade ''as soon as practicable'' or within a specific time frame lead to quicker resolutions and reduce risk for market participants? If so, what time frame would be appropriate and should it vary based on other factors, such as the nature of the product or transaction type, whether the error was a participant error or system error, or whether the error was discovered before or after the trade was cleared?

(52) Should a SEF be permitted to adjust or cancel an error trade without consulting with the parties to the trade in some or all circumstances, or should the Commission require a SEF to consult with or obtain the consent of the parties to an error trade in some or all circumstances?

(53) Should market participants be required to report all errors to a SEF or are there certain errors that are immaterial and do not otherwise require correction?

(54) What type of error trade policy should a SEF be required to adopt for swap transactions that are subject to an exception to the prohibition on pre-execution communications under proposed § 37.201(b), given that such swaps may be negotiated or arranged away from the SEF's trading system or platform?

(55) Should a SEF be required to specify who may request a review of a trade as a potential error trade? Should the ability to request a review be limited to the parties to a trade or should market participants affected by the trade also have the ability to request a review?

(56) Are there alternative requirements that would enhance efficiency and transparency in the error trade resolution process?

(57) Should the Commission require SEFs to notify all market participants of an error trade and the resolution of such trade or only a smaller subset of participants? Should the Commission provide any time frame for such notice?

(58) Should a DCO be required to notify a SEF of the reason why a trade was rejected from clearing? If so, what type of information should the Commission require the DCO to provide to the SEF in such a circumstance?

6. § 37.203(f)—Investigations [447]

Existing § 37.203(f) currently sets forth requirements for SEFs with respect to conducting investigations of their market participants for potential rule violations.[448] Existing § 37.203(f)(1) requires a SEF to have procedures that require its compliance staff to conduct investigations of possible rule violations.[449] The rule further requires that an investigation be commenced upon Commission staff's request or upon discovery of information by a SEF that indicates a reasonable basis for finding that a violation has occurred or will occur. Existing § 37.203(f)(2) requires that investigations be completed in a timely manner, defined as twelve months after an investigation is opened, absent enumerated mitigating circumstances.[450] Existing § 37.203(f)(3) requires a SEF's compliance staff to submit an investigation report for disciplinary action any time staff determines that a reasonable basis exists for finding a rule violation,[451] while existing § 37.203(f)(4) requires compliance staff to prepare an investigation report upon concluding an investigation and determining that no reasonable basis exists for finding a rule violation.[452] Existing §§ 37.203(f)(3)–(4) enumerate the items that must be included in the investigation report. Finally, existing § 37.203(f)(5) prohibits a SEF from issuing more than one

[447] The Commission proposes to retitle § 37.203(f) to ''Investigations'' from ''Investigations and investigation reports'' based on the proposed changes described below.

[448] 17 CFR 37.203(f).

[449] 17 CFR 37.203(f)(1).

[450] 17 CFR 37.203(f)(2).

[451] 17 CFR 37.203(f)(2).

[452] 17 CFR 37.203(f)(4).

warning letter to the same person or entity for the same rule violation during a rolling twelve-month period.[453]

The Commission proposes to amend existing § 37.203(f) to simplify and streamline the procedures for SEFs to conduct investigations and prepare investigation reports. First, the Commission proposes to amend § 37.203(f)(1) to state that each SEF must establish and maintain procedures requiring compliance staff to conduct investigations, *including* the commencement of an investigation upon the receipt of a request from Commission staff or upon the discovery or receipt of information by the SEF that indicates the existence of a reasonable basis for finding that a violation may have occurred or will occur (emphasis added). This proposed amendment reflects the Commission's view that SEFs may, and should have the right to, choose to initiate investigations under broader circumstances than the two instances identified in the existing provision.

Second, the Commission proposes to amend § 37.203(f)(2) to eliminate the twelve-month requirement for completing investigations and instead provide SEFs with the ability to complete investigations in a timely manner taking into account the facts and circumstances of the investigation. Based on its experience, the Commission recognizes that each investigation raises unique issues, facts, and circumstances that affect the time that it takes to complete the investigation. A SEF may complete some investigations in less than twelve months and complete some investigations in more than twelve months. The Commission also recognizes that the list of mitigating factors in the existing rule is not comprehensive, and other factors may affect the time of an investigation. Rather than prescribe a singular requirement, the Commission believes that it is more appropriate to establish general parameters for completing investigations. In conjunction with this amendment, the Commission also proposes guidance to Core Principle 2 in Appendix B to provide SEFs with reasonable discretion to determine that time frame.[454]

Third, the Commission proposes to streamline the requirements that apply to all SEF investigation reports, regardless of whether a reasonable basis exists for finding a violation, by consolidating the provisions under existing § 37.203(f)(4) into a new proposed § 37.203(f)(3). Accordingly, proposed § 37.203(f)(3) would require a SEF's compliance staff to prepare a written investigation report to document the conclusion of each investigation. The proposed rule would maintain the existing requirement that each investigation report contain the following information: (i) The reason the investigation was initiated; (ii) a summary of the complaint, if any; (iii) the relevant facts; (iv) the compliance staff's analysis and conclusions; and (v) a recommendation as to whether disciplinary action should be pursued. To provide further clarity regarding the actions that a SEF may take once the investigation report is completed, the Commission proposes adding guidance to Core Principle 2 in Appendix B to provide that compliance staff should submit all investigation reports to the CCO or other compliance department staff responsible for reviewing such reports and determining next steps in the process; and the CCO or other responsible staff should have reasonable discretion to decide whether to take any action, such as presenting the investigation report to a disciplinary panel for disciplinary action.[455]

As part of the Commission's proposal to consolidate multiple existing warning letter requirements into a single provision under proposed § 37.206(c)(2), the Commission also proposes to eliminate the warning letter requirement under existing § 37.203(f)(5).[456]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.203(f) and the associated guidance to Core Principle 2 in Appendix B.

7. § 37.203(g)—Additional Sources for Compliance

The Commission is not proposing any amendments to § 37.203(g).

C. § 37.204—Regulatory Services Provided by a Third Party

Section 37.204, among other things, permits a SEF to contract with an RFA, another registered entity, or the Financial Industry Regulatory Authority (''FINRA'') for the provision of regulatory services, subject to the requirement that the SEF supervises its regulatory service provider and retains exclusive authority over substantive decisions. As described below, the Commission proposes a series of amendments that would provide a SEF with further options in choosing and utilizing a regulatory service provider to assist with fulfilling its regulatory obligations, while still maintaining regulatory protections that relate to the use of an external services provider.

1. § 37.204(a)—Use of Regulatory Service Provider Permitted

Section 37.204(a) permits a SEF to contract with an RFA, another registered entity, or FINRA to assist the SEF in complying with the Act and Commission regulations, as approved by the Commission.[457] A SEF that elects to use the services of a regulatory service provider must ensure that the provider has the capacity and resources to provide timely and effective regulatory services.[458] A SEF remains responsible at all times for the performance of any regulatory services received, compliance with its obligations under the Act and Commission regulations, and the regulatory service provider's performance on its behalf.[459]

Based upon its experience with implementing part 37, the Commission is proposing to expand the scope of entities that may provide regulatory services under § 37.204(a) to include any non-registered entity approved by the Commission.[460] The Commission believes that this proposed expansion would be appropriate and notes that the Act does not address or proscribe the

[453] 17 CFR 37.203(f)(5).

[454] The Commission proposes to add this guidance as paragraph (a)(2) to Core Principle 2 in Appendix B and eliminate the existing guidance, which currently states that a SEF should adopt and enforce any additional rules it believes are necessary to comply with § 37.203. The Commission views this guidance as unnecessary based on the proposed changes to § 37.203(f).

[455] The Commission proposes to add this guidance as paragraph (a)(3) to Core Principle 2 in Appendix B. The Commission notes that it provided similar clarification in the preamble to the SEF Core Principles Final Rule. SEF Core Principles Final Rule at 33515. As discussed below, the Commission proposes to renumber the existing language in paragraph (a)(3) to paragraph (a)(6), *see infra* Section VII.E.1.—§ 37.206(a)—Enforcement Staff; and eliminate the existing language in paragraph (a)(6), *see infra* Section VII.E.2.—§ 37.206(b)—Disciplinary Program.

[456] The Commission proposes to streamline and consolidate multiple existing provisions that address the SEF's use of warning letters—under existing § 37.203(f)(5), existing § 37.205(c)(2) with respect to audit trail violations, and existing § 36.206(f) with respect to rule violations—into a single provision under proposed § 37.206(c)(2), as discussed below. *See infra* Section VII.E.3.—§ 37.206(c)—Hearings. Further, the Commission proposes to eliminate the existing language under paragraph (a)(1) of the guidance to Core Principle 2 in Appendix B, which states that a SEF's rules may authorize its compliance staff to issues warning letters or recommend that a disciplinary panel take such action. The Commission views this guidance as unnecessary based on the proposed changes to § 37.203(f).

[457] 17 CFR 37.204(a).

[458] *Id.*

[459] *Id.*

[460] The Commission proposes to amend ''Financial Industry Regulatory Authority'' in the text of § 37.204(a) to ''any non-registered entity.''

types of entities that SEFs may use for the provision of regulatory services; for example, the Commission used this basis originally to include FINRA among the list of entities that could provide regulatory services. Therefore, consistent with the statute, SEFs would be allowed to choose from a greater number of potential third-party providers. The Commission believes that this change would potentially increase competition among existing and potential regulatory service providers and, thus, reduce operating costs for SEFs, encourage innovation and technological developments, and mitigate barriers to entry for new SEFs.

Section 37.204(a), however, would also continue to be subject to important protections to ensure that a regulatory service provider provides effective regulatory services. To ensure each SEF's compliance with §§ 37.203(c)–(d), among other provisions, the Commission would continue to evaluate the sufficiency of a provider's compliance staff and resources and the capabilities of its automated trade surveillance system, and other capabilities.[461] Section 37.204(a) would still require each SEF to be responsible at all times for the performance of the regulatory services received, for compliance with the SEF's obligations under the Act and Commission regulations, and for the provider's performance on its behalf. Further, as discussed below, § 37.204(b) would still impose a duty to supervise the provider. Accordingly, the Commission believes that these protections, combined with the Commission's prior evaluation of any provider, support the ability of a SEF to consider an entity outside of an RFA, a registered entity, or FINRA.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.204(a).

2. § 37.204(b)—Duty To Supervise Regulatory Service Provider

Existing §§ 37.204(b)–(c) generally set forth a SEF's oversight responsibilities with respect to a regulatory service provider. Existing § 37.204(b) requires a SEF to retain sufficient compliance staff to supervise the quality and effectiveness of the services performed by a regulatory service provider; hold regular meetings with the regulatory service provider to discuss ongoing investigations, trading patterns, market participants, and any other matters of regulatory concern; and conduct and document periodic reviews of the adequacy and effectiveness of services provided on its behalf.[462] Existing § 37.204(c), however, requires a SEF to retain exclusive authority over all substantive decisions made by its regulatory service provider, such as decisions involving trade cancellations, issuance of disciplinary charges, and access denials.[463] A SEF is also required to document any instance where its actions differ from those recommended by its regulatory service provider, including the reasons for the course of action recommended by the regulatory service provider and the reasons why the SEF chose a different course of action.[464]

The Commission proposes to combine and streamline the requirements of existing §§ 37.204(b)–(c) into a new proposed § 37.204(b). The Commission further proposes to maintain a SEF's duty to supervise its regulatory service provider, but to eliminate the requirement that the SEF hold regular meetings and conduct periodic reviews of the provider. Instead, the Commission proposes that a SEF be able to determine the necessary processes for supervising their regulatory service providers. Consistent with this proposed change, the Commission also proposes to provide each SEF with the option to allow its regulatory service provider to make substantive decisions, provided that, at a minimum, the SEF is involved in such decisions. Therefore, a SEF would have the discretion to determine how they are involved in such decisions. The proposed rule would keep the existing examples of substantive decisions, including the adjustment or cancellation of trades, the issuance of disciplinary charges, and denials of access to the SEF for disciplinary reasons. Finally, the Commission proposes to eliminate the requirement that a SEF document where its actions differ from the regulatory service provider's recommendations, deferring instead to the SEF and its regulatory service provider to mutually agree on the method that they will use to document substantive decisions.

Based on its experience implementing the SEF regulatory framework, the Commission believes that some of the specific requirements currently prescribed under existing §§ 37.204(b)–(c) are unnecessary and overly prescriptive because SEFs, consistent with their position as self-regulatory organizations, remain ultimately responsible for the performance of any regulatory services received, for compliance with their obligations under the Act and Commission regulations, and for the regulatory service providers' performance on their behalf. Given a SEF's ultimate responsibility, the Commission believes that the SEF should be allowed to determine how best to supervise its regulatory service provider based on the services it receives and the nature of the SEF's operations and markets. The Commission also notes that this proposed approach is consistent with a SEF's discretion under Core Principle 1.[465] The Commission further believes that the discretion that SEFs and their regulatory service providers would have under § 37.204(b) to determine a mutually acceptable process may enable more timely decision making regarding substantive matters.[466]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.204(b).

3. § 37.204(c)—Delegation of Authority

The Commission proposes a new § 37.204(c) to delegate to DMO the authority to approve any regulatory service provider chosen by a SEF. This does not, however, prohibit the Commission from exercising authority to approve any third party regulatory service provider. The Commission anticipates that expanding the scope of entities that may provide regulatory services under proposed § 37.204(a) may lead to a greater number of approval requests for such entities. Therefore, the Commission proposes to delegate this authority to ensure that such a review is conducted in an efficient manner. Such approval would require, at a minimum, that each regulatory service provider demonstrate that it has the capabilities and resources necessary to provide timely and effective regulatory services on behalf of the SEF, including adequate staff and automated surveillance systems, as required under proposed § 37.204(a).

Request for Comment

The Commission requests comment on all aspects of proposed § 37.204(c).

D. § 37.205—Audit Trail

Section 37.205 sets forth a SEF's audit trail requirements and generally requires a SEF to establish procedures to

[461] The Commission would evaluate a provider with respect to these requirements prior to approving any arrangement between a SEF and the provider, or during the course of conducting routine oversight of a SEFs self-regulatory program.

[462] 17 CFR 37.204(b).

[463] 17 CFR 37.204(c).

[464] *Id.*

[465] 7 U.S.C. 7b–3(f)(1)(B).

[466] The Commission notes that a commenter to the SEF Core Principles Final Rule stated that entrusting greater discretion to a regulatory service provider would provide for prompt decision-making. SEF Core Principles Final Rule at 33517.

capture and retain information that may be used in establishing whether rule violations have occurred. Specifically, § 37.205(a) requires a SEF to have an audit trail; § 37.205(b) prescribes the elements of an acceptable audit trail program; and § 37.205(c) requires a SEF to enforce its audit trail requirements.[467]

Based on the Commission's experience with implementing part 37, including the SEF registration process, the Commission has observed that technology limitations have impacted SEFs' ability to comply with all of the audit trail requirements, particularly for orders submitted by voice and certain electronic communications that include instant messages and emails. Based on these observations, as well as the proposed ability for a SEF to offer flexible execution methods, the Commission proposes amendments to the audit trail requirements that seek to strike the appropriate balance between offering SEFs the ability to adopt such requirements that are best suited to their respective trading systems or platforms, while also ensuring that such programs enable SEFs to fulfill their self-regulatory obligations. The Commission believes that the proposed changes are consistent with Core Principle 2, which generally requires a SEF to capture information that may be used in establishing whether rule violations have occurred.[468]

1. § 37.205(a)—Audit Trail Required

Section 37.205(a) requires a SEF to capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses.[469] Such audit trail data must be sufficient to reconstruct all indications of interest, requests for quotes, orders, and trades.[470] The audit trail must also permit a SEF to track a customer order from the time of receipt through fill, allocation, or other disposition.[471]

The Commission proposes several amendments to streamline the existing requirements, account for different execution methods and swaps market practices, and eliminate redundancies with other part 37 requirements. Notwithstanding the proposed changes described above, the Commission emphasizes that the type of execution method offered by a SEF does not alter the obligation to capture all audit trail data necessary to detect, investigate, and enforce its rules pursuant to Core Principle 2.

First, the Commission proposes to clarify the existing language to specify that a SEF must capture and retain all audit trail data necessary to *reconstruct all trading on its facility,* detect and investigate customer and market abuses, and *take appropriate disciplinary action* (emphasis added).[472] By replacing the requirement to ''prevent'' customer and market abuses with the requirement to ''take appropriate disciplinary action'' and specifying that the data must enable the SEF to reconstruct all trading on its facility, the Commission believes that § 37.205(a) would more accurately reflect the capabilities for which a SEF may use its audit trail data. The Commission notes that an audit trail cannot ''prevent'' customer and market abuses and the ability to ''reconstruct'' trading is already required under existing § 37.205(a), as described below.

Second, the Commission proposes to move the requirement that audit trail data shall be sufficient to reconstruct all indications of interest, requests for quotes, orders, and trades to the guidance to Core Principle 2 in Appendix B.[473] Given the proposal to allow each SEF to offer flexible methods of execution, as well as continuing advances in technology, the Commission believes that enumerating specific audit trail data in the regulatory language may unnecessarily limit the universe of data relevant to a SEF's audit trail. The Commission emphasizes that a SEF must capture all audit trail data related to each offered execution method that is necessary to reconstruct all trading on its facility, detect and investigate customer and market abuses, and take disciplinary action as noted above. The Commission also believes that SEFs must capture such a data set to be able to detect, investigate and enforce its rules under Core Principle 2, to reconstruct all trading under Core Principle 4, and to comply with the audit trail reconstruction program under proposed 37.205(c), as described below.

Third, the Commission proposes to eliminate the requirement that a SEF capture post-execution allocation information in its audit trail data. During the SEF registration process, numerous SEFs indicated that post-execution allocations normally occur between the clearing firm or the customer and the DCO, or at the middleware provider.[474] Therefore, these SEFs represented that they typically do not have access to post-execution allocation information, and are unable to obtain such data from third parties, such as DCOs and SDRs, due to confidentiality concerns. Based on these representations, Commission staff has issued continuing no-action relief to SEFs from this requirement.[475] Based on its experience, the Commission understands that SEFs are still routinely unable to obtain this information pursuant to the requirements of §§ 37.205(a) and (b)(2).[476] Accordingly, in lieu of requiring that the audit trail track a customer order through ''fill, allocation, or other disposition,'' the Commission proposes to require SEFs to capture the audit trail data only through execution on the SEF. The Commission understands that this proposed change is consistent with current swap market practices.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.205(a). In particular, the Commission requests comment on the following questions:

(59) Is the scope of the proposed audit trail requirements sufficiently clear? If not, then please explain. Is the scope overly broad or narrow to enable a SEF to comply with its obligations under the Act? If so, please explain. Would a SEF's audit trail obligations be impacted by the Commission's proposed approach to pre-execution communications? If so, then how?

(60) What challenges, if any, do SEFs encounter in capturing or retaining audit trail data?

(61) Are there any specific audit trail data points that are too costly or burdensome for a SEF to capture or maintain?

(62) Is the proposed guidance to this section appropriate? Are SEFs currently capturing all indications of interest, requests for quotes, orders, and trades? Is the meaning of ''indications of

[467] 17 CFR 37.205(a)–(c).

[468] 7 U.S.C. 7b–3(f)(2).

[469] 17 CFR 37.205(a).

[470] *Id.*

[471] *Id.*

[472] The Commission proposes to eliminate the introductory sentence under § 37.205, which states that a SEF shall establish procedures to capture and retain information that may be used in establishing whether rule violations have occurred, given that this language is duplicative of the audit trail requirements under § 37.205(a).

[473] The Commission proposes to add this guidance to paragraph (a)(4) to Core Principle 2 in Appendix B. As discussed below, the Commission proposes to eliminate the existing language in paragraph (a)(4), *see infra* Section VII.E.2.—§ 37.206(b)—Disciplinary Program.

[474] CFTC Letter No. 17–54, Re: No-Action Relief for Swap Execution Facilities from Certain Audit Trail Requirements in Commission Regulation 37.205 Related to Post-Execution Allocation Information at 2 (Oct. 31, 2017).

[475] *Id.*

[476] The Commission notes that § 37.205(b)(2) also requires a SEF's audit trail to include an electronic transaction history database that captures, among other elements, the identity of each account to which fills are allocated. 17 CFR 37.205(b)(2). As discussed below, the Commission proposes to eliminate this requirement. *See infra* note 484 and accompanying discussion.

interest'' sufficiently clear? If not, please provide suggestions on how to clarify this term. Should a SEF be required to capture all indications of interest and requests for quotes to enable it to comply with its obligations under the Act? Are there other data points that should be added to the guidance?

2. § 37.205(b)—Elements of an Acceptable Audit Trail Program

Section 37.205(b) requires, among other things, that SEFs retain all original source documents; maintain a transaction history database; conduct electronic analysis; and safely store all audit trail data.[477] Section 37.205(b)(1) requires that a SEF's audit trail include original source documents and specifies the nature and content of such documents.[478] Section 37.205(b)(2) requires a SEF's audit trail program to include an electronic transaction history database and specifies the required elements of an adequate database.[479] Section 37.205(b)(3) requires a SEF's audit trail program to include electronic analysis capability with respect to all audit trail data in the transaction history database.[480] Section 37.205(b)(4) requires a SEF's audit trail program to safely store all audit trail data retained in the transaction history database.[481]

a. § 37.205(b)(1)—Original Source Documents; § 37.205(b)(2)—Transaction History Database; § 37.205(b)(3)—Electronic Analysis Capability

The Commission proposes to eliminate certain elements of the original source documents requirement under § 37.205(b)(1) that specify the nature and content of the original source documents,[482] as such requirements may not capture the appropriate universe of content. The Commission also believes that the detailed requirements are not necessary; as discussed above, the general requirement that a SEF must capture all audit trail data necessary to reconstruct all trading on its facility, detect and investigate customer and market abuses, and take disciplinary action is sufficient to guide a SEF as to the content of its original source documents, which would be based on the SEF's execution methods, trading operations, and markets. Section 37.205(b)(1), however, would maintain that the SEF's audit trail must include original source documents, including unalterable, sequentially-identified records on which trade execution information is originally recorded, whether recorded manually or electronically.

The Commission further proposes to amend § 37.205(b)(2) to revise the scope of audit trail data that must be captured in a SEF's electronic transaction history database. Specifically, the Commission proposes to eliminate the requirement that the database include all indications of interest, requests for quotes, orders, and trades entered into a SEF's trading system or platform. Instead, the SEFs would be required to include (i) trades executed by voice or by entry into a SEF's electronic trading system or platform; and (ii) orders that are entered into its electronic trading system or platform. Similar to proposed § 37.203(d), this proposed amendment recognizes that a SEF may not have a cost-effective and efficient method for inputting orders submitted by voice or certain other electronic communications, such as instant messaging and email, into an electronic transaction history database, given that they are not in the same format as orders and trades that are entered into a SEF's electronic trading system or platform.[483] As noted above, the Commission emphasizes that a SEF must continue to keep a record of all orders entered by voice (*i.e.,* oral communications) or certain other electronic communications, such as instant messaging and email. Such a record, however, would not need to be included in the SEF's electronic transaction history database given the formatting challenges.

The Commission additionally proposes to eliminate the remaining requirements of § 37.205(b)(2) that detail the information that must be included in transaction history database, given that these requirements are already captured in other audit trail requirements or do not comport with existing swaps market practices.[484] Consistent with the proposed amendments to § 37.205(b)(2), the Commission further proposes to amend § 37.205(b)(3) to clarify that a SEF's electronic analysis capability must enable the SEF to reconstruct ''any trade executed by voice or by entry into a swap execution facility's electronic trading system or platform and any order entered into its electronic trading system or platform'' rather than ''indications of interest, requests for quotes, orders, and trades.''

These proposed amendments are consistent with feedback received regarding the audit trail requirements during the SEF registration process. Some SEFs that offer voice-based trading systems or platforms stated that they do not have the requisite technology to conduct an electronic analysis of audit trail data that is not entered into a SEF's electronic trading system or platform, such as oral communications, electronic instant messages, and emails. The Commission understands that during that time, such technology, if available, would have been costly for SEFs to adopt and would not have been fully capable of digitizing oral communications in a sufficiently accurate manner to conduct effective surveillance.

While the Commission is aware that promising technologies are developing in this area, it does not believe that a viable, cost-effective automated technology solution currently exists. Currently, SEFs that offer any form of voice-based trading system or platform are required, as a condition to their registration, to establish voice audit trail surveillance programs to ensure that they can reconstruct a sample of voice trades and review such trades for possible trading violations. The proposed amendments to §§ 37.205(b)(2)–(3) would relieve a SEF from establishing or maintaining such a program, but the proposed audit trail reconstruction requirement under § 37.205(c), as discussed below, would apply instead. Nonetheless, a SEF must continue to conduct electronic analysis, using an automated trade surveillance system that meets the requirements of proposed § 37.203(d).

[477] 17 CFR 37.205(b).

[478] 17 CFR 37.205(b)(1).

[479] 17 CFR 37.205(b)(2).

[480] 17 CFR 37.205(b)(3).

[481] 17 CFR 37.205(b)(4).

[482] Section 37.205(b)(1) requires, among other things, that records for customer orders (whether filled, unfilled, or cancelled, each of which shall be retained or electronically captured) shall reflect the terms of the order, an account identifier that relates back to the account(s) owner(s), the time of order entry, and the time of trade execution. A SEF must also require that all orders, indications of interest, and requests for quotes be immediately captured in the audit trail. 17 CFR 37.205(b)(1).

[483] *See supra* Section VII.B.4.—§ 37.203(d)—Automated Trade Surveillance System.

[484] For example, customer type indicator code (''CTI'') is used in futures trading to designate the capacity in which the person was executing a trade—for the person's own account; for a proprietary account; on behalf of another member; or for a customer. Many DCM-based automated trade surveillance systems are programmed to detect aberrations in CTI code usage that may indicate potential rule violations. The Commission understands, however, that a SEF's automated trade surveillance system does not use CTI codes to detect potential rule violations. Therefore, the Commission proposes to eliminate this requirement. Further, as discussed above, since SEFs cannot routinely obtain post-execution allocation information, it is not possible to identify ''each account to which fills are allocated.'' *See supra* note 476 and accompanying discussion. Therefore, the proposed amendment to § 37.205(b)(2) would also eliminate the requirement to include post-execution allocation information in a SEF's transaction history database.

The Commission further proposes to eliminate the safe storage requirement under § 37.205(b)(4), given that it is generally duplicative of the requirements under Core Principle 14 and related regulations.[485] As discussed below, however, the Commission proposes a non-substantive amendment to move the requirement that a SEF must protect audit trail data from unauthorized alteration, accidental erasure, or other loss to § 37.1401(c), which addresses system safeguard requirements.[486]

Request for Comment

The Commission requests comment on all aspects of proposed §§ 37.205(b)(1)–(3).

3. § 37.205(c)—Audit Trail Reconstruction [487]

Section 37.205(c) generally requires a SEF to enforce its audit trail and recordkeeping requirements.[488] Section 37.205(c)(1) requires enforcement through annual reviews and prescribes the minimum components that must be included in such reviews.[489] Section 37.205(c)(2) requires that a SEF establish an enforcement program and to impose meaningful sanctions against persons and firms where deficiencies are found.[490]

The Commission proposes to eliminate the existing audit trail enforcement requirements under § 37.205(c) and adopt an audit trail reconstruction requirement instead.[491] The Commission believes that the primary goal of audit trail enforcement is to ensure that a SEF's audit trail enables it to reconstruct trading and conduct effective surveillance to fulfill its Core Principle 2 obligations. To that end, audit trail enforcement focuses on reviewing certain components of the audit trail data to ensure that a SEF's audit trail data is complete and accurate. Existing audit trail reviews include a (1) review of randomly selected samples of front-end audit trail data; (2) review of the process by which user identifications are assigned and records relating to user identifications are maintained; (3) review of the usage patterns of user identifications to identify violations of user identification rules; and (4) review of account numbers and CTI codes for accuracy and proper use. The Commission understands that these reviews focus on components of the audit trail that are generally not relevant to SEFs. For example, SEFs have represented that there is little, if any, ''front-end audit trail data'' that is not already captured by the SEF, and that many of the data points for review, such as user identifications, account numbers, and CTI codes, are not used in the same manner as they are for DCMs. Therefore, the Commission believes that requiring SEFs to conduct an audit trail enforcement program based on the requirements of existing § 37.205(c) serves a limited purpose.

The Commission believes that ensuring a SEF's audit trail is accurate and sufficient to conduct effective surveillance—the primary goals of audit trail enforcement—would be better served through an audit trail reconstruction program that focuses on verifying the accuracy of audit trail data and a SEF's ability to comprehensively and accurately reconstruct all trading on its facility in a timely manner. As discussed above, the Commission is aware that SEFs that offer any form of a voice-based trading system or platform do not currently have cost-effective solutions for consolidating certain types of data, such as oral communications, electronic instant messages, and emails, inputting them into an electronic transaction history database, and loading and processing them into an automated system to reconstruct trading. Given that the ability to reconstruct all trading is an essential component to conducting effective surveillance and is currently not being conducted in a routine, automated manner for certain key data, the Commission proposes to require that a SEF establish a program to verify its ability to comprehensively and accurately reconstruct all trading on its facility in a timely manner. The Commission also proposes to adopt guidance to Core Principle 2 in Appendix B specifying that an effective audit trail reconstruction program should annually review an adequate sample of executed and unexecuted orders and trades from each execution method offered to verify compliance with § 37.205(c).[492]

Since SEFs that offer only electronic trading systems or platforms can use their automated trade surveillance systems to reconstruct trading, the reconstructions under proposed § 37.205(c) would serve to verify the accuracy of their audit trail data. A SEF that offers any form of voice-based trading could comply with proposed § 37.205(c) by conducting manual reconstructions, including orders entered by oral communications, instant messages, and email, and trades executed by voice that are captured by the SEF's electronic transaction history database. In addition to verifying the accuracy of the audit trail data for SEFs that offer electronic trading systems or platforms, these reconstructions would help ensure that in the absence of such an automated solution, a SEF that offers voice-based trading is able to reconstruct trading as necessary, including when they are investigating problematic trading activity.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.205(c) and the associated guidance to Core Principle 2 in Appendix B. In particular, the Commission requests comment on the following questions:

(63) What factors should a SEF consider in selecting an adequate sample of orders and trades for reconstruction?

(64) Should SEFs be required to annually reconstruct a minimum number or orders and trades? If so, what is the minimum number?

(65) Should SEFs be required to conduct annual audit trail reviews of their members and firms that are subject to recordkeeping requirements? If so, what should these reviews include?

E. § 37.206—Disciplinary Procedures and Sanctions

Section 37.206 generally requires a SEF to establish rules that deter abuses and have the capacity to enforce those rules though prompt and effective disciplinary action. The disciplinary rules that implement this requirement require a SEF to maintain sufficient enforcement staff, establish disciplinary panels, follow certain disciplinary

[485] 7 U.S.C. 7b–3(f)(14); 17 CFR 37.1401.

[486] *See infra* Section XIX.A.—§ 37.1401(c).

[487] The Commission proposes to retitle § 37.205(c) to ''Audit trail reconstruction'' from ''Enforcement of audit trail requirements'' based on the proposed changes described below.

[488] 17 CFR 37.205(c).

[489] 17 CFR 37.205(c)(1).

[490] 17 CFR 37.205(c)(2). The Commission notes that § 37.205(c)(2) also imposes a warning letter requirement for audit trail violations. As discussed below, the Commission proposes to streamline and consolidate this provision into proposed § 37.206(c)(2). *See infra* Section VII.E.6.—§ 37.206(f)—Warning Letters.

[491] Notwithstanding these proposed changes, the Commission notes that to comply with the general audit trail requirement under proposed § 37.205(a), which requires a SEF to capture all audit trail data related to each offered execution method that is necessary to reconstruct all trading on its facility, detect and investigate customer and market abuses, and take disciplinary action, the SEF must ensure that market participants are submitting accurate and complete audit trail data.

[492] The Commission proposes to add this guidance to paragraph (a)(5) to Core Principle 2 in Appendix B. 17 CFR part 37 app. B. As discussed below, the Commission proposes to eliminate the existing language in paragraph (a)(5). *See infra* Section VII.E.2.——§ 37.206(b)—Disciplinary Program.

procedures that afford respondents procedural safeguards, and impose sanctions that are commensurate to the violations committed.[493] The rules prescribe the use of various sanctions, including suspension or expulsion of members or market participants; customer restitution; and issuance of warning letters.[494]

Since the adoption of § 37.206, the Commission has considered whether alternative cost-effective methods exist for complying with Core Principle 2's requirement to establish and enforce trading, trade processing, and participation rules that deter abuses, and have the capacity to investigate and enforce such abuses.[495] Based on its experience with the part 37 implementation, the Commission believes that alternative disciplinary methods exist that would ensure that SEFs maintain robust disciplinary structures necessary to enforce compliance with their rules and deter abusive trading to promote market integrity. The Commission acknowledges that § 37.206 is a limited approach that is based in many respects on its experience with oversight of DCM disciplinary programs.[496] While the Commission believes that all SEFs should be subject to certain threshold requirements, it also believes that SEFs should be able to use their experience and knowledge to establish disciplinary procedures that are appropriate for their own markets and market participants. The Commission notes that this approach is consistent with the reasonable discretion afforded to SEFs under Core Principle 1.[497] Therefore, the Commission proposes to streamline the SEF disciplinary program rules, discussed further below.[498]

1. § 37.206(a)—Enforcement Staff

Section 37.206(a) requires a SEF to establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations within the disciplinary jurisdiction of the SEF.[499]

The Commission proposes to change the word ''prosecute'' to ''enforce'' to more accurately describe the requirements under § 37.206(a), given that every rule violation may not lead to a prosecution.

The Commission also proposes to amend the guidance to Core Principle 2 in Appendix B that addresses a SEF's enforcement staff.[500] The Commission proposes eliminating the language stating that a SEF's enforcement staff may operate as part of the SEF's compliance staff. The Commission no longer believes this language is necessary, given that SEFs should have the option to determine the appropriate structure for their disciplinary programs, including their enforcement staff, discussed further below with respect to § 37.206(b).

Request for Comment

The Commission requests comment on all aspects of proposed § 37.206(a) and the associated guidance to Core Principle 2 in Appendix B.

2. § 37.206(b)—Disciplinary Program [501]

Section 37.206(b) currently requires SEFs to establish one or more disciplinary panels that meet the composition requirements of part 40 and do not include a SEF's compliance staff or any person involved in adjudicating any other stage of the same proceeding.[502]

The Commission proposes to amend § 37.206(b) to permit a SEF to administer its disciplinary program through not only one or more disciplinary panels, as currently allowed, but also through its compliance staff. As discussed above, this amendment provides SEFs with the ability to adopt a cost-effective disciplinary structure that best suits their markets and market participants, while still effectuating the requirements and protections of Core Principle 2 through compliance staff, disciplinary panels, or some combination of both.[503]

The Commission also proposes other amendments to § 37.206(b), including non-substantive revisions, to streamline certain existing composition requirements for disciplinary panels.[504] For SEFs that elect to administer their disciplinary program though compliance staff, the Commission proposes to amend § 37.206(b) to exclude compliance staff from the requirements under § 1.64(c)(4). Section 1.64, among other things, prescribes rules that govern the composition of an SRO's major disciplinary committee.[505] The Commission recognizes that a SEF's compliance staff could qualify as a ''[m]ajor disciplinary committee'' [506] under § 1.64(a)(2) when imposing sanctions under the proposed rule; therefore, the staff would otherwise be subject to the composition requirement of § 1.64(c)(4), which requires ''sufficient different membership

[493] 17 CFR 37.206(a)–(f).

[494] 17 CFR 37.206(e)–(f).

[495] 7 U.S.C. 7b–3(f)(2)(B).

[496] *See* SEF Core Principles Final Rule at 33520–21 (noting that the disciplinary procedures in the part 37 proposed rules paralleled the procedures for DCMs).

[497] 7 U.S.C. 7b–3(f)(1)(B).

[498] The Commission proposes to eliminate the introductory sentence under § 37.206, which states that a SEF shall establish trading, trade processing, and participation rules that will deter abuses and have the capacity to enforce such rules through prompt and effective disciplinary action, including suspension or expulsion of members or market participants who violate the rules of the swap execution facility, given that this language is duplicative of requirements elsewhere in this part, including Core Principle 2 and various provisions under § 37.206.

[499] 17 CFR 37.206(a).

[500] The Commission proposes to renumber paragraph (a)(3) to paragraph (a)(6) of the guidance to Core Principle 2 in Appendix B and adopt the amendments described above. 17 CFR part 37 app. B.

[501] The Commission proposes to retitle § 37.206(b) to ''Disciplinary program'' from ''Disciplinary panels'' based on the proposed changes described below.

[502] 17 CFR 37.206(b). The Commission proposed composition requirements for disciplinary panels, but has not adopted those requirements in a final rule. Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 FR 63732, 63752 (Oct. 18, 2010).

[503] While the participation of SEF compliance staff could present a possible conflict of interest, the Commission believes that this concern is adequately addressed through the SEF's CCO. Under proposed § 37.1501(c)(2), a CCO would be required to take reasonable steps to resolve any material conflicts of interest. *See infra* Section XX.A.3.—§ 37.1501(c)—Duties of Chief Compliance Officer. Further, a CCO would be required to conduct an annual assessment of the SEF's policies on the handling of conflicts of interest. *See infra* Section XX.A.4.—§ 37.1501(d)—Preparation of Annual Compliance Report. The Commission also notes that the SEF's disciplinary practices are within the scope of the Commission's examinations.

[504] The Commission proposes to amend the panel composition language by replacing the reference to part 40 with ''applicable Commission regulations.'' Additionally, paragraph (a)(11)(ii) of the guidance to Core Principle 2 in Appendix B currently specifies that the composition of the appellate panels should be consistent with part 40 and should not include any members of the SEF's compliance staff or any person involved in adjudicating any other stage of the same proceeding. 17 CFR part 37 app. B. To avoid duplicative language, the Commission proposes to consolidate these provisions under § 37.206(b) to require that any *disciplinary panel* or *appellate panel* established by a SEF must meet the composition requirements of applicable Commission regulations, and shall not include any member of the SEF's compliance staff or any person involved in adjudicating any other stage of the same proceeding (emphasis added). The Commission also proposes to eliminate paragraph (a)(11) of the guidance to Core Principle 2 in Appendix B as noted below. 17 CFR part 37 app. B.

[505] 17 CFR 1.64.

[506] Section 1.64(a)(2) defines ''major disciplinary committee'' as a committee of persons authorized by a self-regulatory organization to conduct disciplinary hearings, settle disciplinary charges, or impose disciplinary sanctions. Such a committee may also hear appeals of cases involving any violation of a SRO's rules, except for rules related to decorum or attire; financial requirements; reporting or recordkeeping; and violations that do not involve fraud, deceit or conversion. 17 CFR 1.64(a)(2). Under § 37.2, SEFs are subject to all applicable Commission regulations, including § 1.64.

interests.'' [507] Accordingly, the Commission believes these amendments are necessary to effectuate the proposed rule of allowing compliance staff to administer a SEF's disciplinary program.

Consistent with the Commission's intention to streamline requirements while still effectuating the Core Principle 2 requirements, the Commission proposes to eliminate the guidance to Core Principle 2 in Appendix B that specifies protocols for the SEF to handle charges and settlement offers.[508] Given that proposed § 37.206(b) would permit SEFs to administer their disciplinary program through compliance staff, the Commission does not believe that this detailed guidance is necessary. Instead, the Commission proposes new guidance to specify that a SEF's rules governing the adjudication of a matter by the SEF's disciplinary panel should be fair, equitable, and publicly available.[509]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.206(b) and the associated guidance to Core Principle 2 in Appendix B.

3. § 37.206(c)—Hearings

Section 37.206(c) requires a SEF to adopt rules that provide certain minimum procedural safeguards for any hearing. In general, the rule requires a fair hearing, promptly convened after reasonable notice to the respondent; and a copy of the hearing to be made and be a part of the record of the proceeding if the respondent requested the hearing.[510]

The Commission proposes to eliminate § 37.206(c). First, the detailed hearing procedures under existing § 37.206(c) are not necessary, as SEFs that choose to establish a disciplinary panel have reasonable discretion to do so pursuant to Core Principle 1.[511] Second, the Commission notes that requirements for hearings under § 37.206(c) would not apply to SEFs that choose to administer their disciplinary program through compliance staff. Third, as noted above, the Commission proposes to add guidance to Core Principle 2 in Appendix B that a SEF's rules relating to disciplinary panel procedures should be fair, equitable, and publicly available.[512] The Commission believes this guidance adequately captures the principal procedural objectives when SEFs are conducting disciplinary hearings and obviates the need for the otherwise prescriptive regulatory requirements. Consistent with the Commission's elimination of § 37.206(c), the Commission also proposes to eliminate the guidance to Core Principle 2 in Appendix B that specifies detailed guidelines for disciplinary hearing protocols.[513]

Request for Comment

The Commission requests comment on all aspects of the proposed elimination of § 37.206(c) and the associated guidance to Core Principle 2 in Appendix B.

4. § 37.206(d)—Decisions

Section 37.206(d) requires a disciplinary panel to render a written decision promptly following a hearing.[514] The rule also provides detailed items to be included in the decision, such as a notice or summary of charges, the answer, and a statement of finding and conclusions with respect to each charge.[515]

The Commission proposes to eliminate the prescriptive requirements under § 37.206(d). This proposed elimination is consistent with other proposed amendments to § 37.206 that would allow a SEF to exercise discretion in establishing its disciplinary procedures pursuant to Core Principle 2. The Commission, however, also proposes to add guidance to Core Principle 2 in Appendix B to specify that a SEF's rules should require the disciplinary panel to promptly issue a written decision following a hearing or the acceptance of a settlement offer.[516] Consistent with the Commission's elimination of the requirements under § 37.206(d), the Commission also proposes to eliminate the guidance to Core Principle 2 in Appendix B that specifies guidelines for a SEF's ability to provide rights of appeal to respondents and issue a final decision.[517]

Request for Comment

The Commission requests comment on all aspects of the proposed elimination of § 37.206(d) and the associated guidance to Core Principle 2 in Appendix B.

5. § 37.206(e)—Disciplinary Sanctions

Existing § 37.206(e) requires that all disciplinary sanctions imposed by a SEF must be commensurate with the violations committed and must be clearly sufficient to deter recidivism or similar violations by other market participants.[518] A SEF is also required to consider a respondent's disciplinary history when evaluating appropriate sanctions.[519] In the event of demonstrated customer harm, any disciplinary sanction must include full customer restitution, except where the amount of restitution, or to whom it should be provided, cannot be reasonably determined.[520]

The Commission proposes to consolidate the requirements that apply to disciplinary sanctions and warning letters, under existing § 37.206(e) and existing § 37.206(f),[521] respectively, into a new proposed § 37.206(c).[522] Consistent with the Commission's goal to provide SEFs with a greater ability to develop cost-effective approaches to administer their disciplinary programs based on their markets and market participants, the Commission believes that a SEF should have greater discretion to choose between taking disciplinary action or issuing a warning letter. Accordingly, as discussed below, the Commission proposes under § 37.206(c)(2) to expand the current use of warning letters by allowing a SEF to issue more than one warning letter over a rolling twelve-month period for violations that involve minor recordkeeping or reporting infractions. To balance the expanded authority to issue warning letters and ensure their proper use by SEFs, the Commission also proposes under § 37.206(c)(1) to extend the existing criteria for issuing disciplinary sanctions to warning letters. Specifically, proposed

[507] Section 1.64(c)(4) requires that each major disciplinary committee, or hearing panel thereof, include sufficient different membership interests so as to ensure fairness and prevent special treatment or preference for any person in the conduct of a committee's or panel's responsibilities. 17 CFR 1.64(c)(4).

[508] The Commission proposes to eliminate paragraphs (a)(4)–(9) of the guidance to Core Principle 2 in Appendix B. 17 CFR part 37 app. B.

[509] The Commission proposes to add this guidance as paragraph (a)(7) to Core Principle 2 in Appendix B. 17 CFR part 37 app. B.

[510] 17 CFR 37.206(c).

[511] 7 U.S.C. 7b–3(f)(1)(B).

[512] *See supra* note 509.

[513] The Commission proposes to eliminate paragraph (a)(10) of the guidance to Core Principle 2 in Appendix B. 17 CFR part 37 app. B.

[514] 17 CFR 37.206(d).

[515] *Id.*

[516] The Commission proposes to add this guidance as part of paragraph (a)(7) to Core Principle 2 in Appendix B. 17 CFR part 37 app. B.

[517] The Commission proposes to eliminate paragraphs (a)(11)–(12) of the guidance to Core Principle 2 in Appendix B. 17 CFR part 37 app. B.

[518] 17 CFR 37.206(e).

[519] *Id.*

[520] *Id.*

[521] Existing § 37.206(f) states that where a rule violation is found to have occurred, no more than one warning letter may be issued per rolling twelve-month period for the same violation.

[522] The Commission proposes to retitle § 37.206(c) to ''Warning letters and sanctions'' from ''Hearings'' based on the proposed changes described below.

§ 37.206(c)(1) would require that all warning letters and sanctions imposed by a SEF must be commensurate with the violations committed and shall be clearly sufficient to deter recidivism or similar violations by other market participants. Further, all warning letters and sanctions, including summary fines and sanctions imposed pursuant to an accepted settlement offer, must take into account the respondent's disciplinary history.[523]

The Commission also proposes several amendments to related guidance to Core Principle 2 in Appendix B that are consistent with the proposed changes and are intended to allow a SEF to determine how to issue warning letters and sanctions. First, the Commission proposes to adopt guidance to Core Principle 2 in Appendix B to state that SEFs should have reasonable discretion in determining when to issue warning letters and apply sanctions.[524] Second, the Commission also proposes to eliminate detailed guidance regarding the procedures for taking emergency disciplinary action. The guidance, however, would maintain that a SEF may impose a sanction or take summary action as necessary to protect the best interest of the marketplace.[525]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.206(c)(1) and the associated guidance to Core Principle 2 in Appendix B. In particular, the Commission requests comment on the following question:

(66) Should the Commission provide further explanation regarding the meaning of ''minor'' recordkeeping or reporting infractions?

6. § 37.206(f)—Warning Letters

Existing § 37.206(f) states that where a rule violation is found to have occurred, no more than one warning letter may be issued per rolling twelve-month period for the same violation.[526]

As part of a new proposed § 37.206(c)(2) noted above, the Commission proposes to amend this provision to establish a more practical approach to the use of warning letters. Under the proposed approach, a SEF would be allowed to issue more than one warning letter over a rolling twelve-month period for violations that involve minor recordkeeping or reporting infractions. Given the *de minimis* nature of such infractions, the Commission believes that a SEF should have the ability to determine whether they merit the issuance of a warning letter or sanction. The Commission also proposes to clarify that the twelve-month limitation on warning letters applies to the same individual who is found to have committed the same rule violation, rather than an entity. The Commission acknowledges that applying the limitation to subject entities is not practical because many of them have hundreds of employees trading on behalf of the entity.[527] Further, the Commission notes that the rolling twelve-month period begins tolling once the SEF finds that a violation occurred, rather than the date that the subject activity occurred.

The Commission also proposes to eliminate guidance to Core Principle 2 in Appendix B that currently specifies that a SEF may adopt summary fines for violations of rules related to the failure to timely submit accurate records required for clearing or verifying each day's transactions.[528] The Commission notes that § 37.206(c)(1) as proposed would already specify that a SEF may issue summary fines as a sanction.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.206(c)(2) and the associated guidance to Core Principle 2 in Appendix B. In particular, the Commission requests comment on the following question:

(67) Is the Commission's approach to warning letters appropriate? Should the Commission allow SEFs to issue more than one warning letter to the same individual within a rolling twelve-month period for other rule violations in addition to minor recordkeeping or reporting infractions? If so, should the Commission specify which rule violations? If so, identify those rule violations and explain why.

7. § 37.206(g)—Additional Sources for Compliance

The Commission is not proposing any amendments to § 37.206(g).[529]

F. Part 9—Rules Relating to Review of Exchange Disciplinary, Access Denial or Other Adverse Actions

Part 9 of the Commission's regulations details the process and procedures for the Commission's review of exchange disciplinary, access denial, or other adverse actions.[530] The rules also address the procedures and standards governing filing and service, motions, and settlement; the process that exchanges must follow in providing notice of a final disciplinary action to the subject of the action and to the Commission; and the publication of such notice.[531]

The Commission is proposing several non-substantive amendments to part 9 that correspond to certain proposed amendments to the Core Principle 2 regulations under part 37.[532] As discussed above, the Commission proposes to eliminate various disciplinary procedures under proposed § 37.206 and the applicable guidance to Core Principle 2 in Appendix B to part 37 to streamline existing Core Principle 2 requirements and provide SEFs with discretion in administering their disciplinary programs.[533] These proposed changes include eliminating requirements concerning disciplinary decisions under § 37.206(d) and eliminating various procedures detailed in guidance to Core Principle 2 concerning settlement offers;[534] sanctions upon persons who impede the progress of disciplinary hearings;[535] the right to appeal adverse actions;[536] and summary fines for violations of rules regarding the timely submission of records.[537] To the extent that the part 9 regulations contain cross-references to these part 37 provisions, the Commission proposes to eliminate those references.[538]

Specifically, the Commission proposes to eliminate those references under § 9.11(b)(2), which govern the content requirements for SEF

[523] The Commission proposes to add the term ''summary fine'' to clarify that summary fines are among the types of disciplinary sanctions that may be issued and would be subject to the requirements of the proposed rule.

[524] The Commission proposes to add this guidance as paragraph (a)(9) to Core Principle 2 in Appendix B. 17 CFR part 37 app. B.

[525] The Commission proposes to renumber paragraph (a)(14) to paragraph (a)(8) to Core Principle 2 in Appendix B. 17 CFR part 37 app. B.

[526] 17 CFR 37.206(f).

[527] The Commission notes, however, that this provision would be evaluated in conjunction proposed § 37.206(c)(1).

[528] The Commission proposes to eliminate paragraph (a)(13) of the guidance to Core Principle 2 in Appendix B. 17 CFR part 37 app. B.

[529] The Commission proposes to renumber § 37.206(g) to § 37.206(d) based on the proposed changes described above.

[530] 17 CFR part 9. For these purposes, the Commission interprets references to ''exchange'' to part 9 to mean DCMs and SEFs.

[531] *Id.*

[532] The Commission also proposes to renumber § 9.1(b)(4) to § 9.1(c) and § 9.1(c) to § 9.1(d).

[533] *See supra* Section VII.E.—§ 37.206—Disciplinary Procedures and Sanctions.

[534] *See supra* note 508 (elimination of paragraph (a)(9)).

[535] *See supra* note 513 (elimination of paragraph (a)(10)(vi)).

[536] *See supra* note 517 (elimination of in paragraph (a)(11)(iv)).

[537] *See supra* note 528 (elimination of paragraph (a)(13)).

[538] The Commission also proposes to renumber the cross-references under § 9.2(k), § 9.12(a)(1), and § 9.24(a)(2) from paragraph (a)(14) to paragraph (a)(8) of the guidance to Core Principle 2 in Appendix B. *See supra* note 525.

disciplinary and access denial notices that must be filed with the person subject to the action. Currently, the notice of such actions must be provided as a copy of a written decision, which accords with § 37.206(d) and guidance to Core Principle 2 in Appendix B relating to the use of written decisions where a disciplinary panel accepts a settlement offer;[539] and paragraph (a)(11)(iv), where an appellate panel responds to appeals of adverse decisions by a disciplinary panel.[540] Alternatively, § 9.11(b)(2) provides that SEFs may file a written notice that includes the items listed under §§ 9.11(b)(3)(i)–(vi).[541] Given the proposed elimination of § 37.206(d) and associated guidance to Core Principle 2, the Commission proposes that the contents of the SEF disciplinary or access denial notice be limited to the information specified under §§ 9.11(b)(3)(i)–(vi).

Under § 9.1(b)(2), § 9.2(k), and § 9.12(a)(3), the Commission also proposes to eliminate references to paragraph (a)(13) of the guidance to Core Principle 2 in Appendix B, which addresses the issuance of summary fines for failing to submit certain records in a timely manner. To replace those references, the Commission proposes to add new regulatory language that accounts for summary fines being permitted under the rules of the SEF for recordkeeping or reporting violations.

Under § 9.2(k) and § 9.12(a)(2), the Commission further proposes to eliminate references to paragraph (a)(10)(vi) of the guidance to Core Principle 2 in Appendix B, which addresses the use of sanctions for persons who impede the progress of disciplinary hearings. To replace those references, the Commission proposes new regulatory language that accounts for SEFs imposing disciplinary action on a person for impeding the progress of a hearing under the rules of the SEF.

VIII. Part 37—Subpart D: Core Principle 3 (Swaps Not Readily Susceptible to Manipulation)

Core Principle 3 specifies that a SEF shall permit trading only in swaps that are not readily susceptible to manipulation.[542]

A. § 37.301—General Requirements

Section 37.301 further implements Core Principle 3 by requiring a SEF, at the time that it submits a new swap contract to the Commission, to demonstrate that the swap is not readily susceptible to manipulation by providing the information required in Appendix C to part 38.[543] Section 37.301 also states that in addition to referring to Appendix C to part 38, a SEF may refer to the guidance to Core Principle 3 in Appendix B.[544] With respect to swaps, this guidance is similar in scope to the guidance to Appendix C to part 38.

Appendix C to part 38 for DCMs, as applied by § 37.301 to SEFs, provides guidance regarding the relevant considerations for evaluating if a new or existing swap contract is readily susceptible to manipulation.[545] The objective of this guidance, which applies the guidance for futures contracts to swaps as applicable, is intended to ensure that a given contract is not readily susceptible to manipulation and will provide a reliable pricing basis, as well as promote cash and swaps price convergence. Among other things, the guidance states that a swap contract submitted under part 40 should conform to prevailing commercial practices, such that the settlement or delivery procedures adopted for a swap contract should reflect the underlying cash market.[546] For cash-settled swap contracts, the guidance explains that the cash settlement index should be based on a reliable price reference series that accurately reflects the underlying market value, is not readily susceptible to manipulation, and is highly regarded by industry/market participants.[547] For physically-settled swap contracts, the guidance explains that the terms and conditions should provide for adequate deliverable supply and be designed to avoid impediments to the delivery of the commodity.[548]

1. Appendix C to Part 37—Demonstration of Compliance That a Swap Contract Is Not Readily Susceptible to Manipulation

The Commission proposes to eliminate the existing cross-reference to Appendix C to part 38 under § 37.301 and establish a separate Appendix C to part 37 to provide specific guidance to SEFs for complying with the requirements of Core Principle 3.[549] In conjunction with the Commission's proposal to create a separate Appendix C to part 37, the Commission also proposes to adopt conforming changes to the guidance to Core Principle 3 in Appendix B.[550]

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[539] 17 CFR part 37 app. B (guidance to Core Principle 2—paragraph (a)(9)(iii)—''Settlement offers'').

[540] 17 CFR part 37 app. B (guidance to Core Principle 2—paragraph (a)(11)(iv)—''Right to appeal'').

[541] Section 9.11(b)(3) requires that the notice of a disciplinary action or access denial action include the following: (i) The name of the person against whom the disciplinary action or access denial action was taken; (ii) a statement of the reasons for the disciplinary action or access denial action, detailing the exchange product which was involved, as applicable, and whether the violation that resulted in the action also resulted in financial harm to any customers together with a listing of any rules which the person who was the subject of the disciplinary action or access denial action was charged with having violated or which otherwise serve as the basis of the exchange action; (iii) a statement of the conclusions and findings made by the exchange with regard to each rule violation charged or, in the event of settlement, a statement specifying those rule violations which the exchange has reason to believe were committed; (iv) the terms of the disciplinary action or access denial action; (v) the date on which the action was taken and the date the exchange intends to make the disciplinary or access denial action effective; and (vi) except as otherwise provided under § 9.1(b), a statement informing the party subject to the disciplinary action or access denial action of the availability of Commission review of the exchange action pursuant to section 8c of the Act and this part. 17 CFR 9.11(b)(3).

[542] The Commission codified Core Principle 3 under § 37.300. 17 CFR 37.300.

[543] Appendix C to part 38—''Demonstration of Compliance That a Contract Is Not Readily Susceptible to Manipulation''—provides guidance regarding (i) the information that a new futures contract submission should include; (ii) estimations of deliverable supplies; (iii) contract terms and conditions that should be specified for physically-delivered contracts; (iv) demonstration that a cash-settled contract is reflective of the underlying cash market and is not readily subject to manipulation or distortion; (v) contract terms and conditions that should be specified for cash-settled contracts; (vi) requirements for options on futures contracts; (vii) the terms and conditions for non-price based futures contracts; and (vii) the terms and conditions for swap contracts. 17 CFR part 38 app. C (''Appendix C to part 38''). The Commission amended and updated this guidance to address swap transactions in 2012 as part of a part 38 rulemaking for designated contract markets. Core Principles and Other Requirements for Designated Contract Markets, 77 FR 36612 (Jun. 19, 2012).

[544] 17 CFR 37.301.

[545] *See generally* Appendix C to part 38.

[546] *See* paragraph (g)(4) of Appendix C to part 38, which references various provisions related to contract terms and conditions requirements for futures contracts.

[547] *See* paragraph (g)(1) of Appendix C to part 38.

[548] Paragraph (g)(4) of Appendix C to part 38, which applies to swaps, refers to paragraph (b)(2), which specifies contract term and condition requirements for futures contracts settled by physical delivery. Paragraph (b)(2) specifies various criteria related to quality standards of the underlying commodity, delivery point/area specifications, and specification of the delivery period. The Commission notes that paragraph (b)(1) generally specifies that the terms and conditions should be designed to avoid any impediments to delivery so as to promote convergence between the price of the futures contract and the cash market value of the commodity at the expiration of the contract. Paragraph (b)(1)(i)(A) specifies that the terms and conditions should result in a deliverable supply that is sufficient to ensure that the contract is not susceptible to price manipulation or distortion.

[549] The Commission also proposes a conforming non-substantive amendment to § 37.301 to update the reference to Appendix C to part 37.

[550] The proposed amendments to Appendix B would eliminate the existing explanatory guidance to Core Principle 3, which the Commission is

Continued

Specifically, proposed Appendix C to part 37 specifies (1) measures that a SEF should take to determine that a cash-settled swap contract is reflective of the underlying cash market, is not readily subject to manipulation or distortion, and is based on a cash price series that is reliable, acceptable, publicly available, and timely; (2) terms and conditions that should be specified for cash-settled swap contracts; (3) terms and conditions that should be specified for physically-settled swap contracts; (4) methodologies that should be utilized in estimating deliverable supplies; (5) terms and conditions that should be specified for options on swap contracts; and (6) guidance for options on physicals contracts.[551]

The Commission believes that the proposed amendments would streamline the guidance to Core Principle 3 in a single appendix that is dedicated to part 37. A separate appendix for SEFs and swaps trading from the guidance provided in Appendix C to part 38, which primarily applies to DCMs and futures trading, reflects good regulatory practice that provides greater clarity and certainty. The proposed Appendix C to part 37 would serve as a streamlined source of guidance for new and existing SEFs when developing new swap products to list for trading and when monitoring their existing swap products.[552] Based on the number of swap contracts that SEFs currently list for trading and will likely submit in the future, the Commission believes that a separate guidance in part 37 is appropriate for SEFs.

The Commission believes that the proposed Appendix C to part 37 also clarifies a SEF's obligations pursuant to Core Principle 3 because the guidance specifically addresses swap contracts and reflects the diverse and non-standardized nature of the swaps market, including swaps traded on SEFs. In particular, the guidance provides SEFs with additional flexibility for certain terms and conditions for non-standardized swap contracts.[553] This flexibility reflects the negotiated nature of non-standardized swap contracts. Similarly, the proposed Appendix C includes specific guidance for options on swap contracts. This guidance is not currently included in Appendix C to part 38, which focuses primarily on futures products. This proposed guidance, however, is consistent with previous Commission expectations with respect to contract design and transparency of option contract terms.

Request for Comment

The Commission requests comments on all aspects of the proposed guidance to Core Principle 3 in Appendix C to part 37. In particular, the Commission requests comment on the following questions:

(68) Is the scope and content of the proposed guidance appropriately tailored for swap contracts? If not, then please explain any changes.

(69) Is the additional flexibility for certain terms and conditions for non-standardized swap contracts appropriate? If not, please explain why.

IX. Part 37—Subpart E: Core Principle 4 (Monitoring of Trading and Trade Processing)

Core Principle 4 requires a SEF to establish and enforce rules or terms and conditions that define, or specifications that detail, the trading procedures to be used in entering and executing orders traded on or through the facilities of the SEF and procedures for trade processing of swaps on or through the facilities of the SEF.[554] Core Principle 4 also requires a SEF to monitor trading in swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures.[555] As part of its monitoring responsibilities, a SEF must establish methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.[556] As described below, §§ 37.401–408 further implement Core Principle 4 by establishing requirements that a SEF monitor trading activity on its facility and beyond its own market in certain circumstances.

The Commission received feedback from SEFs during the part 37 implementation that certain Core Principle 4 requirements are unnecessarily broad and create impracticable monitoring burdens upon SEFs, especially those requiring a SEF to monitor activity beyond its own markets. Based on its experience, the Commission has assessed this feedback and proposes amendments that would establish more practical monitoring requirements. These amendments, which in many cases would narrow a SEF's monitoring obligations to trading activity on its own facility, allow a SEF greater discretion to devise its own monitoring systems and protocols to suit the products that it offers for trading in a manner compliant with Core Principle 4. The Commission also proposes several amendments to the regulations under Core Principle 4 to conform to the proposed Appendix C to part 37, which sets forth guidance for SEFs to mitigate a swap contract's susceptibility to manipulation when developing new products and monitoring existing products.[557]

A. § 37.401—General Requirements

Section 37.401 currently implements Core Principle 4 by setting forth requirements for SEFs to monitor market activity for the purpose of detecting manipulation, price distortions, and disruptions.[558] Existing § 37.401(a) creates an ongoing obligation for a SEF to collect and evaluate data on its market participants' market activity to detect and prevent, among other things, disruptions to the physical-delivery or cash-settlement process where possible.[559] Existing § 37.401(b) requires a SEF to examine general market data in order to detect and prevent manipulative activity that would result in the failure of market prices to reflect the normal forces of supply and demand.[560] Existing § 37.401(c) requires a SEF to demonstrate an effective program for conducting real-time monitoring of trading for the purpose of detecting and resolving abnormalities.[561] Existing

proposing to address in the proposed Appendix C to part 37; and replace the existing cross-reference to sections of Appendix C to part 38 with a general reference to Appendix C to part 37.

[551] ''Options on physicals'' refers to option contracts that do not provide for exercise into an underlying futures contract. Upon exercise, options on physicals can be settled via physical delivery of the underlying commodity or by a cash payment. *See* proposed Appendix C to part 37—paragraph (d)—''Guidance for options on physicals contracts.''

[552] The guidance in Appendix C to this part is based on best practices that were developed over the past three decades by the Commission and other market regulators in their review of product submissions. *See* Core Principles and Other Requirements for Designated Contract Markets, 75 FR 80572, 80582 (proposed Dec. 22, 2010).

[553] The Commission notes that for purposes of establishing the terms and conditions of a swap that it lists for trading, a SEF has discretion to determine whether the swap is standardized or non-standardized in nature. For example, the Commission understands that the swaps subject to the current trade execution requirement are generally standardized swaps. *See supra* notes 33–34 (describing the characteristics of the swaps that have been submitted as ''available to trade'').

[554] 7 U.S.C. 7b–3(f)(4). The Commission codified Core Principle 4 under § 37.400. 17 CFR 37.400.

[555] *Id.*

[556] *Id.*

[557] *See supra* Section VIII.A.1.—Appendix C—Demonstration of Compliance that a Swap Contract is Not Readily Susceptible to Manipulation.

[558] 17 CFR 37.401.

[559] 17 CFR 37.401(a).

[560] 17 CFR 37.401(b).

[561] 17 CFR 37.401(c). The guidance to Core Principle 4 in Appendix B provides that an acceptable program may include some monitoring on a T+1 basis. 17 CFR part 37 app. B (guidance

§ 37.401(d) requires a SEF to demonstrate the ability to comprehensively and accurately reconstruct daily trading activity.[562]

In the preamble to the SEF Core Principles Final Rule, the Commission clarified that § 37.401(a) requires a SEF to monitor its market participants' trading activity and reference data beyond its own market on an ongoing basis in certain instances.[563] The Commission also clarified that § 37.401(b) requires a SEF to monitor and evaluate ''general market data,'' such as the pricing of the underlying commodity or a third-party index or instrument used as a reference price of its swaps.[564] The Commission further clarified that the requirements with respect to ''general market data'' means that a SEF shall monitor and evaluate general market conditions related to its swaps.[565] Despite commenters' concerns about the lack of available information to meet the scope of these requirements, the Commission stated that such monitoring would be necessary to comply with Core Principle 4.[566]

The Commission proposes to amend § 37.401 to establish more practical trade monitoring requirements that are based on information about trading activity that is actually accessible to SEFs and, therefore, are more consistent with current practice in swaps and other derivatives markets. First, the Commission proposes to clarify under proposed § 37.401(a) that a SEF must conduct real-time market monitoring of ''trading activity'' on its own facility to identify (i) disorderly trading; (ii) any market or system anomalies; and (iii) instances or threats of manipulation, price distortion, and disruption.[567] This proposed amendment, among other things, incorporates the existing requirement under § 37.203(e) that requires a SEF to conduct real-time market monitoring.[568] Second, the Commission proposes to specify under proposed § 37.401(b) that a SEF has discretion to determine when to collect and evaluate data on its market participants' trading activity beyond its own market, *i.e.,* as necessary to detect and prevent manipulation, price distortion, and, where possible, disruptions of the physical-delivery or cash-settlement process, rather than on an ''ongoing basis.'' [569] This data would include market participants' trading in (i) the index or instrument used as a reference price; (ii) the underlying commodity for the listed swap; and (iii) any related derivatives markets.

In proposing these changes, the Commission recognizes that Core Principle 4 does not explicitly mandate the existing requirements under §§ 37.401(a)–(b) and has also learned that requiring a SEF to monitor trading activity beyond its own market on an ''ongoing basis'' has imposed impractical burdens, particularly given that many swaps trade both on multiple SEFs and on an OTC basis. For a swap subject to the trade execution requirement, a SEF is currently required to continually monitor trading for the same or similar swap listed on multiple SEFs. For a listed swap not subject to the requirement, the SEF must additionally monitor trading for the same swap or similar swap traded bilaterally away from a SEF.[570] Given that many SEFs list the same or similar swaps that are traded bilaterally—with a large amount of related trading activity occurring away from a SEF's own market—expecting each SEF to maintain an ongoing collection and monitoring program for these elements is impractical and not consistent with current practice in other derivatives markets.[571] SEFs have also demonstrated that this scope and frequency of monitoring is difficult because they currently lack the capability to obtain sufficient trading information. Accordingly, the Commission's proposed changes are intended to align a SEF's obligation to monitor beyond its own market more closely with current practice and obligations in other derivatives markets, where there is not an ongoing monitoring requirement.

Given the practical challenges discussed above in complying with the existing Core Principle 4 monitoring requirements, the Commission believes that a SEF should monitor beyond its own market as necessary to detect and prevent manipulation, price distortion, and, where possible, disruptions of the physical-delivery or cash-settlement processes. Further, such monitoring should be conducted when necessary to detect manipulative activity that would result in the failure of the market price to reflect the normal forces of supply and demand. In such cases, the SEF should be able to determine the instances in which it needs to collect and evaluate data related to that activity. As proposed, the scope of this data corresponds to the existing requirements of § 37.404, which require a SEF to have the ability to obtain this trading information.[572] These amendments would ensure that SEFs can still collect additional information based on a legitimate need, but would also reduce the significant and otherwise duplicative effort among SEFs to collect and evaluate trading and other information on an ongoing basis. The Commission believes that these revised monitoring requirements not only reflect current practice in other markets, but also would continue to protect the integrity of the swaps markets.

The Commission also proposes to amend § 37.401(c) to establish more practical monitoring requirements with respect to a SEF's obligation to monitor general market data. The Commission proposes to clarify that a SEF has the discretion to determine when to monitor and evaluate such data beyond its own market, *i.e.,* as necessary to detect and prevent manipulative activity that would result in the failure of the market

to Core Principle 4—paragraph (a)(1)—''General requirements'').

[562] 17 CFR 37.401(d).

[563] SEF Core Principles Final Rule at 33528, 33530.

[564] *Id.* at 33528.

[565] *Id.*

[566] *Id.* at 33527–28. *See also* ISDA, Path Forward for Centralized Execution of Swaps 6 (2015) (explaining that a SEF should not be required to monitor other markets for manipulation because SEFs do not have, and cannot be expected to obtain, sufficient information about other marketplaces).

[567] The Commission also proposes to renumber subsection (c) to subsection (a) and amend the requirement as described.

[568] The Commission notes that existing § 37.203(e) specifies that a SEF must conduct real-time market monitoring of all trading activity on its system(s) or platform(s) to identify ''disorderly trading and any market or system anomalies.'' As discussed above, the Commission is proposing to eliminate this provision and establish those requirements under proposed § 37.401(a) to streamline the existing regulations. *See supra* note 438.

[569] The Commission proposes to renumber existing subsection (a) to subsection (b) and amend the requirement as described. In the adopting part 37, the Commission also clarified that ''market activity'' in existing § 37.401(a) means the ''trading activity'' of a SEF's market participants. SEF Core Principles Final Rule at 33528. The Commission proposes a non-substantive revision to replace ''market activity'' with ''trading activity.''

[570] For example, the Commission notes that multiple SEFs offer the same fixed-to-floating USD-denominated IRS in standard benchmark tenors that are currently subject to the trade execution requirement.

[571] For example, a SEF offering an FX non-deliverable forward cannot reasonably monitor over a dozen SEFs that offer equivalent non-deliverable forward products and the market participants engaging in hundreds of equivalent bilateral transactions away from a SEF.

[572] The Commission notes that a SEF may collect this data on market participants' trading activity directly from its market participants pursuant to Core Principle 5, which requires a SEF to establish and enforce rules that provide the authority to obtain information from its participants. 17 CFR 37.501. Further, § 37.503 requires a SEF to share information, as required by the Commission or as necessary and appropriate, to fulfill its regulatory responsibilities. 17 CFR 37.503. The Commission notes that it is proposing various amendments to the Core Principle 5 regulations, as discussed below, but is maintaining these requirements. *See infra* Section X.—Part 37—Subpart F: Core Principle 5 (Ability to Obtain Information).

price to reflect the normal forces of supply and demand.[573] The Commission notes that the existing provision does not specify the required scope or frequency of monitoring such data, which is used to evaluate market conditions and includes, among other things, pricing in a third-party index or instrument used as a reference price. As noted further below with respect to monitoring requirements for cash-settled swaps, the Commission has observed that SEFs do not have full access to certain types of data, such as the pricing of proprietary third-party indexes.[574] Therefore, providing a SEF with the discretion to monitor and evaluate general market data on an as-needed basis would align the requirement to SEF capabilities and current market practices.

Finally, the Commission proposes to consolidate the trade reconstruction requirements under existing § 37.401(d) and existing § 37.406 into a new proposed § 37.401(d), which would require a SEF to have the ability to comprehensively and accurately reconstruct all trading activity on its facility for the purpose of detecting instances or threats of manipulation, price distortion, and disruptions.

The Commission also proposes certain non-substantive changes to eliminate demonstration-based requirements under existing §§ 37.401(c)–(d). As noted above, the Commission proposes to set forth an affirmative monitoring requirement, rather than a demonstration requirement. The Commission notes that demonstration of compliance could otherwise be required upon Commission request under § 37.5(b), which requires a SEF to provide a written demonstration that it is in compliance with its obligations under the Act.[575]

The Commission further proposes to eliminate duplicative language and adopt various conforming changes to the guidance to Core Principle 4 in Appendix B.[576]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.401 and the associated guidance to Core Principle 4 in Appendix B. In particular, the Commission requests comment on the following question:

(70) The Commission has observed that SEFs may provide input into market pricing information, such as third-party indexes, that is available to market participants, which includes executed prices, prices from executable or indicative bids and offers, views of trading specialists, or prices from related instruments in other markets. Should the Commission's general market monitoring requirements require SEFs to monitor this type of information—for example, pricing provided by its own trading specialists?

B. § 37.402—Additional Requirements for Physical-Delivery Swaps

For swaps settled by physical delivery, § 37.402 requires that a SEF monitor each swap's terms and conditions as they relate to the underlying commodity market and monitor the ''availability of supply'' of the underlying commodity, as specified by the swap's delivery requirements.[577] The Commission also provided additional guidance to Core Principle 4 in Appendix B to specify that a SEF should monitor the general ''availability'' of the commodity specified by the swap; the commodity's characteristics; the delivery locations; and if available, information related to the size and ownership of deliverable supplies.[578] In the SEF Core Principles Final Rule, the Commission explained that using the phrase ''availability of supply'' and providing the associated guidance was intended to provide a SEF with additional flexibility in response to commenter feedback that the proposed regulation was, among other things, duplicative, unmanageable, and created the risk of conflicting conclusions.[579]

The Commission proposes to clarify a SEF's monitoring obligations with respect to physical-delivery swaps under § 37.402 to be consistent with the guidance in proposed Appendix C to part 37 and ensure that the SEF can comply with Core Principles 3 and 4.[580] Among other things, a swap contract's terms and conditions should assure the availability of adequate deliverable supplies, such that the contract is not readily susceptible to price manipulation.[581] To ensure that a swap contract's terms and conditions remain appropriately designed, § 37.402 would require a SEF to (i) monitor the swap's terms and conditions as they relate to the underlying commodity market by reviewing the convergence between the swap's price and the price of the underlying commodity, and make a good-faith effort to resolve conditions that are interfering with convergence or notify the Commission of such conditions; and (ii) monitor the availability of the supply of the commodity specified by the delivery requirements of the swap, and make a good-faith effort to resolve conditions that threaten the adequacy of supplies or the delivery process or notify the Commission of such conditions.[582]

The Commission notes that Core Principles 3 and 4 place affirmative obligations on SEFs to permit trading only in swaps that are not readily susceptible to manipulation and prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process, respectively. As such, proposed § 37.402 places affirmative obligations on a SEF to make a good-faith effort to resolve conditions that are interfering with convergence or that threaten the adequacy of supplies or the delivery process. The Commission recognizes, however, that a SEF may not always be able to resolve these conditions; therefore, proposed § 37.402 allows the SEF to notify the Commission of such conditions.[583]

The Commission further proposes corresponding amendments to the associated guidance to Core Principle 4

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[573] The Commission proposes to renumber existing subsection (b) to subsection (c) and amend the requirement as described.

[574] *See infra* Section IX.C.—§ 37.403—Additional Requirements for Cash-Settled Swaps (discussing the proposed elimination of the requirement to monitor the pricing of the reference price where a third-party index or instrument is used).

[575] 17 CFR 37.5(b).

[576] The Commission proposes these changes in paragraph (a)(1) to the guidance to Core Principle 4 in Appendix B. 17 CFR part 37 app. B.

[577] 17 CFR 37.402.

[578] 17 CFR part 37 app. B (guidance to Core Principle 4—paragraph (a)(2)—''Physical-delivery swaps'').

[579] *See* SEF Core Principles Final Rule at 33529 (explaining the Commission's revision of the proposed requirement that a SEF monitor whether the supply is ''adequate'' to the ''availability'' of the supply; and replacing detailed proposed requirements to monitor the supply, marketing, and ownership of the commodity to be physically delivered with similar guidance in Appendix B).

[580] Proposed Appendix C to part 37, among other things, provides related guidance on the design of physically-settled swap contracts that should be adopted by a SEF to minimize their susceptibility to manipulation. *See* paragraph (b) of the proposed Appendix C to part 37—''Guidance for physically-settled swaps.'' 17 CFR part 37 app. C.

[581] Proposed Appendix C to part 37 specifies that a SEF should estimate the deliverable supply for which the swap is not readily susceptible to price manipulation. To assure the availability of adequate deliverable supplies, the swap contract terms and conditions, in particular, should be designed based upon an adequate assessment of the potential range of deliverable supplies and should account for variations in the patterns of production, consumption, and supply over a period of at least three years. *See id.* (paragraph (b)(iii)—''Accounting for variations in deliverable supplies'').

[582] The Commission also proposes to (i) amend the guidance to Core Principle 4 in Appendix B to define ''price convergence'' as the process whereby the price of a physically-delivered swap converges to the spot price of the underlying commodity as the swap nears expiration; and (ii) make conforming changes. 17 CFR part 37 app. B.

[583] A SEF should provide electronic notification to the Commission at *submissions@cftc.gov* and DMO at *DMOSubmissions@cftc.gov*.

in Appendix B.[584] The Commission proposes a non-substantive revision to clarify that a SEF should monitor physical-delivery swaps listed on its facility. To conform to Core Principle 4, the Commission also proposes to clarify that a SEF should monitor for conditions that may cause a swap to become susceptible to manipulation, price distortion, or disruptions;[585] such conditions would include those that influence the convergence between the swap's price and the price of the underlying commodity. This proposed language would conform to the proposed guidance for physically-settled swaps in the proposed Appendix C to part 37, which states that a physically-settled swap contract's terms and conditions should be designed to avoid any impediments to the delivery of the commodity so as to promote convergence between the value of the swap contract and the cash market value of the commodity at the expiration of the swap contract.[586]

The Commission also proposes a non-substantive change to eliminate the demonstration-based requirement under § 37.402. As noted above, the Commission proposes to set forth an affirmative monitoring requirement for SEFs, rather than a demonstration requirement. The Commission notes that demonstration of compliance could otherwise be required upon Commission request under § 37.5(b), which requires a SEF to provide a written demonstration that it is in compliance with its obligations under the Act.[587]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.402 and the associated guidance to Core Principle 4 in Appendix B.

C. § 37.403—Additional Requirements for Cash-Settled Swaps

For cash-settled swaps, § 37.403(a) requires that a SEF monitor the pricing of the reference price used to determine cash flows or settlement of a swap.[588] Where the reference price is formulated or computed by the SEF, § 37.403(b) requires a SEF to demonstrate that it monitors the continued appropriateness of its methodology for deriving that price.[589] Where the reference price relies on a third-party index or instrument, § 37.403(c) requires a SEF to demonstrate that it monitors the continued appropriateness of the index or instrument.[590] The Commission provided additional guidance to Core Principle 4 in Appendix B to specify that a SEF should monitor pricing abnormalities in the index or instrument used to calculate the reference price to avoid manipulation, price disruptions, or market distortions.[591] For self-formulated or self-computed reference prices, the SEF should amend the existing methodology or impose new methodologies where such threats exist. For pricing based on a third-party index or instrument, a SEF should conduct due diligence to ensure that the contract is not susceptible to manipulation.[592]

Based on its experience, the Commission acknowledges that the requirement imposed by § 37.403(a) to monitor the methodologies behind third-party indexes or instruments is not realistic due to the proprietary nature of these indexes and instruments. The Commission has observed that many SEFs offer swaps for which pricing is based on benchmark prices or benchmark indices owned or administered by third parties, such as the Intercontinental Exchange, Inc. (''ICE''),[593] IHS Markit Ltd. (''IHS Markit''),[594] and the European Money Markets Institute (''EMMI'').[595] For example, many SEFs offer IRS for trading that rely on LIBOR or EURIBOR as the underlying benchmark, which are based upon submissions from panel banks. The Commission believes that requiring a SEF to monitor the inputs and calculations involved in ICE's or EMMI's methodologies when calculating their respective benchmarks on an ongoing basis is impractical.[596] The Commission understands that as a general matter, certain aspects of these benchmarks remain proprietary in nature. Therefore, the Commission acknowledges that SEFs do not necessarily have full access to the information to monitor trading to detect disruptions or manipulations of indexes or reference rates administered by other industry participants. Further, the Commission notes that these entities are subject to their own monitoring and oversight mechanisms.[597]

Based on these considerations, the Commission proposes to eliminate the requirement under § 37.403(a) that SEFs monitor the ''pricing'' of the reference price used to determine cash flows or settlement.[598] Where the reference price relies on a third-party index or instrument, a SEF would continue to be required under proposed § 37.403(b) (existing § 37.403(c)) to monitor the ''appropriateness'' of the index or instrument; the Commission, however, proposes to amend this requirement to additionally require a SEF to take appropriate action, including selecting an alternate index or instrument for deriving the reference price, where there is a threat of manipulation, price

[584] 17 CFR part 37 app. B (guidance to Core Principle 4—paragraph (a)(2)—''Physical-delivery swaps'').

[585] *Id.*

[586] *See* 17 CFR part 37 app. C (paragraph (b)(iv) of the proposed Appendix C to part 37—''Contract terms and conditions'').

[587] 17 CFR 37.5(b).

[588] 17 CFR 37.403(a).

[589] 17 CFR 37.403(b).

[590] 17 CFR 37.403(c).

[591] 17 CFR part 37 app. B (guidance to Core Principle 4—paragraph (a)(3)—''Cash-settled swaps''). *See* SEF Core Principles Final Rule at 33529 (stating that market participants may have incentives to disrupt or manipulate reference prices for cash-settled swaps and stating that SEFs must monitor the pricing of the reference price in order to comply with Core Principle 4's requirement to prevent manipulation, price distortion, and disruptions of the cash settlement process).

[592] *Id.*

[593] ICE serves as the current administrator for ICE Swap Rate (formerly known as ISDAFix), which serves as a benchmark for swap rates and spreads for IRS. ICE, About ICE Swap Rate, *https://www.theice.com/iba/ice-swap-rate.* ICE also serves as the current administrator for ICE LIBOR (formerly known as BBA LIBOR), which is a widely-adopted benchmark for short-term interest rates that is used to specify the floating rate for fixed-to-floating IRS. ICE, ICE Libor-Overview, *https://www.theice.com/iba/libor.*

[594] IHS Markit owns and operates several tradeable CDS indices that are based on a basket of single-name CDS. IHS Markit, Indices, *https://ihsmarkit.com/products/indices.html.*

[595] EMMI, a non-profit making association whose members are national banking associations in the EU-member states, serves as the current administrator for Euribor and EONIA, which are widely-adopted benchmarks for euro-denominated IRS. EMMI, 2 Benchmarks, *https://www.emmi-benchmarks.eu.*

[596] The Commission notes, however, that ICE and EMMI offer general information on the methodologies for calculating their respective benchmarks. For example, ICE states that it determines the ICE Swap Rate benchmark, which represents the mid-price for the fixed leg of IRS, based on tradeable quotes from regulated, electronic, multilateral trading venues. *See* ICE, Calculation of ICE Swap Rate from Tradeable Quotes, *available at https://www.theice.com/publicdocs/ICE_Swap_Rate_Full_Calculation_Methodology.pdf*; *see also* EMMI, Euribor Code of Conduct, *available at https://www.emmi-benchmarks.eu/assets/files/D2712J-2014-Euribor%20Code%20of%20Conduct%2001Oct2013%20-%20Revised%201%20June%202016-%20final%20new.pdf.*

[597] ICE maintains an oversight committee for LIBOR, which is responsible for reviewing the methodology, scope, and definition of the benchmark (including assessing its underlying market and usage); overseeing any changes to the benchmark; and overseeing and reviewing an associated code of conduct. ICE, Governance & Oversight, *https://www.theice.com/iba/libor#methodology.* EMMI maintains a Steering Committee, which is responsible for similar functions with respect to Euribor. EMMI, Steering Committee, *https://www.emmi-benchmarks.eu/euribor-org/steering-committee.html.*

[598] The Commission notes, however, that a SEF would be required under proposed § 37.401(b) to monitor trading in the index or instrument used as a reference price.

distortion, or market disruption.[599] The Commission believes that sufficient information is generally available to SEFs to comply with this proposed requirement. Based on this proposed requirement, the Commission expects that a SEF would take action with respect to its use of a third-party index or instrument for a listed swap contract that would inhibit the SEF's ability to prevent manipulation pursuant to Core Principles 3 and 4. Where a SEF formulates and computes the reference price, the Commission proposes to amend § 37.403(b) to require a SEF to take appropriate action, including amending the methodology, where there is a threat of manipulation, price distortion, or market disruption.[600] In contrast to the circumstances where a SEF relies on a third-party index or instrument, the SEF could monitor its own methodology for deriving the reference price.

The Commission believes that these proposed amendments would provide greater clarity and establish more practical requirements for SEFs to monitor the reference prices, including the index or instrument used to calculate them, in a manner that is consistent with Core Principle 4. Further, the Commission believes that these proposed amendments are consistent with the proposed guidance in Appendix C to part 37 regarding the design of cash-settled swap contracts. Among other things, that guidance specifies that the SEF should ensure that the reference price used for its contract is not readily susceptible to manipulation by assessing its reliability as an indicator of cash market values in the underlying commercial market.[601]

The Commission also proposes a non-substantive change to eliminate the demonstration-based requirements under § 37.403. As noted above, the Commission proposes to set forth an affirmative monitoring requirement, rather than a demonstration requirement. The Commission notes that demonstration of compliance could otherwise be required upon Commission request under § 37.5(b), which requires a SEF to provide a written demonstration that it is in compliance with its obligations under the Act.[602]

Given the changes to § 37.403 proposed above, the Commission proposes to delete the existing associated guidance in Core Principle 4 in Appendix B.[603]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.403 and the elimination of the associated guidance to Core Principle 4 in Appendix B.

D. § 37.404—Ability To Obtain Information

Section 37.404(a) provides that a SEF must demonstrate that it has access to sufficient information to assess whether trading in swaps listed on its market, in the index or instrument used as a reference price, or in the underlying commodity for its listed swaps is being used to affect prices on its market.[604] Section 37.404(b) requires a SEF to have rules that require its market participants to keep records of their trading, including records of their activity in the index or instrument used as a reference price, the underlying commodity, and related derivatives markets; and make those records available to the SEF, its regulatory service provider if applicable, and the Commission.[605] The Commission specified in the guidance to Core Principle 4 in Appendix B that a SEF may limit the application of these requirements to market participants who conduct ''substantial trading'' on its facility.[606]

The Commission proposes several amendments to the associated guidance to Core Principle 4 in Appendix B. In particular, the Commission proposes to eliminate a SEF's ability to limit the application of proposed § 37.404(a) and proposed § 37.404(b) to only those market participants who conduct ''substantial trading'' on its facility. The Commission notes that it has not provided SEFs with any additional guidance, *e.g.,* volume-based metrics or similar factors, as to what constitutes ''substantial trading'' by a market participant. Eliminating this guidance would not only remove an ambiguity as to whom § 37.404 applies, but also promote a more comprehensive and effective monitoring requirement that would require a SEF to have the ability to obtain information from all of its market participants, thereby better fulfilling the objectives of Core Principle 4.[607] In addition, based on its experience, the Commission believes that market participants are keeping records of their related trading, so eliminating the ''substantial'' requirement should not impose additional burdens. In addition to this amendment, the Commission also proposes several non-substantive amendments to the guidance.[608]

The Commission also proposes a non-substantive change to eliminate the demonstration-based requirement under § 37.404(a).[609] As noted above, the Commission proposes to set forth an affirmative monitoring requirement, rather than a demonstration requirement. The Commission notes that demonstration of compliance could otherwise be required upon Commission request under § 37.5(b), which requires a SEF to provide a written demonstration that it is in compliance with its obligations under the Act.[610]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.404 and the associated guidance to Core Principle 4 in Appendix B.

E. § 37.405—Risk Controls for Trading

Section 37.405 requires that a SEF establish and maintain risk control mechanisms to prevent and reduce the potential risk of market disruptions, including, but not limited to, market restrictions that pause or halt trading in market conditions prescribed by the SEF.[611] The associated guidance to Core Principle 4 in Appendix B, among other things, provides examples of the different types of risk controls that a SEF may adopt based on whether or not they are appropriate to the characteristics of the trading platform or

[599] The Commission proposes to renumber existing subsection (c) to subsection (b) and amend the language as described.

[600] The Commission proposes to renumber existing subsection (b) to subsection (a) and amend the language as described.

[601] *See* 17 CFR part 37 app. C (paragraph (a)(ii) of the proposed Appendix C to part 37—''Reference price susceptibility to manipulation'').

[602] 17 CFR 37.5(b).

[603] The Commission proposes to eliminate paragraph (a)(3).

[604] 17 CFR 37.404(a).

[605] 17 CFR 37.404(b).

[606] 17 CFR part 37 app. B (guidance to Core Principle 4—paragraph (a)(4)—''Ability to obtain information'').

[607] The Commission notes, however, that the scope of this requirement would be based on the proposed definition of ''market participant'' under § 37.2(b), which would limit § 37.404 to persons who access the SEF directly or through a third-party functionality, or otherwise direct an intermediary to trade on their behalf. *See supra* Section IV.B.2.a.—Applicability of § 37.404(b) to Market Participants.

[608] The Commission proposes to streamline and move the guidance that currently specifies that a SEF can adopt information-sharing agreements with other trading venues or a third-party regulatory service provider where position and trading information is not available directly from market participants. The Commission proposes to move this guidance to paragraph (a) of the guidance to Core Principle 5 because the applicable requirements for a SEF to adopt information-sharing practices are addressed under proposed § 37.503, as discussed below.

[609] The Commission also proposes to eliminate similar associated guidance to Core Principle 4 in Appendix B.

[610] 17 CFR 37.5(b).

[611] 17 CFR 37.405.

market offered by the SEF.[612] Among those types of controls, the guidance specifies that a SEF may establish clear error-trade and order cancellation policies.

The Commission proposes two amendments to § 37.405 to align the existing requirement with the proposed amendments to other Core Principle 4 regulations. First, the Commission proposes to clarify that a SEF is required to have risk control mechanisms to prevent and reduce market disruptions, as well as price distortions on their facility. This proposed change is consistent with Core Principle 4, which requires a SEF to monitor trading to prevent price distortions and disruptions to the delivery or cash settlement process.[613] Second, the Commission proposes to limit this requirement to swaps trading activity occurring on a SEF's own facility, which would be consistent with the proposed changes to § 37.401(a).

The Commission also proposes several amendments to the associated guidance to Core Principle 4 in Appendix B. First, the Commission proposes to eliminate the reference to intraday position limit risk controls, which generally do not apply to a SEF because the Commission has yet to establish position limit rules for swaps. Second, the Commission proposes to clarify that a SEF's risk controls should be adapted to the swap contracts that it lists for trading; this amendment does not reflect a substantive change, but rather would be consistent with the proposed guidance in Appendix C to part 37, which provides that a SEF may adapt certain risk controls for swap contracts based on whether they are standardized or non-standardized.[614] Third, the Commission proposes to eliminate the language specifying that a SEF may adopt an error trade policy; the Commission notes that, as described above, proposed § 37.203(e) would require a SEF to adopt an error trade policy for trading on its facility. The Commission also proposes to make several other non-substantive conforming and clarifying amendments to the guidance.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.405 and the associated guidance to Core Principle 4 in Appendix B.

F. § 37.406—Trade Reconstruction

Section 37.406 requires that a SEF have the ability to comprehensively and accurately reconstruct all trading on its facility, and that audit-trail data and reconstructions be made available to the Commission in a form, manner, and time that is acceptable to the Commission.[615]

Given the proposed consolidation with § 37.401(d), as described above, the Commission proposes to eliminate § 37.406.[616] The Commission also notes that the requirement to make information available to the Commission is already addressed under Core Principle 5 regulations, discussed further below.[617]

Request for Comment

The Commission requests comment on all aspects of the proposed elimination of § 37.406.

G. § 37.407—Regulatory Service Provider; § 37.408—Additional Sources for Compliance[618]

The Commission is not proposing any amendments to §§ 37.407–408.

X. Part 37—Subpart F: Core Principle 5 (Ability To Obtain Information)

Core Principle 5 requires a SEF to establish and enforce rules that allow the facility to obtain any ''necessary information'' to perform any of the functions described in CEA section 5h; provide the information to the Commission upon request; and have the capacity to carry out international information-sharing agreements as the Commission may require.[619] The Commission further implemented Core Principle 5 under §§ 37.501–504. Based on the Commission's understanding of current SEF operational practices, the Commission is proposing several amendments, including non-substantive changes, to these implementing regulations, as described below.

A. § 37.501—Establish and Enforce Rules

Section 37.501 specifies that a SEF's rules must allow it to obtain sufficient information to fulfill its functions and obligations under part 37, including the capacity to carry out such international information-sharing agreements as the Commission may require.[620] The Commission proposes a non-substantive amendment to eliminate the duplicative language under § 37.501 regarding a SEF's capacity to carry out international information-sharing agreements. The Commission notes that this requirement is already established under Core Principle 5.

B. § 37.502—Provide Information to the Commission

Existing § 37.502 requires a SEF to adopt rules that allow it to collect information on a routine basis, allow for the collection of non-routine data from its market participants, and allow for its examination of books and records kept by its market participants.[621]

The Commission proposes to eliminate existing § 37.502.[622] The Commission notes that the language of this requirement is duplicative of the general requirement that SEFs have the ability to obtain information from their market participants, as already set forth in Core Principle 5 and § 37.501. Eliminating the requirement that a SEF must have rules to allow it to examine books and records is also consistent with the Commission's proposed amendment to § 37.203(b), which would replace a similar existing requirement with a more general rule that would allow a SEF to tailor its rules for collecting books and records from market participants.[623]

Request for Comment

The Commission requests comment on all aspects of the proposed elimination of existing § 37.502.

C. § 37.503—Information-Sharing[624]

Existing § 37.504 requires a SEF to share information with other regulatory organizations, data repositories, and third-party data reporting services as required by the Commission or as otherwise necessary and appropriate to fulfill its self-regulatory and reporting

[612] 17 CFR part 37 app. B (guidance to Core Principle 4—paragraph (a)(5)—''Risk controls for trading'').

[613] 7 U.S.C. 7b–3(f)(4)(b).

[614] *See supra* Section VIII.A.1.—Appendix C—Demonstration of Compliance that a Swap Contract is Not Readily Susceptible to Manipulation.

[615] 17 CFR 37.406.

[616] As discussed above, proposed § 37.401(d) would require a SEF to have the ability to comprehensively and accurately reconstruct all trading activity on its facility for the purpose of detecting instances or threats of manipulation, price distortion, and disruptions.

[617] *See infra* Section X.B.—§ 37.502—Provide Information to the Commission.

[618] The Commission proposes to renumber §§ 37.407–408 to §§ 37.406–407, given the proposed elimination of existing § 37.406.

[619] 7 U.S.C. 7b–3(f)(5). The Commission codified Core Principle 5 under § 37.500. 17 CFR 37.500.

[620] 17 CFR 37.501.

[621] 17 CFR 37.502.

[622] The Commission proposes to renumber existing § 37.503 to § 37.502 and retitle the provision to ''Provide information to the Commission'' from ''Collection of information'' based on the proposed changes described below.

[623] *See supra* Section VII.B.2.—§ 37.203(b)—Authority to Collect Information (proposing an amendment to require that a SEF have the authority to collect information required to be kept by persons subject to the SEF's recordkeeping rules).

[624] The Commission proposes to renumber existing § 37.504 to § 37.503 and retitle the provision to ''Information-sharing'' from ''Provide information to the Commission'' based on the proposed changes described below.

responsibilities.[625] Section 37.504 also states that appropriate information-sharing agreements can be established with the specified entities or the Commission can act in conjunction with the SEF to carry out such information sharing.

The Commission proposes to establish a more straightforward and streamlined information-sharing requirement by eliminating the specifically enumerated list of entities with which a SEF must share information and adopting conforming amendments. Instead, a SEF would be required to generally share information, as required by the Commission, or as appropriate to fulfill its self-regulatory and reporting responsibilities. Rather than limiting the types of entities that a SEF may share information with, however, a SEF would have the flexibility to share information with third parties that it may utilize to carry out those responsibilities, including affiliated entities. This broader and more adaptive approach to information-sharing practices would better accommodate, for example, a SEF's ability to use different types of regulatory service providers pursuant to the proposed amendments under § 37.204. The Commission emphasizes, however, that SEFs would not be required to share information with competitor entities. In relevant situations where information or data may need to be shared across different markets to help identify manipulation, price distortions or other disruptions, for example, the Commission anticipates that it will continue working in conjunction with SEFs to help establish such information-sharing arrangements.

The Commission also proposes a non-substantive revision by moving certain provisions from the existing guidance to Core Principle 4 to the guidance to Core Principle 5 in Appendix B.[626] This proposed guidance would specify that if position and trading information is available through information-sharing agreements with other trading venues or a third-party regulatory service provider, then the SEF should cooperate, to the extent practicable, in such information-sharing agreements.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.503 and the associated guidance to Core Principle 5 in Appendix B.

D. § 37.504—Prohibited Use of Data Collected for Regulatory Purposes[627]

Section 37.7—''Prohibited use of data collected for regulatory purposes''—prohibits a SEF from using, for business or marketing purposes, any proprietary data or personal information it collects or receives, from or on behalf of any person, for the purpose of fulfilling its regulatory obligations, unless the person clearly consents to the SEF's use of such data or information in such manner.[628] The purpose of this provision is to protect customer privacy and prevent a SEF from using information, obtained for compliance purposes, to otherwise advance its commercial interests.[629] Section 37.7 also provides that a SEF, where necessary for regulatory purposes, may share such data or information with one or more SEFs or DCMs registered with the Commission.[630]

The Commission proposes to create a more cohesive rule with respect to information-sharing practices under Core Principle 5 by moving existing § 37.7 to a new proposed § 37.504 and amending the current language of the requirement. Consistent with the existing prohibition, the Commission proposes that a SEF that shares such proprietary data or personal information with a third party shall ensure that that third party does not use the data or information for business or marketing purposes, unless the person from whom such data or information was obtained clearly consents to its use for business or marketing purposes (including consent to use by those third parties with whom the SEF may share such information). This proposed amendment corresponds to the Commission's other proposed amendments that would expand the scope of entities with whom a SEF may share information, including § 37.503, which would provide a SEF with greater flexibility in selecting a third-party provider to fulfill its self-regulatory and reporting responsibilities; and § 37.204, which would allow the SEF to utilize a broader scope of third-party entities, including non-registered affiliates to provide regulatory services, subject to Commission approval.[631]

In the course of using such a provider, a SEF may need to share proprietary data or personal information with that third party. To the extent that § 37.504 would continue to limit SEFs from using this type of information for non-regulatory purposes, the Commission believes that the objective of protecting customer privacy and preventing the use of data for commercial purposes should also equally apply to third parties that obtain access to such data or information from a SEF for regulatory purposes. The Commission believes that the proposed amendments achieve this objective.

Request for Comment

The Commission requests comments on all aspects of proposed § 37.504.

XI. Part 37—Subpart G: Core Principle 6 (Position Limits or Accountability)

Core Principle 6 requires a SEF that is a trading facility to adopt, as is necessary and appropriate, position limits or position accountability levels for each swap contract to reduce the potential threat of market manipulation or congestion.[632] For contracts that are subject to a federal position limit under CEA section 4a(a), the SEF must set its position limits at a level that is no higher than the limit established by the Commission; and monitor positions established on or through the SEF for compliance with the Commission's limit and the limit, if any, set by the SEF.[633]

A. § 37.601—Additional Sources for Compliance; Guidance to Core Principle 6 in Appendix B

Section 37.601 further implements Core Principle 6 and specifies that until such time that compliance is required under part 151 of the Commission's regulations, a SEF may refer to the associated guidance and/or acceptable practices set forth in Appendix B to part 37.[634] The guidance to Core Principle 6 in Appendix B provides a SEF with reasonable discretion to comply with Core Principle 6 and sets forth how a SEF may demonstrate compliance for trading that occurs on its own market.[635] The Commission notes that it has proposed new language for § 37.601 and new corresponding guidance to Core Principle 6 in Appendix B in a re-proposal of a position limits

[625] 17 CFR 37.504.

[626] The Commission proposes to move this guidance from paragraph (a)(4) to Core Principle 4 to paragraph (a) to Core Principle 5 in Appendix B.

[627] The Commission proposes to retitle § 37.504 to ''Prohibited use of data collected for regulatory purposes'' from ''Information-sharing agreements'' based on the proposed changes described below.

[628] 17 CFR 37.7.

[629] SEF Core Principles Final Rule at 33492.

[630] 17 CFR 37.7.

[631] In this regard, the Commission notes that under its proposed amendments to § 37.204, a SEF would be permitted to contract with any entity for the provision of services to assist in complying with the Act and Commission regulations, subject to Commission approval. *See supra* Section VII.C.1.—§ 37.204(a)—Use of Regulatory Service Provider Permitted.

[632] 7 U.S.C. 7b–3(f)(6). The Commission codified Core Principle 6 under § 37.600. 17 CFR 37.600.

[633] *Id.*

[634] 17 CFR 37.601.

[635] 17 CFR part 37 app. B (guidance to Core Principle 6—paragraph (a)—''Guidance'').

rulemaking, pending further Commission action.[636]

The Commission proposes to eliminate the language of § 37.601 and the existing corresponding guidance to Core Principle 6, based on its intent to address this issue in a separate rulemaking. Until that time, the Commission clarifies that SEFs have reasonable discretion to determine how to comply with Core Principle 6 pursuant to Core Principle 1.[637] This approach is consistent with the existing approach under § 37.601 and the associated guidance to Core Principle 6.

Request for Comment

The Commission requests comment on all aspects of the proposed elimination of § 37.601 and the associated guidance to Core Principle 6 in Appendix B.

XII. Part 37—Subpart H: Core Principle 7 (Financial Integrity of Transactions); § 39.12—Participant and Product Eligibility

Core Principle 7 requires a SEF to establish and enforce rules and procedures for ensuring the financial integrity of swaps entered on or through the facilities of the SEF, including the clearance and settlement of the swaps pursuant to CEA section 2(h)(1).[638] As described further below, §§ 37.700–703 implement Core Principle 7 by establishing requirements for SEFs to facilitate the processing and routing of swap transactions to a DCO for clearing. Section 39.12(b)(7), which implements Core Principle C for DCOs, sets forth corresponding requirements for registered DCOs that specify the time frame for acceptance or rejection of transactions submitted to the registered DCO from DCMs and SEFs.[639]

As described further below, the Commission is proposing several amendments to the implementing regulations and § 39.12(b)(7), including amendments to certain ''straight-through processing'' obligations that apply to SEFs, DCMs, and DCOs.[640]

A. § 37.701—Required Clearing

Section 37.701 requires that transactions executed on or through a SEF that are subject to the clearing requirement, or are voluntarily cleared by the counterparties, must be cleared through a registered DCO or an exempt DCO.[641]

The Commission proposes to amend § 37.701 to require a SEF to establish a direct and independent clearing agreement with each registered DCO or exempt DCO to which the SEF submits swap transactions for clearing.[642] During the part 37 implementation, the Commission observed that some SEFs would route swap transactions to certain exempt DCOs for clearing without having established a direct clearing agreement with those DCOs. Rather than enter a direct agreement with the exempt DCO, the SEF would establish the capacity to route transactions through the use of a third-party service provider. Such routing arrangements occurred pursuant to a services agreement between the SEF and the provider; the provider, in turn, maintained a separate agreement with the exempt DCO.

A SEF's use of a third-party service provider to route swap transactions to a DCO for clearing may generally be appropriate, but the Commission believes that the indirect routing of transactions for clearing must occur pursuant to a direct and independent clearing services agreement between the SEF and each DCO utilized by the SEF. The Commission believes that maintaining a direct agreement between a SEF and DCO, notwithstanding the use of a third-party provider, is consistent with § 37.702(b), which requires each SEF to coordinate with a DCO to develop rules and procedures to facilitate prompt and efficient processing of transactions in accordance with the DCO's obligations under § 39.12(b)(7)(i)(A).[643] Such an agreement would provide greater certainty to market participants that the SEF has the appropriate processes to facilitate swaps clearing. The Commission also believes that the terms established in a direct clearing agreement between the SEF and DCO would help the SEF and DCO resolve any problems that arise at the DCO that could diminish the SEF's ability to submit transactions for clearing.

The Commission also proposes a non-substantive amendment to § 37.701 to eliminate ''or through'' from the language of the existing requirement. The Commission notes that this proposed amendment is a conforming change to other part 37 regulations and does not affect the scope of transactions that are required to be cleared pursuant to the clearing requirement in CEA section 2(h)(1)(A).[644]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.701.

B. § 37.702—General Financial Integrity

1. § 37.702(a)

Section 37.702(a) requires a SEF to establish minimum financial standards for its members, which include at a minimum a requirement that each member qualifies as an ECP pursuant to CEA section 1a(18).[645] The Commission proposes a non-substantive amendment to § 37.702(a) to replace the term ''member'' with ''market participant.'' The Commission notes that its proposed definition of ''market participant'' under § 37.2(b) would capture the universe of persons and entities that participate on SEFs and would be subject to minimum financial requirements, including a SEF's members.[646]

2. § 37.702(b) and § 39.12(b)(7)—Time Frame for Clearing

Existing § 37.702(b) and § 39.12(b)(7) require SEFs and registered DCOs, respectively, to coordinate with one another to facilitate the clearing of swap transactions executed on or through the SEF.[647] The two provisions are intended to ensure that SEFs and registered DCOs coordinate and work together to

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[636] Position Limits for Derivatives, 81 FR 96704 (proposed Dec. 30, 2016).

[637] 7 U.S.C. 7b–3(f)(1).

[638] The Commission codified Core Principle 7 under § 37.700. 17 CFR 37.700.

[639] 17 CFR 39.12(b)(7). Core Principle C for DCOs, among other things, requires that each DCO establish appropriate standards for determining the eligibility of agreements, contracts, or transactions submitted to the DCO for clearing. 7 U.S.C. 7a–1(c)(2)(C)(i)(II). Section 39.12(b) implements Core Principle C for DCOs by setting forth product eligibility requirements. 17 CFR 39.12(b).

[640] The Commission notes that § 39.12(b)(7) also applies to the acceptance or rejection for clearing by a DCO of (i) futures and options on futures transactions and (ii) swaps submitted by a DCM. Accordingly, the Commission's proposed amendments to § 39.12(b)(7) would also apply to those transactions. *See infra* Section XII.B.2.b.(2)—§ 39.12(b)(7)(ii)—AQATP Standard for Registered DCOs.

[641] 17 CFR 37.701.

[642] The Commission proposes to renumber the existing requirement under § 37.701 as subsection (a) based on a new requirement proposed under subsection (b), described below.

[643] Section 39.12(b)(7)(i)(A) requires each DCO to coordinate with DCMs and SEFs to develop rules and procedures to facilitate prompt, efficient, and accurate processing of transactions to the DCO for clearing. 17 CFR 39.12(b)(7)(i)(A). As discussed below, § 39.12(b)(7)(i)(A), as amended, would apply to both the processing and routing of transactions to the DCO for clearing. *See infra* Section XII.B.2.b.(1)—§ 37.702(b)(1) and § 39.12(b)(7)(i)(A)—''Prompt, Efficient, and Accurate'' Standard.

[644] The Commission notes that Core Principle 7 refers to swaps ''entered on or through'' the SEF, but notes that the existing requirement under § 37.701 specifically applies to ''executed'' transactions, which are submitted for clearing.

[645] 17 CFR 37.702(a).

[646] *See supra* Section IV.B.2.—§ 37.2(b)—Definition of ''Market Participant.'' The Commission notes that CEA section 2(e) limits swaps trading to ECPs, as defined by section 1a(18) of the Act. 7 U.S.C. 2(e).

[647] The Commission notes that part 39 only applies to registered DCOs and does not apply to exempt DCOs. Accordingly, the Commission notes that § 37.702(b) only refers to registered DCOs.

facilitate the ''straight-through processing'' of transactions from execution through clearing,[648] which the Divisions have described as the ''near[-]instantaneous acceptance or rejection of each trade. . . .'' [649] In order for a DCO to clear a SEF swap transaction, existing § 37.702(b)(1) requires a SEF to ensure that it has the capacity to route transactions to the DCO in a manner acceptable to the registered DCO for purposes of clearing.[650] Existing § 37.702(b)(2) requires a SEF to coordinate with each registered DCO to which it submits transactions for clearing to develop rules and procedures to facilitate ''prompt and efficient'' transaction processing in accordance with the requirements of § 39.12(b)(7).[651] Section 39.12(b)(7)(i)(A) requires each registered DCO to coordinate with a relevant SEF or DCM to develop rules and procedures to facilitate ''prompt, efficient, and *accurate*'' processing of all transactions, including swaps submitted to the registered DCO for clearing by the SEF or DCM (emphasis added).[652]

Sections 39.12(b)(7)(ii)–(iii) each further require a registered DCO to establish standards to accept or reject transactions for clearing as quickly as would be technologically practicable as if fully automated systems were used (the ''AQATP'' standard).[653] Section 39.12(b)(7)(ii) applies this standard to registered DCOs for transactions, including swaps, that are ''executed competitively on or subject to the rules'' of a SEF or DCM and requires the registered DCO to accept or reject a transaction for clearing pursuant to the AQATP standard ''after execution'' of the transaction.[654] For swaps ''not executed on or subject to the rules'' of a SEF or DCM or ''executed non-competitively on or subject to the rules'' of a SEF or DCM, § 39.12(b)(7)(iii) requires a registered DCO to accept or reject a swap for clearing pursuant to the AQATP standard ''after submission'' of the swap to the DCO.[655] In adopting the AQATP standard, the Commission noted that it intended for the requirement to track the evolving industry standard, based on technological developments.[656]

The Divisions subsequently issued the 2013 Staff STP Guidance to further clarify the application of ''straight-through processing'' obligations for swaps that apply to SEFs, DCMs, and DCOs under § 37.702(b), § 38.601(b),[657] and § 39.12(b)(7), respectively.[658] The Divisions stated that the standard for straight-through processing, *i.e.,* the ''near instantaneous acceptance or rejection'' of a transaction by a DCO, is critical to providing certainty of execution and clearing, which in turn would reduce costs and reduce risk.[659] To achieve that standard, the guidance expressed the view that SEFs, DCMs, and registered DCOs must facilitate swap transaction processing through several requirements. With respect to SEFs, the guidance expressed the view that a SEF must ensure that a clearing FCM has been identified in advance for each party on an order-by-order basis; and facilitate the mandatory pre-execution screening of orders by each clearing FCM for compliance with risk-based limits, *i.e.,* ''pre-execution credit screening,'' in accordance with a clearing FCM's obligations under § 1.73.[660] The guidance also expressed the view that a DCO must meet a specific time frame, *i.e.,* ten seconds, to satisfy its obligation under the AQATP standard.[661]

a. ''Prompt and Efficient'' Standard and AQATP Standard

Based on data received by DCR, the 2013 Staff STP Guidance expressed the view that compliance with the AQATP standard under § 39.12(b)(7)(ii) means that a registered DCO must accept or reject such trades for clearing within ten seconds after submission to the DCO.[662] Given that existing § 37.702(b)(2) and § 38.601(b) require SEFs and DCMs, respectively, to coordinate with DCOs in processing transactions for clearing, the 2013 Staff STP Guidance accordingly expressed the view that a SEF or DCM must route swaps to a DCO in compliance with the AQATP standard.[663]

The 2013 Staff STP Guidance also expressed the view that the AQATP standard applies to swap transactions that are routed to a DCO through a SEF's or DCM's use of a post-execution, third-party manual affirmation hub (''affirmation hub'').[664] The Divisions further explained in a follow-up letter to the 2013 Staff STP Guidance (the ''2015 Supplementary Staff Letter'') that a SEF or DCM may send executed trade terms to such a hub to be manually affirmed by the counterparties prior to routing the transaction to the DCO for clearing.[665] According to market participants, this process may take minutes or hours, or occasionally may occur overnight.[666] The Divisions acknowledged that such affirmation hubs can promote prompt and efficient processing by helping counterparties identify and correct potential errors in a transaction's terms prior to routing to a DCO for clearing.[667] The Divisions also stated their belief, however, that the Commission intended the AQATP standard to account for the need to

[648] Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management, 77 FR 21278, 21283 (Apr. 9, 2012) (''Timing of Acceptance for Clearing Final Rule'').

[649] 2013 Staff STP Guidance at 2. *See also infra* notes 658–659 and accompanying discussion. The Commission has previously stated that the ''acceptance or rejection for clearing in close to real time is crucial for both effective risk management and for the efficient operation of trading venues.'' Timing of Acceptance for Clearing Final Rule at 21285. The Commission notes that § 39.12(b)(7) applies to a DCO with respect to (i) futures and options on futures transactions and (ii) swaps submitted by a DCM for clearing. To the extent that the Commission is addressing the proposed amendments to § 39.12(b)(7), as discussed further below, in conjunction with proposed amendments to § 37.702(b)(2), the discussion focuses on swaps routed by a SEF to a DCO for clearing. *See also infra* note 673 (noting that at this time the Commission is not proposing corresponding amendments to § 38.601(b), which establishes analogous processing and routing requirements for DCMs). As discussed below, however, the proposed amendments to § 39.12(b)(7) would also apply to those transactions, including swaps, futures, and options on futures, submitted by a DCM to a DCO for clearing. *See infra* Section XII.B.2.b.(2)—§ 39.12(b)(7)(ii)—AQATP Standard for Registered DCOs.

[650] 17 CFR 37.702(b)(1).

[651] 17 CFR 37.702(b)(2).

[652] 17 CFR 39.12(b)(7)(i)(A). The Commission notes that ''transactions'' refers to swaps submitted by a SEF or DCM, as well as futures and options on futures submitted by a DCM.

[653] 17 CFR 39.12(b)(7).

[654] 17 CFR 39.12(b)(7)(ii).

[655] 17 CFR 39.12(b)(7)(iii).

[656] Timing of Acceptance for Clearing Final Rule at 21285–86.

[657] Section 38.601(b) applies to DCMs and establishes processing and routing requirements that are analogous to § 37.702(b) for SEFs. 17 CFR 38.601.

[658] 2013 Staff STP Guidance at 2. The 2013 Staff STP Guidance also specified straight-through processing requirements for FCMs under § 1.74. *Id.* at 2–3. *See infra* note 660.

[659] 2013 Staff STP Guidance at 2.

[660] 2013 Staff STP Guidance at 3. Section 1.74 applies similar straight-through processing requirements to FCMs, including the requirement that a FCM to coordinate with any DCO to which it is a clearing member to establish systems that enable the FCM, or the DCO acting on its behalf, to accept or reject each trade submitted to the DCO for clearing as quickly as would be technologically practicable if fully automated systems were used. 17 CFR 1.74.

[661] 2013 Staff STP Guidance at 5.

[662] *Id.*

[663] *Id.* at 4.

[664] *Id.*

[665] Straight Through Processing and Affirmation of SEF Cleared Swaps, CFTC Letter No. 15–67 (Dec. 21, 2015) (''2015 Supplementary Staff Letter'').

[666] *Id.* at 2.

[667] The Divisions noted that if an erroneous swap is cleared immediately after execution, the counterparties would have to address the errors after clearing, which may be difficult and costly. Additionally, counterparties may have to bear significant margin costs until an error is corrected because the swap may have been cleared at the wrong DCO; the swap terms may contain the wrong counterparty; or the swap may contain incorrect economic terms. *Id.*

refine and reduce errors to facilitate prompt and efficient processing.[668]

The 2015 Supplementary Staff Letter expressed the view that the AQATP standard for transactions routed to an affirmation hub would be satisfied if the transactions were routed to and received by the relevant DCO no more than ten minutes after execution.[669] In establishing this standard, the Divisions noted the interaction between a DCO's requirements under § 39.12(b)(7) with a SEF's or a DCM's requirements under § 37.702(b) and § 38.601(b), respectively.[670] Accordingly, based on the interaction between these respective requirements, the staff letter expressed the view that a SEF or DCM is also obligated under the AQATP standard—at least to the extent that the SEF uses a third-party affirmation hub acting as its agent—to ensure that the DCO receives the transaction no later than ten minutes after execution.[671] The Divisions stated, however, that they would continue to review this standard and take further action as necessary, based in part on industry developments.[672]

b. Proposed Approach to Straight-Through Processing

The Commission notes that the Divisions provided views regarding several aspects of straight-through processing in the 2013 Staff STP Guidance and the 2015 Supplementary Staff Letter. The Commission also understands that certain aspects of the guidance and staff letter may be unclear when read in conjunction with existing regulations. Therefore, the Commission seeks to provide clarity under the proposed regulatory framework with respect to the straight-through processing requirements for SEFs and DCOs through the proposed clarifications and amendments described below.[673]

(1) § 37.702(b)(1) and § 39.12(b)(7)(i)(A)—''Prompt, Efficient, and Accurate'' Standard

The Commission proposes several amendments to streamline and align the straight-through processing requirements between SEFs and DCOs.[674] First, the Commission proposes to eliminate the duplicative requirement under existing § 37.702(b)(1) that requires SEFs to have the capacity to route transactions to the DCO for purposes of clearing. Accordingly, the Commission proposes to renumber existing § 37.702(b)(2) to a new proposed § 37.702(b)(1) and revise the existing ''prompt and efficient'' standard for SEFs to ''prompt, efficient, and *accurate*'' to conform to the requirement for DCOs (emphasis added). The Commission notes that this proposed amendment would establish the same requirement for both SEFs and DCOs, respectively, to coordinate with one another to facilitate the processing of swaps for clearing. To clarify the functions that are subject to straight-through processing requirements, the Commission also proposes to specify under proposed § 37.702(b)(1) that this standard applies to the ''routing'' of swaps by a SEF to a DCO for clearing.[675] Further, the Commission proposes a non-substantive amendment to specify that a SEF's obligation to coordinate with DCOs should be in accordance with the DCOs' obligations under § 39.12(b)(7)(i)(A).[676]

The Commission also notes that some uncertainty exists about the interaction between the ''prompt, efficient, and accurate'' standard[677] and the AQATP standard for registered DCOs, based in part on the 2013 Staff STP Guidance and 2015 Supplementary Staff Letter. Accordingly, the Commission proposes that the ''prompt, efficient, and accurate'' standard applies to (i) each SEF, under proposed § 37.702(b)(1), with respect to the processing and routing of transactions to a DCO; and (ii) each registered DCO, under § 39.12(b)(7)(i)(A), with respect to any coordination needed to assist a SEF with implementing any procedures or systems to facilitate the processing and routing of swaps to the DCO. For the avoidance of doubt, the Commission proposes that the AQATP standard does not apply to the processing and routing of transactions. As discussed further below, the Commission proposes that the AQATP standard set forth under §§ 39.12(b)(7)(ii)–(iii) specifically applies to a registered DCO's acceptance or rejection of a transaction from a SEF or DCM, *i.e.,* when the DCO receives the transaction.[678] The Commission believes that this proposed approach establishes a requirement for a SEF that addresses its functions—to process and route swaps to the DCO—that is appropriately distinct from a DCO's functions—to accept or reject a swap from clearing upon submission of the swap to the DCO, among other things. For further clarity, the Commission specifies that the SEF's requirement to process and route swaps in a prompt, efficient, and accurate manner also includes the SEF's transmission and delivery of the swap to the DCO; accordingly, the ''submission'' of a swap by the SEF to the DCO is deemed to have occurred upon the DCO's receipt of the swap.

In particular, the Commission proposes that the ''prompt, efficient, and accurate'' standard also applies to the processing and routing of swaps from a SEF to a DCO via affirmation hubs.[679] The Commission acknowledges

[668] *Id.* at 3. The Commission previously stated that the use of an affirmation hub for routing a swap to a DCO for clearing would be permissible, provided that such routing complies with § 37.702(b) and the trade is processed in accordance with § 39.12, among other related Commission requirements. SEF Core Principles Final Rule at 33535.

[669] 2015 Supplementary Staff Letter at 3.

[670] *Id.* at 1–2.

[671] *Id.* at 3.

[672] *Id.* The Commission also previously stated that it would monitor the implementation of the AQATP standard and propose amendments in the future. Timing of Acceptance for Clearing Final Rule at 21286.

[673] Notwithstanding the fact that § 39.12(b)(7), the 2013 Staff STP Guidance, and the 2015 Supplementary Letter also apply to DCMs as described above, the scope of this proposed rule does not include a similar proposed amendment to § 38.601(b) for DCMs that submit (i) futures and options on futures; and (ii) swaps to a DCO for clearing. The Commission may propose a conforming amendment in a future proposed rulemaking that applies to DCMs. As discussed herein, however, a DCO's obligations under the proposed amendments to § 39.12(b)(7) would apply equally to futures and options on futures and swaps executed on a SEF or DCM, or executed pursuant to the rules of a DCM. *See supra* note 640.

[674] To the extent that the Commission is addressing the proposed amendments to § 39.12(b)(7)(i)(A) in conjunction with the proposed amendments to § 37.702(b)(1), the discussion focuses on swaps routed by a SEF to a DCO for clearing. *See also supra* note 673 (noting that the Commission is not proposing corresponding amendments to § 38.601(b), which establishes analogous processing and routing requirements for DCMs, at this time). The proposed amendments to § 39.12(b)(7)(i)(A), however, would also apply to those transactions, including swaps, futures, and options on futures submitted by a DCM to a DCO for clearing.

[675] The Commission acknowledges that the term ''processing'' in the existing requirement may encompass the routing of swaps from a SEF to a DCO, but proposes to amend the language to include ''routing'' for greater clarity and the avoidance of doubt.

[676] The current language under § 37.702(b)(2) requires SEFs to work with each DCO in accordance with the requirements of § 39.12(b)(7). The Commission's proposal would amend the requirement to specify § 39.12(b)(7)(i)(A), which imposes a corresponding obligation on DCOs to work with SEFs to develop rules to facilitate the ''prompt, efficient, and accurate processing'' of transactions.

[677] As noted above, the Commission is proposing to amend the existing standard for SEFs under § 37.702(b)(2) (renumbered as § 37.702(b)(1)) to ''prompt, efficient, and accurate.''

[678] The Commission notes that it is proposing amendments to streamline § 39.12(b)(7)(ii)–(iii), as discussed below. *See infra* Section XII.B.2.b.(2)—§ 39.12(b)(7)(ii)—AQATP Standard for Registered DCOs.

[679] The Commission notes that the 2015 Supplementary Staff Letter expresses the view that the AQATP standard applies to a SEF's use of affirmation hubs to process and route trades to a DCO. 2015 Supplementary Staff Letter at 3. As discussed further below, however, the Commission proposes that the AQATP standard applies to a

Continued

the beneficial role of these mechanisms and intends to facilitate their use to reduce error rates and related costs prior to routing a swap to the DCO. Instead of the ten-minute time frame set forth in the 2015 Supplementary Staff Letter, however, the Commission proposes that the ''prompt, efficient, and accurate'' standard would allow swaps subject to affirmation via third-party hubs to be processed and routed to the DCO in a manner that accounts for existing market practices and technology, as well as market conditions at the time of execution.

Based on the Divisions' experience with the ten-minute time frame, the Commission believes that a qualitative interpretation of ''prompt, efficient, and accurate'' is more appropriate than imposing a specific time standard upon SEFs for processing and routing transactions to the DCO. The Commission has observed that many SEFs, particularly those that offer voice-based or voice-assisted trading systems or platforms, have not been able to meet the time frame when using manual affirmation hubs. Further, the Commission believes that maintaining a specific time standard would be inconsistent with the proposed expansion of the trade execution requirement and the availability of flexible execution methods under the proposed framework. In particular, the expansion of the trade execution requirement will lead to the trading of a broader array of swaps on SEFs, many of which are likely more complex in nature and require more time for affirmation to occur. The inability to comply with a specific time frame could hinder the anticipated growth of trading in additional products on SEFs and impede the ability to utilize flexible means of execution. Further, a specific time frame may also limit the use—and therefore the benefits—of affirmation hubs. Therefore, the Commission believes that a rigid time frame for processing and routing trades from a SEF to a DCO is inappropriate under the proposed regulatory framework.

The ''prompt, efficient, and accurate'' standard may result in varying lengths of time for transactions to be processed and routed to a DCO, including some longer instances, *e.g.,* a time period that exceeds ten minutes. The Commission, however, expects that market and technological developments will enable processing and routing through affirmation hubs to occur in increasingly shorter time intervals. Further, the Commission notes that under the qualitative standard, transactions that can be reasonably affirmed on a fully automatic basis after execution should be affirmed in that manner.[680] In such cases, the Commission believes that ''prompt, efficient, and accurate'' processing and routing would occur in a much shorter time frame, *e.g.,* less than ten minutes.

Where affirmation hubs are not utilized, the Commission believes that the ''prompt, efficient, and accurate'' standard would also result in a trade being processed and routed from a SEF to a DCO in a much shorter time frame. As noted above, that exact time frame would depend on swap market practices and technology, as well as market conditions at the time of execution. The Commission expects that the industry will continue to reduce time frames for transaction processing and routing to a DCO. The Commission emphasizes that it will continue to monitor time frames and industry developments with respect to transaction processing to ensure that SEFs and DCOs facilitate prompt, efficient, and accurate transaction processing and routing.

(2) § 39.12(b)(7)(ii)—AQATP Standard for Registered DCOs

In addition to specifying that the ''prompt, efficient, and accurate'' standard applies to SEFs with respect to processing and routing transactions, the Commission proposes to clarify that the AQATP standard applies to a DCO's acceptance or rejection of a transaction for clearing upon submission to the DCO, *i.e.,* when the DCO receives the transaction. The Commission also proposes to delete existing § 39.12(b)(7)(iii) as unnecessary.[681] The Commission notes that this approach is generally consistent with the 2013 Staff STP Guidance with respect to swaps, but this proposal specifies that the AQATP standard applies exclusively to the DCO and is triggered upon submission of the agreement, contract, or transaction[682] to the DCO from a SEF, a DCM, or counterparties that submit swaps directly to the DCO for clearing. Therefore, a DCO's ability to comply with the AQATP standard for accepting or rejecting a trade is distinct from the length of time it takes an entity such as a SEF or DCM to process and route a trade to the DCO.[683] As discussed below, the DCO's obligation to comply with the AQATP standard is also independent from the method of execution or venue by which counterparties execute an agreement, contract, or transaction, given that the DCO's obligation to accept or reject that executed agreement, contract, or transaction only begins from the point after which it has been submitted to the DCO, *i.e.,* when the DCO receives the transaction. If a SEF, DCM, or counterparty to a bilaterally-executed agreement, contract, or transaction delays the submission of a cleared swap to a DCO for clearing, then it would not impact the DCO's obligation to accept or reject on an AQATP basis after it has received the transaction.

In conjunction with clarifying that the AQATP standard applies to registered DCOs, the Commission proposes to streamline and consolidate §§ 39.12(b)(7)(ii)–(iii) to establish one AQATP standard for registered DCOs under a new proposed § 39.12(b)(7)(ii) for all agreements, contracts, and transactions, regardless of whether they (i) are executed competitively or non-competitively; (ii) are executed on or pursuant to the rules of a SEF or DCM; or (iii) are swaps, futures contracts, or options on futures contracts.[684] The Commission also proposes that this AQATP standard would apply to all such agreements, contracts, and transactions *after submission* to the DCO, rather than *after execution,* as currently required for competitively executed transactions on or subject to

registered DCO after submission of the trade to the DCO for clearing. Proposed § 37.702(b)(1) and § 39.12(b)(7)(i)(A), as amended, would require SEFs and DCOs to respectively coordinate and work together to effect the ''prompt, efficient, and accurate'' standard.

[680] The Commission notes that this statement is consistent with the views expressed by the Divisions in the 2015 Supplementary Staff Letter. *Id.* at 3.

[681] As discussed below, the Commission notes that it is proposing amendments to streamline §§ 39.12(b)(7)(ii)–(iii) into a single provision.

[682] The Commission notes that both CEA section 1a(15), which defines a DCO, and § 39.12(b)(1), which establishes product eligibility for DCOs, refer to ''agreements, contracts, or transactions.'' Similarly, CEA section 1a(47), which defines a ''swap,'' also refers to an ''agreement, contract, or transaction.'' To conform to these provisions, the Commission proposes non-substantive amendments to §§ 39.12(b)(7)(i)–(ii) to apply to all ''agreements, contracts, and transactions.'' The Commission notes that this conforming change does not alter the substantive scope of a DCO's obligations under proposed § 39.12(b)(7). Core Principle 7 and its implementing regulations, however, refer to ''swaps'' and ''transactions'' interchangeably without intending to impose a substantive distinction on a SEF's obligations. For example, § 37.700 refers to ''swaps'' while §§ 37.701–702 refer to ''transactions,'' but the Commission's use of ''transaction'' is intended to refer generally to *transactions of swaps* on the SEF and not intended to differentiate among agreements, contracts, or transactions that constitute swaps (emphasis added).

[683] Under proposed § 37.702(b)(1), a SEF's obligation to submit swaps for clearing to the DCO includes the SEF's obligation to process and route swaps and is subject to the prompt, efficient, and accurate standard.

[684] Based on this consolidation, the Commission proposes to eliminate the existing language of § 39.12(b)(7)(iii).

the rules of a DCM or SEF under existing § 39.12(b)(7)(ii) (emphasis added). The Commission believes that a DCO should be able to accept or reject a trade for clearing in a similar AQATP standard time frame after receiving the transaction, regardless of the manner of execution—competitive or non-competitive—or whether the trade has been processed and routed by a SEF or DCM, a third-party affirmation hub, or the counterparties themselves on a direct basis. As applied to swaps, a DCO would be subject to the same AQATP standard, regardless of whether the swap is subject to the trade execution requirement or otherwise voluntarily cleared.

The AQATP standard reflects the Commission's belief that acceptance or rejection for clearing in close to real time is crucial both for effective risk management and for the efficient operation of trading venues.[685] While the Commission did not prescribe a rigid time frame for acceptance or rejection for clearing when adopting existing §§ 39.12(b)(7)(ii)–(iii), the Commission did note that the performance standard would require action in a matter of milliseconds or seconds, or at most, a few minutes, not hours or days.[686] The Commission notes that Commission staff continues to monitor reports from DCOs about their ability to accept or reject trades for clearing in a timely matter. To date, the Commission has not been made aware of significant delays or difficulties meeting the ten-second standard articulated in the 2013 Staff STP Guidance. Accordingly, as DCOs have been able to accept or reject trades within ten seconds after submission by the SEF for the past five years, the Commission proposes that this standard continue for registered DCOs under the AQATP standard under proposed § 39.12(b)(7)(ii).

(3) §§ 37.702(b)(2)–(3)—Pre-Execution Credit Screening

With respect to the pre-execution credit screening of orders for compliance with risk-based limits, the 2013 Staff STP Guidance expressed the view that (i) a clearing FCM must be identified in advance for each counterparty on an order-by-order basis for trades intended for clearing; and (ii) a SEF must facilitate pre-execution screening by each clearing FCM in accordance with § 1.73 on an order-by-order basis.[687] To facilitate such screening in practice, SEFs have provided their respective clearing FCMs with a ''pre-trade credit screening'' functionality that allows them to screen orders executed on the facility.[688] The Divisions have viewed pre-trade credit screening functionalities as beneficial to facilitate ''prompt and efficient'' transaction processing in accordance with straight-through processing requirements.[689]

With respect to pre-execution screening by each clearing FCM, the 2013 Staff STP Guidance viewed §§ 1.73(a)(2)(i)–(ii) as requiring a clearing FCM to conduct pre-execution screening of orders for execution on a SEF or DCM for compliance with risk-based limits.[690] The 2013 Staff STP Guidance further expressed the view that § 1.73 provides FCMs with the ability to reject orders before execution; as a result, orders that have satisfied clearing FCMs' pre-execution limits are deemed accepted for clearing and thereby subject to a guarantee by the clearing FCM upon execution.[691] Accordingly, the 2013 Staff STP Guidance expressed the view that a clearing FCM may not reject a trade that has passed its pre-execution credit screening filter because this would violate the AQATP standard, under which trades should be accepted or rejected for clearing as soon as technologically practicable as if fully automated systems were used.[692]

With respect to the requirement that a clearing FCM must be identified in advance for trades intended for clearing, the 2013 Staff STP Guidance noted that the Commission has already required parties to have a clearing arrangement in place with a clearing FCM in advance of execution and that in cases where more than one DCO offered clearing services, the parties would also need to specify in advance where the trade should be sent for clearing.[693] Accordingly, the 2013 Staff STP Guidance expressed the view that no trade intended for clearing may be executed on or subject to the rules of a SEF unless a clearing FCM was identified in advance for each party on an order-by-order basis.[694]

In conjunction with the Commission's proposal to clarify and amend straight-through processing requirements, the Commission proposes to adopt these two obligations—that each market participant identify a clearing member in advance and that a SEF facilitate pre-execution credit screening—under §§ 37.702(b)(2)–(3), respectively. The Commission believes that the proposed requirements are consistent with the proposed approach to straight-through processing as described above. In

[685] *See* Timing of Acceptance for Clearing Final Rule at 21285. In recognizing that some trading venues may not be fully automated, the Commission stated that the use of manual steps would be permitted, as long as the process could operate within the same timeframes as the automated systems. *Id.* The Commission also noted that the timeframe for acceptance by clearing FCMs (outlined under § 1.74) and DCOs is stricter than the timeframes for submission by SDs and MSPs. *Id.* The Commission noted that ''where execution is bilateral and clearing is voluntary, the delay between execution and submission to clearing is, of necessity, within the discretion of the parties to some degree. The Commission believes, however, that prudent risk management dictates that once a trade has been submitted to a clearing member or a DCO, the clearing member or DCO must accept or reject it as quickly as possible.'' *Id.*

[686] *See id.* For example, IRS were executed and cleared with an average time of 1.9 seconds on CME platforms in early 2012. *Id.*

[687] 2013 Staff STP Guidance at 3.

[688] SEFs have been able to facilitate the use of their pre-trade credit screening functionalities by clearing FCMs for swap block trades pursuant to time-limited no-action relief provided by Commission staff, which allows market participants to execute swap block trades on the SEF that are intended to be cleared. *See infra* Section XXII.A.—§ 43.2—Definition—Block Trade; § 37.203(a)—Elimination of Block Trade Exception to Pre-Arranged Trading. As discussed below, the Commission is proposing to amend the definition of ''block trade'' under § 43.2 to continue to allow clearing FCMs to comply with § 1.73 by using pre-execution credit screenings on the SEF.

[689] 2013 Staff STP Guidance at 2–3. With respect to establishing pre-execution credit screenings, the 2013 Staff STP Guidance expressed the view that SEFs and FCMs should work together to effect the risk-based limits to ensure straight-through processing of swaps. *Id.*

[690] 2013 Staff STP Guidance at 1–2. Section 1.73(a)(1) requires each clearing FCM to establish risk-based limits for each proprietary account and each customer account that are based on position size, order size, margin requirements, or similar factors. 17 CFR 1.73(a)(1). Similarly, § 1.73(a)(2)(i) states that when a clearing FCM provides electronic market access or accepts orders for automated execution, the FCM must use automated means to screen orders for compliance with such risk-based limits. 17 CFR 1.73(a)(2)(i). Section 1.73(a)(2)(ii) states that when a clearing FCM accepts orders for non-automated execution, the FCM must establish and maintain systems of risk controls reasonably designed to ensure compliance with the limits. 17 CFR 1.73(a)(2)(ii). Section 1.73(a)(2)(iii) states that when a clearing FCM accepts transactions that were executed bilaterally and then submitted for clearing, the FCM must establish and maintain systems of risk controls reasonably designed to ensure compliance with the limits. 17 CFR 1.73(a)(2)(iii). The Commission notes that paragraph (a)(2)(i)–(ii) apply to ''orders,'' while paragraph (a)(2)(iii) applies to ''transactions.'' In addition, paragraph (a)(2)(iii) is limited to transactions executed ''bilaterally.'' In contrast, the Commission stated in the final rule adopting § 1.73 that paragraph (a)(2)(i) refers to ''automated trading systems,'' such as CME's Globex, while paragraph (a)(2)(ii) includes ''non-automated markets such as open outcry exchanges or voice brokers.'' *See* Timing of Acceptance for Clearing Final Rule at 21288. As the Commission affirmatively included voice brokers in connection with paragraph (a)(2)(ii), transactions executed through voice brokers do not fall under paragraph (a)(2)(iii). Accordingly, § 1.73(a)(2)(iii) only applies where two parties transact directly with one another, outside of a SEF or DCM.

[691] 2013 Staff STP Guidance at 3.

[692] *Id.*

[693] *See* Timing of Acceptance for Clearing Final Rule at 21284.

[694] 2013 Staff STP Guidance at 3.

particular, the use of pre-execution credit screening functionalities help SEFs and DCOs to both meet their respective straight-through processing requirements by reducing the number of transactions that are rejected from clearing by a DCO. The Commission notes that pre-execution credit screening has become a fundamental component of the swaps clearing infrastructure.[695]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.702 and §§ 39.12(b)(7)(i)–(ii). In particular, the Commission requests comment on the following questions:

(71) The proposed ''prompt, efficient, and accurate'' standard, as applied to trades submitted to a DCO for clearing via third-party affirmation hubs would take into consideration evolving swap market practices and technology, as well as current market conditions at the time of execution. Is the proposed approach appropriate? Why or why not? Does the approach provide sufficient guidance regarding the standard?

(72) Is the distinction sufficiently clear between (i) the submission and related processing and routing of a swap by a SEF to a DCO under the ''prompt, efficient, and accurate'' standard and (ii) the DCO's decision to accept or not accept a swap under the AQATP standard? Does the approach provide sufficient clarity regarding the distinct, but interrelated, roles of SEFs and DCOs? Why or why not?

(73) The 2013 Staff STP Guidance and 2015 Supplementary Staff Letter apply to ''intended to be cleared swaps,'' including swaps subject to the clearing requirement and swaps that are voluntarily cleared by the counterparties. Should these requirements apply to voluntarily-cleared swaps?

(74) Proposed §§ 39.12(b)(7)(ii) would eliminate the distinction when applying the AQATP standard between (i) trades that are executed competitively and (ii) trades that are not executed competitively or are executed away from a SEF or DCM. Is the proposed approach appropriate? Why or why not?

(75) Proposed § 39.12(b)(7)(ii) would apply the AQATP standard after submission to the DCO, rather than after execution. Is the proposed approach appropriate? Why or why not?

(76) Proposed § 39.12(b)(7)(ii) would apply the AQATP standard after submission to the DCO, rather than after execution, for all swaps, futures, and options on futures submitted for clearing. Proposed § 39.12(b)(7)(ii) would apply to all agreements, contracts, and transactions submitted to the DCO for clearing. Is the proposed approach appropriate? Why or why not?

(77) Should a DCO have the flexibility to have additional time to address instances in which a clearing member has insufficient credit on deposit for the DCO to accept an agreement, contract, or transaction for clearing? If so, should the Commission require the DCO to have rules and procedures for the DCO's process to address those instances?

3. Applicability of § 37.702(b) to SEFs That Do Not Facilitate Clearing

The Commission proposes to amend the introductory language under proposed § 37.702(b) to specify that its requirements apply only to those transactions routed through a SEF to a registered DCO for clearing rather than, as currently required, to any transaction cleared by a DCO. While not meant to reflect a substantive change, the Commission believes that this amendment would clarify that the requirements of § 37.702(b) do not apply to a SEF that does not facilitate the clearing of applicable listed swaps that are not subject to the clearing requirement. The requirements would apply, however, if the SEF offers to facilitate the clearing of such swaps.[696] Therefore, to the extent counterparties choose to voluntary clear such transactions through a SEF that offers to facilitate clearing for such swaps, § 37.702(b) would then apply to the SEF.

C. § 37.703—Monitoring for Financial Soundness

Section 37.703(a) requires a SEF to monitor its members to ensure that they continue to qualify as an ECP pursuant to CEA section 1a(18).[697] The Commission proposes a non-substantive amendment to proposed § 37.703 to replace the term ''member'' with ''market participant.'' The Commission notes that its proposed definition of ''market participant'' under § 37.2(b) would capture the universe of persons and entities that participate on SEFs and would be subject to minimum financial requirements, including a SEF's members.[698]

XIII. Part 37—Subpart I: Core Principle 8 (Emergency Authority)

Core Principle 8 requires a SEF to adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any swap or to suspend or curtail trading in a swap.[699]

A. § 37.801—Additional Sources for Compliance

Section 37.801 further implements Core Principle 8 by referring SEFs to associated guidance and/or acceptable practices set forth in Appendix B to comply with § 37.800.[700] The guidance to Core Principle 8 specifies, among other things, the types of emergency actions that a SEF should take in particular to address perceived market threats, and states that the SEF should promptly notify the Commission of its exercise of emergency action.

The Commission proposes to amend the guidance to Core Principle 8 by eliminating references to certain emergency actions that the Commission understands a SEF, as a matter of general market practice, would not be able to adopt, including imposing special margin requirements and transferring customer contracts and the margin. Since SEFs do not own the contracts, they do not have the ability to impose margin or transfer contracts. Additionally, the Commission proposes

[695] As noted above, the 2013 Staff STP Guidance expressed the view that a clearing FCM may not reject a trade that has passed its pre-execution credit screening filter because such a rejection would violate the AQATP requirement. 2013 Staff STP Guidance at 3. The Commission expects that this practice which is beneficial to market participants by providing trade certainty in as minimal a time delay as possible, will continue. The screening of transactions by a clearing FCM does not, however, prevent the DCO from rejecting a swap for clearing.

[696] The Commission notes that certain SEFs, such as those that facilitate trading in FX non-deliverable forward products, do not hold themselves out as offering services to facilitate clearing with a DCO. As a result, the straight-through processing requirements, including the ''prompt, efficient, and accurate'' standard and pre-execution credit screening requirements, would not apply to such SEFs, even if the counterparties subsequently voluntarily clear a swap away from the SEF. The Commission notes that a SEF could offer to facilitate the clearing of certain listed swaps, to which § 37.702(b)'s requirements would apply, while not offering to facilitate the clearing of other of its listed swaps, to which § 37.702(b)'s requirements would not apply. The Commission notes, however, that the requirements of § 39.12(b)(7)(ii) apply to all agreements, contracts, and transactions submitted to a DCO for clearing, regardless of whether a particular swap is subject to the clearing requirement pursuant to section 2(h)(1) of the CEA.

[697] 17 CFR 37.703.

[698] *See supra* Section IV.B.2.—§ 37.2(b)—Definition of ''Market Participant.'' The Commission notes that CEA section 2(e) limits swaps trading to ECPs, as defined by section 1a(18) of the Act. 7 U.S.C. 2(e).

[699] 7 U.S.C. 7b–3(f)(8). The Commission codified Core Principle 8 under § 37.800. 17 CFR 37.800.

[700] 17 CFR 37.801.

several non-substantive amendments to the guidance.[701]

Request for Comment

The Commission requests comment on all aspects of the proposed associated guidance to Core Principle 8 in Appendix B.

XIV. Part 37—Subpart J: Core Principle 9 (Timely Publication of Trading Information)

The Commission is not proposing any amendments to the regulations under Core Principle 9.

XV. Part 37—Subpart K: Core Principle 10 (Recordkeeping and Reporting)

Core Principle 10 requires a SEF, among other things, to maintain records of all activities related to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of five years.[702] Section 37.1001 implements this requirement by requiring a SEF to maintain an audit trail for all swaps executed on or subject to the rules of the SEF, among other types of records. The Commission proposes a non-substantive amendment to § 37.1001 to eliminate ''or subject to the rules of'' from the existing requirement. This proposed amendment confirms to conforms to the proposed amendment to the ''block trade'' definition under § 43.2, discussed further below.[703]

XVI. Part 37—Subpart L: Core Principle 11 (Antitrust Considerations)

The Commission is not proposing any amendments to the regulations under Core Principle 11.

XVII. Part 37—Subpart M: Core Principle 12 (Conflicts of Interest)

The Commission has not adopted any regulations under Core Principle 12 and is not proposing any regulations at this time.

XVIII. Part 37—Subpart N: Core Principle 13 (Financial Resources)

Core Principle 13 requires a SEF to have adequate financial, operational, and managerial resources to discharge each of its responsibilities.[704] To achieve financial resource adequacy, a SEF must maintain financial resources sufficient to cover its operating costs for a period of at least one year, calculated on a rolling basis.[705] The Commission implemented Core Principle 13 by adopting §§ 37.1301–1307 to specify (i) the eligible types of financial resources that may be counted toward compliance (§ 37.1302); (ii) the computation of projected operating costs (existing § 37.1303); (iii) valuation requirements (existing § 37.1304); (iv) a liquidity requirement for those financial resources that is equal to six months of a SEF's operating costs (existing § 37.1305); and (v) reporting obligations to the Commission (§ 37.1306).

The Commission implemented these regulations to ensure a SEF's financial strength so that it could discharge its responsibilities, ensure market continuity, and withstand unpredictable market events.[706] During the part 37 implementation, the Commission has continued to receive feedback from several SEFs that the existing requirements impose impractical financial and operating burdens.[707] Among other things, these SEFs have contended that the amount of financial resources that a SEF is required to maintain has proven to be unnecessary and confines resources that could otherwise be allocated toward operational growth and further innovation. To address some of these concerns, Commission staff issued two guidance documents regarding the calculation of operating costs.[708]

Based on its experience with overseeing the financial resources requirements, the Commission proposes several amendments to the Core Principle 13 regulations that would achieve a better balance between ensuring SEF financial stability, promoting SEF growth and innovation, and reducing unnecessary costs. The Commission's proposed amendments, which include the addition of acceptable practices to Core Principle 13 in Appendix B, are based in part on existing Commission staff guidance, feedback received from SEFs, and Commission experience gained from ongoing oversight. As discussed in detail further below, the Commission's proposed changes consist of (i) clarification of the scope of operating costs that a SEF must cover with adequate financial resources; (ii) acceptable practices, based on existing Commission staff guidance, that address the discretion that a SEF has when calculating projected operating costs pursuant to proposed § 37.1304; (iii) amendments to the existing six-month liquidity requirement for financial resources held by a SEF; and (iv) streamlined requirements with respect to financial reports filed with the Commission. The proposed changes also would include non-substantive amendments to clarify certain existing requirements, including the renumbering of several provisions to present the requirements in a more cohesive manner.

A. § 37.1301—General Requirements

1. § 37.1301(a)

Existing § 37.1301(a) requires a SEF to maintain financial resources that are sufficient to enable it *to perform its functions in compliance* with the SEF core principles set forth in section 5h of the Act (emphasis added).[709] Existing § 37.1301(c) relates to this requirement and specifies that a SEF's financial resources are sufficient if their value is ''at least equal to'' the SEF's operating costs for a one-year period, on a rolling basis.[710]

Certain SEFs have stated that existing § 37.1301(a), when read in conjunction with § existing 37.1301(c), can be construed to state that operational costs incurred for functions that are not germane to discharging SEF core principle responsibilities must be included in a financial resources calculation. According to those SEFs, requiring those costs to be included would require a SEF to allocate additional resources to comply with the requirement, which would hinder its ability to allocate that capital to operational growth and innovation, thereby creating unnecessary burdens.[711]

The Commission proposes to consolidate the requirement under existing § 37.1301(c) into a new proposed § 37.1301(a) and adopt several amendments. First, the Commission proposes to amend the types of operating costs that must be included in a SEF's financial resources determination. As proposed, a SEF would be required to maintain adequate financial resources to cover the

[701] For example, the Commission proposes to eliminate the reference to § 40.9, as this section is currently reserved by the Commission.

[702] 7 U.S.C. 7b–3(f)(10). The Commission codified Core Principle 10 under § 37.1000. 17 CFR 37.1000.

[703] *See infra* Section XXII.—Part 43—§ 43.2—Definition of ''Block Trade.''

[704] 7 U.S.C. 7b–3(f)(13). The Commission codified Core Principle 13 under § 37.1300. 17 CFR 37.1300.

[705] *Id.*

[706] When the Commission adopted § 37.1301(a), it recognized that a ''SEF's financial strength is vital to ensure that the SEF can discharge its core principle responsibilities. . . .'' SEF Core Principles Final Rule at 33538–39.

[707] *See* WMBAA, Re: Project KISS at 5 (Sept. 29, 2017) (''2017 WMBAA Letter'').

[708] CFTC Letter No. 17–25; CFTC Letter No. 15–26, Division of Market Oversight Guidance on Calculating Projected Operating Costs by Swap Execution Facilities (Apr. 23, 2015) (''CFTC Letter No. 15–26'').

[709] 17 CFR 37.1301(a).

[710] 17 CFR 37.1301(c).

[711] *See* 2017 WMBAA Letter at 6 (stating that the financial resource requirements should focus on fixed costs required for compliance, rather than variable costs and staff-related costs that are not essential).

operating costs that a SEF needs to ''comply'' with the SEF core principles and any applicable Commission regulations, rather than ''perform its functions in compliance with'' the core principles. For example, under the current requirement, a SEF must maintain financial resources to continue to afford all of its existing activities (for example, activities such as product research or business development), even if such activities are not mandated by any core principle or regulatory requirement. Under the proposed amendment, a SEF would not need to include costs that are not necessary to comply with the SEF core principles and any applicable Commission regulations when calculating its operating costs.

The Commission believes that the proposed regulation represents a better and more balanced regulatory approach to implementing the Core Principle 13 requirements. Some SEF operational costs may not be necessary for discharging core principle and regulatory responsibilities, and therefore, should not be included when calculating a SEF's financial resources. Rather than require a SEF to allocate capital to account for such operating costs, the proposed amendment permits SEFs to allocate their capital to other areas, thereby furthering the goal of promoting SEF growth and innovation.[712] Therefore, proposed § 37.1301(a) would achieve a better balance between ensuring that a SEF is financially stable, while also providing the SEF with greater discretion to allocate its limited resources.[713]

Further, the proposed amendment would remove a potential barrier for new SEF entrants who may otherwise have been deterred by the relatively higher capital costs posed by a broad reading of the existing requirement.

The Commission also proposes several non-substantive changes to align proposed § 37.1301(a) more closely to Core Principle 13 requirements. To reflect the ongoing nature of the Core Principle 13 requirements, the Commission proposes to specify that a SEF must maintain adequate financial resources on an ''ongoing basis.'' For consistency purposes with Core Principle 13, the Commission also proposes to replace the word ''sufficient'' with ''adequate'' and adopt additional language to specify that a SEF's financial resources will be considered ''adequate'' if their value ''exceeds,'' rather than is ''at least equal to,'' one year's worth of operating costs,[714] calculated on a rolling basis pursuant to the requirements for calculating such costs under proposed § 37.1304.[715]

Further, as noted above, the Commission proposes to adopt additional language to clarify that a SEF's financial resources must be adequate to comply with the SEF core principles and any ''applicable Commission regulations.'' This amendment is intended to clarify that a SEF's resource adequacy obligation under proposed § 37.1301(a) also applies to any resources needed for complying with any additional regulatory requirements that the Commission has promulgated.[716] The Commission notes that SEFs are already complying with this clarification in practice.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1301(a). In particular, the Commission requests comment on the following question:

(78) To what extent does a requirement for SEFs to maintain financial resources to cover operational costs needed only for core principle and regulatory compliance reduce the financial resources that a SEF needs to maintain, as opposed to the current requirement? Would such a reduction, if any, impair the stability of either the SEF or the marketplace or the marketplace's confidence in the SEF market structure? Would this proposed change encourage innovation or new entrants into the marketplace?

2. § 37.1301(b)

Section 37.1301(b) requires a SEF that also operates as a DCO to also comply with the financial resource requirements for DCOs under § 39.11.[717] The Commission proposes to amend § 37.1301(b) to permit SEFs that also operate as DCOs to file a single financial report under § 39.11 that covers both the SEF and DCO.[718] This proposed approach would streamline and simplify the SEF financial report filing process set forth under § 37.1306 and would also be consistent with the requirement for DCMs under § 38.1101(a)(3), which permits DCMs that operate as a DCO to file a single financial report.[719]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1301(b).

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[712] The Commission understands that businesses, particularly nascent SEFs or SEFs developing new product lines, may incur relatively greater expenses in growing new business, compared to established SEFs or existing product lines. The Commission notes that under the proposed acceptable practices to Core Principle 13 in Appendix B, costs related to marketing and business development could be excluded from a SEF's projected operating cost calculations. *See infra* Section XVIII.D.1.—Acceptable Practices to Core Principle 13 in Appendix B.

[713] The Commission believes that the proposed financial resources obligations in the aggregate would better ensure market stability and the financial viability of SEFs. While proposed § 37.1301(a), along with the associated acceptable practices to Core Principle 13, may reduce the total amount of financial resources that a SEF must hold under § 37.1301(a), the Commission believes that such a change should not affect market integrity or the financial viability of SEFs. SEFs may include illiquid financial assets, as opposed to cash or cash equivalents, towards satisfying this requirement. The Commission, however, has also recognized that based on its experience, illiquid resources are less effective for ensuring an entity's viability, especially in times of market volatility where it may be difficult to timely sell illiquid assets or avoid a significant haircut on such assets. Consequently, the Commission believes that the amount of liquid assets that a SEF must hold, which the Commission addresses under proposed § 37.1303, more effectively protects market integrity and the financial viability of SEFs. As discussed below, proposed § 37.1303 would explicitly require SEFs to maintain sufficient liquidity to cover their projected wind-down costs, with a minimum liquidity level in an amount no less than three months of projected operating costs where wind-down costs would be less than three months of projected operating costs. *See infra* Section XVIII.C.—§ 37.1303—Liquidity of Financial Resources.

[714] The Commission notes that it is also proposing a non-substantive amendment to refer to ''projected operating costs'' instead of ''operating costs'' to conform to existing § 37.1304 and § 37.1307, both of which refer to ''projected operating costs.'' The Commission notes that during informal discussions with SEFs, Commission staff and SEFs have generally referred to SEFs' ''projected'' operating costs.

[715] As discussed below, proposed § 37.1304 (which the Commission proposes to renumber from existing § 37.1303) would continue to provide SEFs with reasonable discretion to calculate their projected operating costs to determine their financial resources requirement under § 37.1301(a) and their liquidity requirement under proposed § 37.1303.

[716] The Commission notes that under Core Principle 1, a SEF must comply with any rule or regulation promulgated by the Commission pursuant to section 8a(5) of the Act. 17 CFR 37.100. For a SEF to discharge its responsibilities pursuant to Core Principle 13, which include complying with the SEF core principles, it is required to ensure that its financial resources are adequate to comply with those rules or regulations.

[717] 17 CFR 37.1301(b).

[718] *See* Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69334 (Nov. 8, 2011). Section 39.11 establishes requirements that a DCO will have to meet in order to comply with Core Principle B (Financial Resources) for DCOs. Core Principle B requires a DCO to possess financial resources that, at a minimum, exceed the total amount that would enable the DCO to meet its financial obligations to its clearing members, notwithstanding a default by a clearing member creating the largest financial exposure for the DCO in extreme but plausible conditions; and enable the DCO to cover its operating costs for a period of one year, as calculated on a rolling basis. 7 U.S.C. 7a–1(c)(2)(B)(ii).

[719] 17 CFR 38.1101(a)(3).

3. § 37.1301(c)

Given the proposed consolidation with § 37.1301(a), as described above, the Commission proposes to eliminate § 37.1301(c).

B. § 37.1302—Types of Financial Resources

Section 37.1302 sets forth the types of financial resources available to SEFs to satisfy the general financial resources requirement.[720] These resources include the SEF's own capital, meaning its assets minus liabilities calculated in accordance with U.S. generally accepted accounting principles; and any other financial resource deemed acceptable by the Commission.[721] The Commission proposes a non-substantive amendment to the current language by referring to generally accepted accounting principles ''in the United States'' to conform to the proposed amendments to § 37.1306 described further below.[722]

C. § 37.1303—Liquidity of Financial Resources[723]

Existing § 37.1305—''Liquidity of financial resources''—currently requires a SEF to maintain unencumbered, liquid financial assets, *i.e.,* cash and/or highly liquid securities, that are equal to at least six months of a SEF's operating costs.[724] If any portion of a SEF's financial resources is not sufficiently liquid, then a SEF is permitted to take into account a committed line of credit or similar facility to meet this requirement.[725] In adopting this rule, the Commission explained that the liquidity requirement is intended to ensure that a SEF could continue to operate and wind down its operations in an orderly fashion, if necessary.[726] The Commission also determined that a six-month period would be an accurate assessment of how long it would take for a SEF to wind down in an orderly manner, absent support for alternative time frames.[727]

The Commission proposes to amend the minimum amount of liquid financial resources that a SEF must include from six months of operating costs to the greater of (i) three months of a SEF's projected operating costs or (ii) the projected costs for a SEF to wind down its business, as determined by the SEF.[728] The Commission acknowledges that in the SEF Core Principles Final Rule, it rejected a three-month requirement based on a lack of cited support for a shorter time frame.[729] Based on its own past oversight of SEFs and DCMs and feedback from registered SEFs since the adoption of part 37, however, the Commission recognizes that the existing six-month requirement is not necessary. Rather, the Commission believes that the proposed requirement, which sets the minimum amount of unencumbered, liquid financial assets that a SEF must maintain at three months of projected operating costs, would be sufficient to fulfill the goal of ensuring that a SEF can continue to operate and, if necessary, wind down its SEF operations in an orderly fashion.

Since the adoption of part 37, many SEFs have continued to maintain that a six-month minimum requirement is not necessary and that some of their liquid assets would be better applied toward growth initiatives.[730] Consistent with that feedback, the Commission has observed over time that the wind downs or ownership changes of several registered trading platforms, including SEFs and DCMs, have occurred within a much shorter time frame.[731] Based on this experience, the Commission acknowledges that a SEF may be better positioned to determine the amount of liquid financial resources needed to continue its operations and to conduct an orderly wind down. Under the proposed change, SEFs would be able to use the additional resources to invest in other areas of their operations. Accordingly, compared to the existing static six-month requirement, the Commission believes that a liquid resources requirement of the ''greater of'' either (i) three months of projected operating costs or (ii) projected wind-down costs would better ensure an orderly wind down for SEFs and ensure a more efficient allocation of resources for SEFs that require a wind-down period of less than six months. Further, by explicitly requiring a SEF to maintain sufficient liquidity to conduct an orderly wind down of its business, this approach would also better protect against the risk of failure in the unlikely event that a SEF would require a wind-down period of longer than six months.

The Commission also proposes a non-substantive amendment to clarify that if a SEF has a deficiency in satisfying this requirement, then it may overcome that deficiency by obtaining a committed line of credit or similar facility in an amount at least equal to that deficiency.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1303. In particular, the Commission requests responses to the questions below.

(79) Is the Commission's proposed requirement for a SEF to have liquid assets equal to the greater of either three months of projected operating costs or projected wind-down costs an appropriate approach? If not, then what should the Commission adopt as a more appropriate liquidity requirement and why? Would a SEF's wind-down period generally be longer or shorter than three months?

(80) Would the change to the liquidity requirement under proposed § 37.1303 impair the stability of either the SEF or the marketplace? Would proposed § 37.1303 encourage innovation or new entrants into the marketplace?

D. § 37.1304—Computation of Costs To Meet Financial Resources Requirement[732]

Existing § 37.1303—''Computation of projected operating costs to meet financial resource requirement''—currently requires a SEF to make a reasonable calculation of its projected operating costs for each fiscal quarter over a twelve-month period to determine the amount of financial resources needed to comply with the financial resource requirement.[733] Existing § 37.1303 further provides that a SEF has reasonable discretion to determine the methodology that it uses to compute its projected operating costs, although the Commission may review

[720] 17 CFR 37.1302.

[721] *Id.*

[722] *See infra* Section XVIII.F.1.—§ 37.1306(a).

[723] The Commission proposes to renumber existing § 37.1305 to § 37.1303 and amend the requirement as described.

[724] 17 CFR 37.1305.

[725] *Id.*

[726] The Commission stated that ''the purpose of the liquidity requirement is so that all SEFs have liquid financial assets to allow them to continue to operate and to wind down in an orderly fashion'' and that the Commission ''view[ed] a six month period as appropriate for a wind-down period . . . .'' SEF Core Principles Final Rule at 33540.

[727] *Id.*

[728] The Commission notes that it is proposing to specify ''projected'' operating costs for consistency with the cost calculation requirement under § 37.1304, discussed below. *See infra* Section XVIII.D.—§ 37.1304—Computation of Costs to Meet Financial Resources Requirement.

[729] SEF Core Principles Final Rule at 33540.

[730] *See* 2017 WMBAA Letter at 5 (citing argument that a shorter liquidity requirement would allow for a SEF to allocate capital for innovation).

[731] For example, the Commission notes that the DCM Green Exchange LLC had its designation vacated and ceased operations. Similarly, the DCM Kansas City Board of Trade was acquired by CME Group and had its designation vacated; it ultimately ceased operations. Likewise, Javelin SEF, LLC was acquired by Bats Global Markets, Inc., which in turn was subsequently acquired by CBOE SEF, LLC. In each case, the Commission observed a relatively efficient process.

[732] The Commission also proposes to renumber existing § 37.1303 to § 37.1304 and amend the requirement as described.

[733] 17 CFR 37.1303.

the SEF's methodology and require the SEF to make changes as appropriate.[734]

The Commission proposes to amend the existing requirement to specify that a SEF must also make a reasonable calculation of projected wind-down costs, but would have reasonable discretion in adopting the methodology for calculating such costs. This proposed addition is consistent with the reasonable discretion already provided for calculating projected operating costs and corresponds to § 37.1303, which incorporates the calculation of a SEF's wind-down costs into the liquidity determination. The Commission also proposes two non-substantive amendments that would add a reference to § 37.1303, given that a SEF must calculate projected operating costs to determine how to comply with the liquidity requirement; and eliminate the twelve-month requirement, given that proposed § 37.1301(a) already establishes that the financial resource requirement applies on a one-year, rolling basis.

1. Acceptable Practices to Core Principle 13 in Appendix B

To help SEFs comply with Core Principle 13, which requires a SEF to calculate its operating costs as part of a financial resources determination, the Commission is proposing acceptable practices to Core Principle 13 in Appendix B associated with § 37.1304. The proposed acceptable practices expound upon the reasonable discretion that SEFs have for computing projected operating costs in determining their financial resource requirements. Among other things, these acceptable practices would further explain which operating costs are not necessary to comply with the SEF core principles and the Commission's regulations. The Commission notes that these acceptable practices generally incorporate existing guidance provided by Commission staff.[735]

The proposed acceptable practices state that calculations of projected operating costs, *i.e.,* those that are necessary for the SEF to comply with the SEF core principles and any applicable Commission regulations, should be based on a SEF's current business model and anticipated business volume.[736] In particular, if the SEF offers more than one bona fide execution method, then a SEF would be allowed to include the costs of only one of those methods in calculating projected operating costs.[737] A bona fide method refers to a method actually used by SEF participants and not established by a SEF on a *pro forma* basis merely for the purpose of complying with—or evading—the financial resources requirement.

This approach would still require SEFs to maintain sufficient financial resources to ensure their financial viability, but also provide greater flexibility to SEFs to compute operating costs, consistent with the reasonable discretion provided under proposed § 37.1304. Although neither the CEA nor the Commission's regulations require a SEF to have more than one execution method, this flexibility could encourage SEFs to innovate and experiment in offering a variety of trading systems or platforms compared to the current requirements. Accordingly, this flexibility would mitigate possible disincentives for a SEF to limit the number and types of execution methods that it might otherwise develop and offer, were it required to account for the associated operating costs for all offered execution methods in a calculation. In excluding any of these expenses, however, a SEF would need to document and justify those exclusions pursuant to proposed requirements under § 37.1306, discussed further below.[738]

The proposed acceptable practices would also specify that a SEF may exclude certain expenses in making a ''reasonable'' calculation of projected operating costs. These expenses include, in part, marketing and development costs; variable commissions paid to SEF trading specialists, the payment of which is contingent on whether the SEF collects associated revenue from transactions on its systems or platforms; [739] and costs for other SEF personnel who are not necessary to enable a SEF to comply with the core principles, based on its current business model and business volume.[740] Further, a SEF may exclude any non-cash costs, including depreciation and amortization. The Commission notes that excluding these expenses would be consistent with the proposed financial resource requirement and proposed liquidity requirement because they do not reflect costs necessary for a SEF to comply with the SEF core principles or Commission regulations.

In addition to allowing a SEF to exclude certain projected operating costs, the proposed acceptable practices further specify that a SEF may pro-rate, but not exclude, certain expenses in calculating projected operating costs. The Commission recognizes that some costs may be only partly attributable to a SEF's ability to comply with the SEF core principles and the Commission's regulations; therefore, only those attributed costs would need to be included in a SEF's projected operating costs. Accordingly, a SEF may pro-rate expenses that are shared with affiliates, *e.g.,* the costs of administrative staff or seconded employees that a SEF shares with affiliates. Further, a SEF may also pro-rate expenses that are attributable in part to operational aspects that are not required to comply with the SEF core principles, *e.g.,* costs of a SEF's office rental space, to the extent that it is also used to house marketing personnel. In pro-rating any such expenses, however, a SEF would need to document and justify those pro-rated expenses pursuant to proposed requirements under § 37.1306, discussed further below.[741]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1304 and the associated acceptable practices to Core Principle 13 in Appendix B. In particular, the Commission requests comment on the following question:

(81) The proposed acceptable practices would permit a SEF to include only the costs related to one of the bona fide execution methods that it offers. Should a SEF instead be required to include in its projected operating costs the expenses related to all of its execution methods? Why or why not?

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[734] *Id.*

[735] The proposed acceptable practices to Core Principle 13 in Appendix B are based in part upon existing DMO staff guidance. *See* CFTC Letter No. 17–25 and CFTC Letter No. 15–26.

[736] In determining a SEF's projected operating costs under § 37.1301(a) or § 37.1303, a calculation based upon a hypothetical business model that has lower associated costs or lower business volume, and is intended to underestimate or minimize the level of required financial resources, would not be appropriate. As stated in the proposed acceptable practices, however, a SEF may account for any projected modification to its business model, *e.g.,* the addition or subtraction of business lines or operations or other changes, in its calculations and therefore any projected increase or decrease in revenue or operating costs from those changes over the next 12 months.

[737] For example, if a SEF offers both an order book and RFQ system, then the SEF may include the costs associated with one of those methods and exclude the costs associated with the other method.

[738] *See infra* Section XVIII.F.3.—§ 37.1306(c).

[739] *See* CFTC Letter No. 17–25.

[740] For example, if a SEF requires a certain amount of SEF trading specialists to operate a voice-based or voice-assisted trading system or platform, but hires additional personnel to enhance its operations to benefit market participants, then the SEF would only need to include the minimum number of trading specialists needed to operate the trading system or platform based on its current business volume and take into account any projected increase or decrease in business volume in its projected operating cost calculations.

[741] *See infra* Section XVIII.F.3.—§ 37.1306(c).

E. § 37.1305—Valuation of Financial Resources[742]

Section 37.1304—''Valuation of financial resources''—currently requires a SEF, at least once each fiscal quarter, to compute the current market value of each financial resource used to meet its financial resources requirement under § 37.1301.[743] The requirement is designed to address the need to update valuations when there may have been material fluctuations in market value that could impact a SEF's ability to satisfy its financial resource requirement.[744] When valuing a financial resource, the SEF must reduce the value, as appropriate, to reflect any market or credit risk specific to that particular resource, *i.e.,* apply a haircut.[745]

The Commission proposes a non-substantive amendment to add an applicable reference to § 37.1303. The Commission notes that in addition to calculating the current market value of each financial resource used to satisfy its financial resource requirement, compliance with the liquidity requirement would require a SEF to utilize the current market value of the applicable financial resources.

F. § 37.1306—Reporting to the Commission

1. § 37.1306(a)

Section 37.1306 establishes a SEF's financial reporting requirements to the Commission. Section 37.1306(a)(1) currently requires that at the end of each fiscal quarter or upon Commission request, a SEF must report to the Commission (i) the amount of financial resources necessary to meet the financial resources requirement of § 37.1301; and (ii) the value of each financial resource available to meet those requirements as calculated under § 37.1304.[746] Section 37.1306(a)(2) additionally requires a SEF to provide the Commission with a financial statement, including a balance sheet, income statement, and statement of cash flows of the SEF or its parent company.[747] In lieu of submitting its own financial statements, a SEF may submit the financial statements of its parent company.[748]

The Commission proposes several amendments to § 37.1306(a)(2). First, the Commission proposes to require a SEF to prepare its financial statements in accordance with generally accepted accounting principles in the United States (''GAAP''). For a SEF that is not domiciled in the U.S. and is not otherwise required to prepare its financial statements in accordance with GAAP, the Commission would allow that SEF to prepare its statements in accordance with either the International Financial Reporting Standards issued by the International Accounting Standards Board, or a comparable international standard as the Commission may accept in its discretion. The Commission notes that the quality and transparency of SEF financial reports submitted under the existing requirement have varied and believes that the GAAP-based requirement would promote consistency and better ensure a minimum reporting standard across financial submissions.

The Commission also proposes to require a SEF to provide its own financial statements, rather than allow a SEF the option of submitting the statements of its parent company. The Commission notes that it may lack jurisdiction over a SEF's parent company or its affiliates; in such instances, the Commission could not consider the parent company's financial resources in determining whether the SEF itself possesses adequate financial resources. Therefore, the Commission believes that a separate SEF financial statement would more clearly demonstrate evidence of the SEF's compliance with Core Principle 13.

In addition to the proposed amendments to § 37.1306(a)(2), the Commission proposes non-substantive revisions to § 37.1306(a)(1) to add appropriate references to § 37.1303 to § 37.1305, as discussed above. In addition to specifying the amount of financial resources necessary to comply with § 37.1301, a SEF's quarterly report must include the amount of financial resources necessary to comply with the liquidity requirement. Further, the amounts specified in the report must be based on the current market value of each financial resource and computed as reasonable calculations of the SEF's projected operating costs and wind-down costs.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1306(a). In particular, the Commission requests comment on the questions below:

(82) Should the Commission require a SEF's financial reports to be audited? Would requiring an audited annual financial report improve Commission oversight? What costs would be associated with an audit requirement?

(83) Instead of submitting four financial reports as currently required, should the Commission require a semi-annual report and an audited annual report?

(84) Would providing the Commission with the discretionary authority to request that SEFs provide audited financial statements, as necessary or appropriate, help the Commission meet its oversight responsibilities?

(85) Financial statements currently submitted by SEFs do not need to comply with GAAP. What are the costs and benefits of requiring GAAP-compliant financial submissions?

2. § 37.1306(b)

Section 37.1306(b) currently requires a SEF to make its financial resource calculations on the last business day of its fiscal quarter.[749] The Commission proposes a non-substantive amendment to § 37.1306(b) that would add the word ''applicable'' before ''fiscal quarter'' in the existing rule text.

3. § 37.1306(c)

Section 37.1306(c) sets forth documentation requirements for a SEF's financial reporting obligations. Section 37.1306(c)(1) requires a SEF to provide the Commission with sufficient documentation explaining the methodology used to calculate its financial resource requirements under § 37.1301.[750] Section 37.1306(c)(2) requires a SEF to provide sufficient documentation explaining the basis for its valuation and liquidity determinations.[751] To provide such documentation, § 37.1306(c)(3) requires SEFs to provide copies of certain agreements that evidence or otherwise support its conclusions.[752]

Based on the proposed amendments to the Core Principle 13 regulations described above, the Commission proposes conforming amendments to § 37.1306(c) to require a SEF to specify the methodology used to compute its financial resource and liquidity requirements. The documentation to be provided must be sufficient for the Commission to determine that the SEF has made reasonable calculations of projected operating costs and wind-down costs under § 37.1304. As

[742] The Commission proposes to renumber § 37.1304 to § 37.1305 and amend the requirement as described.

[743] 17 CFR 37.1304.

[744] SEF Core Principles Final Rule at 33539.

[745] A ''haircut'' is a deduction taken from the value of an asset to reserve for potential future adverse price movement in such asset. *Id.* at 33539 n.772.

[746] 17 CFR 37.1306(a)(1).

[747] 17 CFR 37.1306(a)(2).

[748] *Id.*

[749] 17 CFR 37.1306(b).

[750] 17 CFR 37.1306(c)(1)

[751] 17 CFR 37.1306(c)(2).

[752] 17 CFR 37.1306(c)(3).

proposed, §§ 37.1306(c)(2)(i)–(iv) [753] would require that the SEF, at a minimum (i) list all of its expenses, without exclusion; (ii) identify all of those expenses that the SEF excluded or pro-rated in its projected operating cost calculations and explain the basis for excluding or pro-rating any expenses; (iii) include documentation related to any committed line of credit or similar facility used to meet the liquidity requirement; [754] and (v) identify estimates of all of the costs and the projected amount of time required for any wind down of operations, including the basis for those estimates.

The proposed requirement does not necessarily create new obligations, but rather clarifies a SEF's existing obligations based upon existing guidance provided by Commission staff.[755] Further, the proposed requirement is specifically intended to ensure that a SEF has sufficient financial resources, particularly in light of the discretion provided to SEFs to compute their projected operating costs and wind-down costs. Therefore, the Commission believes that maintaining the general obligation for each SEF to identify all of its expenses in its financial report, including those that correspond to activities that are not needed for compliance or otherwise are excluded or pro-rated from projected operating costs, is appropriate on an ongoing basis.

The Commission further believes that proposed §§ 37.1306(c)(2)(i)–(iv) would address the current lack of adequate documentation or insufficient identification of excluded or pro-rated expenses by some SEFs in submitting their projected operating costs based on Commission staff guidance. Absent the guidance, the Commission notes that the existing rule has created burdens for Commission staff when determining whether a SEF complies with Core Principle 13. In its experience thus far, the Commission recognizes that Commission staff has devoted additional effort to obtain the appropriate documentation from SEFs. Therefore, the Commission believes that adding greater specificity to the existing requirement would mitigate the time and resources required to determine a SEF's compliance with the financial resource requirements.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1306(c).

4. § 37.1306(d)

Section 37.1306(d) requires a SEF to file its financial report no later than forty calendar days after the end of each of the SEF's first three fiscal quarters and no later than sixty calendar days after the end of the SEF's fourth fiscal quarter, or at such later time as the Commission may permit.[756]

The Commission proposes to extend the due date for each SEF's fourth fiscal quarter report from sixty to ninety days following the end of the quarter. This new proposed due date conforms with the due date for the SEF annual compliance report under proposed § 37.1501(e)(2).[757] The Commission recognizes that preparing multiple year-end reports, which includes a fourth-quarter financial report and an annual compliance report, for concurrent submission imposes resource constraints on a SEF.[758] Therefore, the Commission believes that such potential constraints justify an additional thirty days to prepare and concurrently file the SEF's fourth quarter financial report along with its annual compliance report.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1306(d).

5. § 37.1306(e)

The Commission proposes to add a new requirement under § 37.1306(e) for each SEF to provide notice to the Commission of its non-compliance with the financial resource requirements no later than forty-eight hours after the SEF knows or reasonably should have known of its non-compliance.[759] Each SEF has an ongoing obligation to comply with the requirements under Core Principle 13. The proposed requirement would clarify that the SEF cannot wait until filing its quarterly financial reports to notify the Commission that it no longer satisfies the Core Principle 13 financial resources requirements. In some instances, the Commission has not been informed of a SEF's non-compliance with the financial resource requirements until the filing of a quarterly financial report. The Commission believes, however, that prompt notification of non-compliance is necessary for the Commission to conduct proper market oversight and ensure market stability on an ongoing basis.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1306(e).

G. § 37.1307—Delegation of Authority

Section 37.1307(a) currently delegates authority to the Director of DMO, or other staff as the Director may designate, to perform certain functions that are reserved to the Commission under the Core Principle 13 regulations, including reviewing the methodology used to compute projected operating costs.[760]

The Commission proposes to amend § 37.1307(a)(2) to clarify that the Commission may additionally delegate the authority to review and make changes to the methodology used by a SEF to determine the market value of its financial resources under § 37.1305 and the methodology that SEFs use to determine their wind-down costs under § 37.1304. Further, the Commission would delegate the ability to request the additional documentation related to the calculation methodologies used under § 37.1306(c) and the notification of non-compliance under § 37.1306(e). The proposed amendments also include several additional non-substantive amendments based on the proposed amendments to Core Principle 13 regulations, as described above.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1307.

XIX. Part 37—Subpart O: Core Principle 14 (System Safeguards)

Core Principle 14 requires that SEFs (i) establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of

[753] The Commission proposes to consolidate paragraphs (c)(1)–(3) into paragraphs (c)(1)–(2) and adopt the proposed requirements as described.

[754] The Commission notes that it is also proposing a non-substantive change to eliminate the current language in paragraph (c)(3) regarding copies of insurance coverage or other arrangement evidencing or otherwise supporting the SEF's conclusions. The Commission notes that subsection (c) still requires a SEF to provide sufficient documentation explaining the methodology used to compute its financial resource requirements; therefore, if insurance coverage or other arrangements are necessary to explain a SEF's methodology, then the SEF must submit such documentation. The Commission also notes, however, that such documentation may not be required in all cases; proposed paragraph (c)(2) provides minimum requirements.

[755] *See* CFTC Letter No. 17–25 at 4.

[756] 17 CFR 37.1306(d).

[757] *See infra* Section XX.A.5.—§ 37.1501(e)—Submission of Annual Compliance Report and Related Matters.

[758] The Commission also notes that it is proposing to require a SEF to submit an updated Technology Questionnaire under § 37.1401(g) at the same time on an annual basis. *See infra* Section XIX.B.—§ 37.1401(g)—Program of Risk Analysis and Oversight Technology Questionnaire.

[759] For example, if a SEF knows or reasonably should know that its assets will no longer cover its projected operating costs for the next twelve months, as calculated on a rolling basis, then the SEF should notify the Commission within forty-eight hours.

[760] 17 CFR 37.1307(a).

appropriate controls and procedures, and automated systems that are reliable, secure, and have adequate scalable capacity; (ii) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the SEFs' responsibilities and obligations; and (iii) periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail.[761] The Commission promulgated rules under § 37.1401 to further implement those requirements.[762]

The Commission is not proposing any amendments to existing §§ 37.1401(a)–(b), (e)–(f), (g)–(i), or (k)–(m), other than non-substantive changes to paragraph references that are based on the changes described below.

A. § 37.1401(c)

Section 37.1401(c) requires each SEF to maintain a business continuity-disaster recovery plan and resources, emergency procedures, and backup facilities sufficient to enable timely recovery, resumption of its operations, and resumption of its ongoing fulfillment of its responsibilities and obligations as a SEF following any disruption of its operations.[763] A SEF's business continuity-disaster recovery plan and resources generally should enable resumption of trading and clearing of swaps executed on or pursuant to the rules of the SEF during the next business day following the disruption.

As noted above, the Commission proposes to move the existing requirement under § 37.205(b)(4)—''Safe storage capability''—that a SEF must protect audit trail data from unauthorized alteration, accidental erasure, or other loss to a more appropriate provision under proposed § 37.1401(c).[764] The Commission also proposes additional non-substantive amendments to § 37.1401(c). First, the Commission proposes to eliminate the sentence that references ''critical financial markets'' and § 40.9, which do not exist.[765] Second, the Commission proposes to replace the reference to ''designated clearing organization'' with ''derivatives clearing organization,'' which is the appropriate term under the Commission's regulations. Finally, the Commission proposes to eliminate the reference to swaps executed ''pursuant to the rules of'' a SEF, which conforms to the proposed amendment to the ''block trade'' definition under § 43.2, discussed further below.[766]

B. § 37.1401(g)—Program of Risk Analysis and Oversight Technology Questionnaire

Existing Exhibit V to Form SEF in Appendix A requires an applicant for SEF registration to file an Operational Capability Technology Questionnaire (''Questionnaire'') in order to demonstrate compliance with Core Principle 14 and § 37.1401.[767] The current version of the Questionnaire requests documents and information pertaining to the following eight areas of an applicant's program of risk analysis and oversight: (i) Organizational structure, system descriptions, facility locations, and geographic distribution of staff and equipment; (ii) risk analysis and oversight; (iii) system operations; (iv) systems development methodology; (v) information security; (vi) physical security and environmental controls; (vii) capacity planning and testing; and (viii) business continuity and disaster recovery. The current version of the Questionnaire is located on the Commission's website.[768]

The Commission proposes a new provision under § 37.1401(g) to require each SEF to annually prepare and submit an up-to-date Questionnaire to Commission staff not later than 90 calendar days after the SEF's fiscal year-end.[769] The Commission notes that where information previously submitted on the Questionnaire remains current, the annual update may note that fact, rather than fully describe the same information again.

The updated version of the Questionnaire requests documents and information in the following nine areas to assist the Commission in assessing a SEF's compliance with the Act and Commission regulations: (i) Organizational structure, system descriptions, facility locations, and geographic distribution of staff and equipment, including organizational charts and diagrams; (ii) enterprise risk management program and governance, including information regarding the Board of Directors, audits, and third-party providers; (iii) information security, including storage of records, access controls, and cybersecurity threat intelligence capabilities; (iv) business continuity and disaster recovery plan and resources, including testing and recovery time objectives; (v) capacity planning and testing; (vi) system operations, including configuration management and event management; (vii) systems development methodology, including quality assurance; (viii) physical security and environmental controls; and (ix) testing, including vulnerability, penetration, and controls testing. While the majority of the updated Questionnaire is unchanged from the current version, the Commission is making certain amendments, including the addition of enterprise technology risk assessments, board of director and committee information, third-party service provider information, and cybersecurity threat intelligence capabilities to keep up-to-date with the rapidly changing field of system safeguards and cybersecurity.

The proposed annual update is designed to reduce overall compliance-related burdens and enhance internal operational efficiency for SEFs. First, the Commission would use the Questionnaire as the basis for Systems Safeguards Examination (''SSE'') document requests. The Commission believes that maintaining an updated Questionnaire would limit SSE document requests and the effort required to respond to these requests—a SEF would be able to provide updated information and documents for sections of the Questionnaire that have changed since the last annual filing.[770] Second,

[761] 7 U.S.C. 7b–3(f)(14). The Commission codified Core Principle 14 under § 37.1400. 17 CFR 37.1400.

[762] 17 CFR 37.1401.

[763] 17 CFR 37.1401(c).

[764] *See supra* Section VII.D.2.a.—§ 37.205(b)(1)—Original Source Documents; § 37.205(b)(2)—Transaction History Database; § 37.205(b)(3)—Electronic Analysis Capability.

[765] The Commission further proposes to eliminate the reference to ''critical financial market'' under § 37.1401(d).

[766] *See infra* Section XXII.—Part 43—§ 43.2—Definition of ''Block Trade.''

[767] 17 CFR part 37 app. A.

[768] SEF Operational Capability Technology Questionnaire, *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@industryoversight/documents/file/seftechnologyquestionnaire.pdf.*

[769] The Commission notes that based on the proposed amendments to Form SEF in Appendix A discussed above, Exhibit V would be re-designated as Exhibit Q of Form SEF. The up-to-date questionnaire would be called the ''Program of Risk Analysis and Oversight Technology Questionnaire'' and would be located in Appendix A to part 37. *See supra* note 169 and accompanying discussion. Based on the proposed addition of subsection (g), the Commission proposes to renumber the existing provisions under subsections (g)–(i) to subsections (h)–(j), respectively. Based on the renumbering of these provisions, the Commission also proposes conforming non-substantive amendments to update applicable cross-references to these provisions in proposed paragraphs (a)(3), (h)(5), (i)(1)–(i)(7), and subsection (m).

[770] To the extent that still-current information and documents were provided in the most recent update to the Questionnaire, a SEF responding to an SSE document request would be able to reference that fact, rather than resubmit such information and documents.

the Commission would use the Questionnaire to conduct required system safeguards oversight and maintain a current profile of the SEF's automated systems.[771] Annual updates would reduce the need for separate requests and the burden of responding to these requests. Third, annual updates would assist a SEF's obligation to provide timely advance notice of all material (i) planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and (ii) planned changes to the SEF's program of risk analysis and oversight.[772] Fourth, annual updates, which a SEF would submit concurrently with its annual compliance report, could provide information and documents that are potentially useful in preparing that report.[773]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1401(g).

C. § 37.1401(j)

Section 37.1401(j) specifies that for registered entities deemed by the Commission to be ''critical financial markets,'' § 40.9 sets forth requirements for maintaining and dispersing disaster recovery resources in a manner sufficient to meet a same-day recovery time objective in the event of a wide-scale disruption. The Commission proposes to eliminate this provision, given that the Commission has not defined ''critical financial markets'' and such requirements do not exist under § 40.9.

XX. Part 37—Subpart P: Core Principle 15 (Designation of Chief Compliance Officer)

Core Principle 15 requires each SEF to designate a CCO and sets forth its corresponding duties.[774] Among other responsibilities, a CCO is required to ensure that the SEF complies with the CEA and applicable rules and regulations, as well as establish and administer required policies and procedures.[775] Core Principle 15 also requires the CCO to prepare and file an annual compliance report (''ACR'') to the Commission.[776] The Commission further promulgated requirements under § 37.1501 to implement these requirements.[777] Based on its experience during part 37 implementation, the Commission proposes several amendments to § 37.1501, in particular to streamline requirements related to the composition of the ACR and provide more useful information to the Commission.

A. § 37.1501—Chief Compliance Officer

1. § 37.1501(a)—Definitions

Core Principle 15 requires a CCO to report directly to the SEF's ''board [of directors]'' or the SEF's ''senior officer'' [778] and consult either the board or the senior officer to resolve conflicts of interest.[779] Section 37.1501(a) defines ''board of directors,'' [780] but does not define ''senior officer.'' [781] In the SEF Core Principles Final Rule, the Commission noted that it would not adopt a definition of ''senior officer,'' but noted that the statutory term would only include the most senior executive officer of the legal entity registered as a SEF.[782]

The Commission proposes to define a ''senior officer'' under § 37.1501(a) as the chief executive officer or other equivalent officer of the SEF. Across the various organizational structures that SEFs have established, the Commission has observed that a senior officer often may be the appropriate individual to whom a CCO would report regarding SEF activities. Therefore, this proposed definition would clarify the permissible reporting lines for the CCO and would provide specificity to the Commission's proposed amendments to the Core Principle 15 regulations, as described below. Among other things, the proposed requirements would enable the senior officer to have greater oversight responsibilities over the CCO consistent with Core Principle 15.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1501(a). In particular, the Commission requests comment on the questions below.

(86) Is the Commission's proposed definition of ''senior officer'' sufficiently clear and complete? If not, then please provide an explanation of those aspects of the definition that you believe are insufficiently clear or inadequately addressed.

(87) Are there any officers that may meet the definition of ''senior officer,'' but pose a potential conflict of interest? If so, identify such officers and the types of conflicts that may arise.

(88) Should the Commission add any other definitions to proposed § 37.1501(a)?

2. § 37.1501(b)—Chief Compliance Officer [783]

Sections 37.1501(b)–(c) set forth certain baseline requirements for the SEF CCO position. Section 37.1501(b)—''Designation and qualifications of chief compliance officer''— requires a SEF to designate an individual to serve as the CCO; requires the CCO to have the authority and resources to help fulfill the SEF's statutory and regulatory duties, including supervisory authority over compliance staff; and establishes minimum qualifications for the designated CCO.[784] Section 37.1501(c)—''Appointment, supervision, and removal of chief compliance officer''—establishes the respective authorities of the SEF board of directors and senior officer to designate, supervise, and remove the CCO; and requires the CCO to meet with the SEF's board and regulatory oversight committee (''ROC'') on an annual and quarterly basis, respectively, and provide them with information as requested.[785]

The Commission proposes to amend, clarify, and eliminate various existing requirements under §§ 37.1501(b)–(c) and consolidate the remaining provisions into § 37.1501(b), as described below. The Commission proposes to eliminate duplicative rules to Core Principle 15, including requirements that a SEF designate a

[771] The Commission notes that proposed subsection (h) (renumbered from existing subsection (g)) requires a SEF to provide to the Commission system safeguards-related books and records, including (i) current copies of its business continuity-disaster recovery plans and other emergency procedures; (ii) all assessments of its operational risks or system safeguards-related controls; (iii) all reports concerning system safeguards testing and assessment required by this chapter; and (iv) all other books and records requested by Commission staff in connection with Commission oversight of system safeguards or maintenance of a current profile of the SEF's automated systems. *Id.*

[772] 17 CFR 37.1401(f)(1)–(2).

[773] The Commission is proposing under § 37.1306(d) and § 37.1501(e)(2), respectively, to require a SEF to submit its fourth quarter financial report and annual compliance report no later than ninety days after the SEF's fiscal year end.

[774] 7 U.S.C. 7b–3(f)(15). The Commission codified Core Principle 15 under § 37.1500. 17 CFR 37.1500.

[775] 7 U.S.C. 7b–3(f)(15)(B)(iv)–(v).

[776] 7 U.S.C. 7b–3(f)(15)(D).

[777] 17 CFR 37.1501.

[778] 7 U.S.C. 7b–3(f)(15)(B)(i). The Commission also notes that the CEA does not define ''senior officer.''

[779] 7 U.S.C. 7b–3(f)(15)(B)(iii).

[780] Section 37.1501(a) defines ''board of directors'' as the board of directors of a SEF, or for those SEFs whose organizational structure does not include a board of directors, a body performing a function similar to a board of directors. 17 CFR 37.1501(a).

[781] 17 CFR 37.1501(a).

[782] SEF Core Principles Final Rule at 33544.

[783] The Commission proposes to retitle § 37.1501(b) to ''Chief compliance officer'' from ''Designation and qualifications of chief compliance officer'' based on the proposed changes described below.

[784] 17 CFR 37.1501(b).

[785] 17 CFR 37.1501(c).

CCO[786] and the CCO report directly to the board or the senior officer.[787] With respect to the CCO's obligations to a ROC, Core Principle 15 does not require a SEF to establish a ROC and the Commission has not finalized a rule that establishes requirements for a ROC; therefore, the Commission proposes to eliminate the existing ROC-related requirements from part 37.[788]

Consistent with Core Principle 15, which requires the CCO to report to the SEF's board or senior officer, the Commission also proposes amendments to the consolidated requirement under § 37.1501(b) to allow the SEF's senior officer to have the same oversight responsibilities over the CCO as the board. First, the Commission proposes to allow a CCO to consult with the board of directors or senior officer of the SEF as the CCO develops the SEF's policies and procedures.[789] Second, the Commission also proposes to allow a CCO to meet with the senior officer of the SEF, in addition to the board of directors, on an annual basis.[790] Third, the Commission further proposes to allow the CCO to provide self-regulatory program information to the SEF's senior officer, in addition to the board of directors.[791]

The Commission further proposes to eliminate the limitations on authority to remove a CCO, which currently restricts that removal authority to a majority of the board, or in the absence of a board, a senior officer.[792] Instead, the Commission proposes a more simplified requirement under proposed § 37.1501(b) to establish that (i) the board or the senior officer may appoint or remove the CCO;[793] and (ii) the SEF must notify the Commission within two business days of the appointment or removal (on an interim or permanent basis) of the CCO.[794] Based on its experience, the Commission recognizes that in many instances, the senior officer may be better positioned than the board to provide day-to-day oversight of the SEF and the CCO, as well as to determine whether to remove a CCO. Therefore, consistent with Core Principle 15, the Commission believes that a SEF's senior officer should have the same CCO oversight authority as the SEF's board of directors. This proposed amendment is consistent with Core Principle 15, which does not mandate a voting percentage to approve or remove the CCO. The Commission also believes that these proposed amendments would not only allow a SEF to more appropriately designate, appoint, supervise, and remove a CCO based on the SEF's particular corporate structure, size, and complexity, but also continue to ensure a level of independence for its CCO that is appropriate to comply with Core Principle 15.

Based on the proposed consolidation of existing §§ 37.1501(b)–(c), the Commission also proposes several non-substantive amendments to the remaining provisions under proposed § 37.1501(b), including the renumbering of certain existing provisions.[795]

a. Acceptable Practices to Core Principle 15 in Appendix B

The Commission proposes a new acceptable practice to Core Principle 15 in Appendix B associated with § 37.1501(b)(2)(i), which requires a CCO to have the background and skills appropriate to the position.[796] The proposed acceptable practice would provide a non-exclusive list of factors that a SEF may consider when evaluating an individual's qualifications to be a CCO and state that a SEF may make a determination based on the totality of a person's qualifications. The Commission believes that a non-exclusive list provides the clarity that SEFs have sought as to a CCO's requisite qualifications, but still allows a board and senior officer reasonable flexibility in appointing a CCO.

The proposed acceptable practice also states that a SEF should be especially vigilant regarding potential conflicts of interest when appointing a CCO. The Commission notes that the preamble to the SEF Core Principles Final Rule stated ''a conflict of interest may compromise a CCO's ability to effectively fulfill his or her responsibilities as a CCO . . . .''[797] The Commission continues to believe that conflicts of interest could affect a CCO's ability to effectively fulfill his or her responsibilities. Accordingly, a SEF should be especially vigilant in this regard when appointing a CCO. The Commission also continues to believe that a SEF should have policies and procedures in place to handle instances where its CCO has conflicts of interest.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1501(b) and the associated acceptable practices to Core Principle 15 in Appendix B.

3. § 37.1501(c)—Duties of Chief Compliance Officer[798]

Section 37.1501(d)—''Duties of chief compliance officer''—currently requires a CCO, at a minimum, to (i) oversee and review the SEF's compliance with the Act and Commission regulations;[799] (ii) resolve any conflicts of interest that may arise, including in certain enumerated circumstances;[800] (iii) establish and administer written policies and procedures reasonably designed to prevent violations of the Act and

[786] The Commission proposes to eliminate this requirement under existing paragraph (b)(1), which the Commission proposes to retitle to ''Authority of chief compliance officer'' from ''Chief compliance officer required.''

[787] The Commission proposes to eliminate this requirement under existing paragraph (c)(2).

[788] These requirements include a mandatory quarterly meeting with the ROC under existing subparagraph (c)(1)(iii); and the requirement that the CCO provide self-regulatory program information to the ROC under existing subparagraph (c)(1)(iv). Conflicts of Interest Proposed Rule at 36741–42.

[789] The Commission proposes the amendment under proposed subparagraph (b)(1)(i).

[790] The Commission proposes to renumber existing subparagraph (c)(1)(iii) to paragraph (b)(5), based on the proposed consolidation of existing subsections (b)–(c), and amend the requirement as described.

[791] The Commission proposes to renumber existing subparagraph (c)(1)(iv) to paragraph (b)(6), based on the proposed consolidation of existing subsections (b)–(c), and amend the requirement as described.

[792] The Commission proposes to eliminate this requirement under existing paragraph (c)(3).

[793] The Commission proposes to consolidate and amend the requirements under existing subparagraph (c)(1)(i) in part, which addresses the appointment of a CCO by the board or senior officer, with existing subparagraph (c)(3)(i), which currently addresses the removal of a CCO. Based on the proposed consolidation of existing subsections (b)–(c), the Commission proposes to renumber this consolidated provision to paragraph (b)(3) and retitle the consolidated provision to ''Appointment and removal of chief compliance officer.''

[794] The Commission notes that notification to the Commission of the appointment and removal of a CCO is currently required under existing subparagraph (c)(1)(i) and existing subparagraph (c)(3)(ii), respectively. Based on the proposed consolidation of existing subsections (b)–(c), the Commission proposes to consolidate and amend these notification requirements, and renumber the consolidated requirement to subparagraph (b)(3)(i).

[795] The Commission proposes to renumber the requirements under existing paragraph (b)(2)—''Qualifications of chief compliance officer''—to proposed subparagraphs (b)(2)(i)–(ii). The Commission also proposes to retitle existing subparagraph (c)(1)(ii), which specifies that the board or the senior officer must approve the CCO's compensation, to ''Compensation of the chief compliance officer.'' Based on the proposed consolidation of existing subsections (b)–(c), the Commission is proposing to renumber this requirement to paragraph (b)(4).

[796] The Commission proposes to add this provision in paragraph (b)(1) of the acceptable practices to Core Principle 15 in Appendix B. 17 CFR part 37 app. B.

[797] SEF Core Principles Final Rule at 33543–44.

[798] The Commission proposes to renumber existing subsection (d) to subsection (c).

[799] 17 CFR 37.1501(d)(1).

[800] 17 CFR 37.1501(d)(2). A CCO is specifically required to address conflicts between (i) business considerations and compliance requirements; (ii) business considerations and the requirement that the SEF provide fair, open, and impartial access under § 37.202; and (iii) a SEF's management and board members. 17 CFR 37.1501(d)(2)(i)–(iii).

Commission regulations;[801] (iv) take reasonable steps to ensure compliance with the Act and Commission regulations;[802] (v) establish procedures for the remediation of noncompliance issues identified by the CCO through certain specified protocols;[803] (vi) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues;[804] (vii) establish and administer a compliance manual and a written code of ethics;[805] (viii) supervise a SEF's self-regulatory program;[806] and (ix) supervise the effectiveness and sufficiency of any regulatory services provided to the SEF in accordance with § 37.204.[807]

The Commission proposes to adopt several substantive and non-substantive amendments to clarify and streamline these duties. The Commission proposes to consolidate certain existing provisions and specify that the CCO may identify noncompliance matters through ''any means,'' in addition to the currently prescribed means; and clarify that the procedures followed to address noncompliance issues must be ''reasonably designed'' by the CCO to handle, respond, remediate, retest, and resolve noncompliance issues identified by the CCO.[808] These proposed amendments acknowledge that a CCO may not be able to design procedures that detect all possible noncompliance issues and reflect that a CCO may utilize a variety of resources to identify noncompliance issues beyond a limited set of means.

The Commission also proposes to amend a CCO's duty to resolve conflicts of interest.[809] First, the Commission proposes to limit a CCO's duty to address only ''material'' conflicts of interest. This proposed amendment reflects the Commission's view that the current requirement is overly broad and impractical because a CCO cannot reasonably be expected to resolve every potential conflict of interest that may arise. Consistent with this view, the Commission also proposes to refine the scope of the CCO's duty to taking only ''reasonable steps'' to resolve ''material'' conflicts of interest that may arise.[810] The Commission further proposes to eliminate the existing enumerated conflicts of interest to avoid any inference that they are an exhaustive list of conflicts that a CCO must address.[811]

The Commission believes that these proposed amendments do not weaken a CCO's statutory duty to address conflicts of interest, but rather reflect the CCO's practical ability to detect and resolve conflicts. Moreover, the proposed amendments reflect the Commission's belief that a CCO should have discretion to determine the conflicts that are material to his or her SEF's ability to comply with the Act and the Commission's regulations. The Commission believes that these proposed changes are consistent with Core Principle 15.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1501(c).

4. § 37.1501(d)—Preparation of Annual Compliance Report[812]

Existing § 37.1501(e)—''Preparation of annual compliance report''—currently requires the CCO to annually prepare and sign an ACR that, at a minimum (i) describes the SEF's written policies and procedures, including the code of ethics and conflicts of interest policies;[813] (ii) reviews the SEF's compliance with the Act and Commission regulations in conjunction with the SEF's policies and procedures;[814] (iii) provides a self-assessment of the effectiveness of the SEF's policies and procedures, including areas of improvement and related recommendations for the SEF's compliance program or resources;[815] (iv) lists material changes to the policies and procedures;[816] (v) describes the SEF's financial, managerial, and operational resources, including compliance program staffing and resources, a catalogue of investigations and disciplinary actions, and a review of the disciplinary committee's performance;[817] (vi) describes any material compliance matters identified through certain enumerated mechanisms, *e.g.,* compliance office review or lookback, and explains how they were resolved;[818] and (vii) certifies that, to the best of the CCO's knowledge and reasonable belief and under penalty of law, the ACR report is accurate and complete.[819]

During part 37 implementation, the Commission has gained experience and received feedback with respect to the ACR requirements. The Commission notes that some of the required ACR content has provided the Commission with minimal meaningful insight into a SEF's compliance program. For example, some of the content is duplicative of information obtained by the Commission from other reporting channels, such as the system-related information that a SEF must file pursuant to Core Principle 14[820] and rule certifications filed pursuant to part 40 of the Commission's regulations.[821] Various SEF CCOs have also provided feedback that certain ACR content requires substantial time to prepare and includes some information that does not change frequently.[822] They have requested that the Commission simplify these requirements and provide additional time to file the reports. The Commission also notes, however, that many SEFs have not provided sufficient details that describe and assess whether their respective policies and procedures

[801] 17 CFR 37.1501(d)(3).

[802] 17 CFR 37.1501(d)(4).

[803] 17 CFR 37.1501(d)(5).

[804] 17 CFR 37.1501(d)(6).

[805] 17 CFR 37.1501(d)(7).

[806] 17 CFR 37.1501(d)(8).

[807] 17 CFR 37.1501(d)(9).

[808] Existing paragraph (d)(5) requires a CCO to establish procedures for remediation of noncompliance issues identified through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint. Existing paragraph (d)(6) requires a CCO to establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of non-compliance issues. The Commission proposes to consolidate and amend these requirements and renumber the consolidated requirement to paragraph (c)(5).

[809] The Commission proposes to renumber existing paragraph (d)(2), which addresses the CCO's duty to resolve conflicts of interest, to paragraph (c)(2) and amend the requirement as described.

[810] The Commission also proposes to eliminate ''a body performing a function similar to the board of directors'' under proposed paragraph (c)(2) (existing paragraph (d)(2)), as this phrase is already included in the definition of ''board of directors'' under § 37.1501(a).

[811] These provisions are currently set forth under existing subparagraphs (d)(2)(i)–(iii). *See supra* note 800.

[812] The Commission proposes to renumber existing subsection (e) to subsection (d).

[813] 17 CFR 37.1501(e)(1).

[814] 17 CFR 37.1501(e)(2)(i).

[815] 17 CFR 37.1501(e)(2)(ii)–(iii).

[816] 17 CFR 37.1501(e)(3).

[817] 17 CFR 37.1501(e)(4).

[818] 17 CFR 37.1501(e)(5).

[819] 17 CFR 37.1501(e)(6).

[820] The Commission notes that proposed subsection (h) (existing subsection (g)) requires a SEF to produce system safeguards-related books and records that include current copies of its business continuity-disaster recovery plans and emergency procedures, assessments of its operational risks and controls, and reports concerning system safeguards testing and assessments.

[821] Among other information required to be submitted to the Commission pursuant to part 40, a SEF is required to provide the Commission with amendments to its rulebook and compliance manual.

[822] *See* CFTC Letter No. 17–61, No-Action Relief for Swap Execution Facilities from Compliance with the Timing Requirements of Commission Regulation 37.1501(f)(2) Relating to Chief Compliance Officer Annual Compliance Reports and Commission Regulation 37.1306(d) Relating to Fourth Quarter Financial Reports at 2–3 (Nov. 20, 2017) (''NAL No. 17–61'') (citing testimonials from SEFs that the preparation of an ACR requires an extensive information gathering process, including a review and documentation of information gathered on an entity-wide basis).

(*e.g.,* rulebooks, compliance manuals, conflict of interest policies, code of ethics, governance documentation, and third-party service agreements) comply with the Act and Commission regulations.

Based upon its experience in reviewing ACRs, the Commission is proposing certain amendments that would eliminate duplicative or unnecessary information requirements and streamline existing requirements. These amendments would reduce unnecessary regulatory burdens and compliance costs associated with certain aspects of ACRs. The Commission is also proposing certain amendments to enhance the usefulness of ACRs by enabling the Commission to assess the effectiveness of a SEF's compliance and self-regulatory programs. The proposed revisions represent a simplified approach that continues to effectuate Core Principle 15.

The Commission proposes to refine the scope of some of the required ACR content that it believes is otherwise duplicative, unnecessary, or burdensome. Under the proposed approach, a SEF would no longer need to include in its ACR either a review of all the Commission regulations applicable to a SEF or an identification of the written policies and procedures designed to ensure compliance with the Act and Commission regulations.[823] The Commission believes that instead requiring an ACR to include a description and self-assessment of the effectiveness of the SEF's written policies and procedures to ''reasonably ensure'' compliance with the Act and applicable Commission regulations is more closely aligned with the corresponding provisions of Core Principle 15 and would still allow the Commission to properly assess the SEF's compliance and self-regulatory programs.[824] Similarly, the Commission also proposes to eliminate a required discussion of the SEF's compliance staffing and structure; a catalogue of investigations and disciplinary actions taken over the last year; and a review of disciplinary committee and panel performance.[825] An ACR would continue to be required to describe a SEF's financial, managerial, and operational resources set aside for compliance, which the Commission believes is sufficient information to assess a SEF's self-regulatory program.[826] By refining the scope of information required to be included in the ACR, the Commission anticipates that a SEF will be to devote its resources in providing more detailed, and ultimately better quality, information that will better help assess its compliance.

To facilitate the Commission's ability to assess a SEF's written policies and procedures regarding compliance matters, the Commission also proposes to require a SEF to discuss only material noncompliance matters and explain the corresponding actions taken to resolve such matters.[827] The Commission believes that requiring SEFs to focus on describing material non-compliance matters, rather than describing all compliance matters in similar depth, will streamline this requirement and provide more useful information to the Commission. Further, the Commission proposes to eliminate the enumerated mechanisms for identifying non-compliance issues, which conforms to the ability of a CCO to establish procedures to address non-compliance issues through ''any means,'' as described above.[828]

Consistent with these proposed amendments, the Commission also proposes to limit a SEF CCO's certification of an ACR's accuracy and completeness to ''all material respects'' of the report.[829] The Commission recognizes that CCOs have been hesitant to certify that an entire ACR is accurate and complete under the penalty of the law, without regard to whether a potential inaccuracy or omission would be a material error or not. Therefore, the Commission believes this proposed change will provide an appropriate balance between the SEF CCOs' concerns of potential liability with the material accuracy of an ACR submitted to the Commission.

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1501(d). In particular, the Commission requests comment to the questions below.

(89) Are the proposed revisions to the required content for ACRs appropriate? If not, then how should the Commission modify the required content?

(90) Are there any unintended consequences to removing the specific requirements regarding a description of a SEF's self-regulatory program's staffing and structure, a catalogue of investigations and disciplinary actions taken since the last ACR, and a review of the performance of the disciplinary committees and panels?

(91) Is it appropriate to limit the discussion of non-compliance matters to only those that are material in nature? If not, then why?

5. § 37.1501(e)—Submission of Annual Compliance Report and Related Matters [830]

Existing § 37.1501(f)(1) currently requires a CCO to provide an ACR to the board or, in the absence of a board, the senior officer for review.[831] The board of directors and senior officer may not require the CCO to change the ACR.[832] The SEF's board minutes or a similar written record must reflect the submission of the ACR to the board of directors or senior officer and any subsequent discussion of the report.[833] Additionally, the SEF must concurrently file the ACR and the fourth quarter financial statements with the Commission within 60 calendar days of the end of the SEF's fiscal year end.[834] The CCO must certify and promptly file an amended ACR with the Commission upon the discovery of any material error or omission in the report.[835] A SEF may

[823] The Commission proposes to eliminate these requirements in existing subparagraph (e)(2)(i) and the introductory language of existing paragraph (e)(2).

[824] As proposed, a SEF would continue to be required to describe the SEF's written policies and procedures, consistent with Core Principle 15. In addition to the required description, the Commission proposes to consolidate and amend existing subparagraph (e)(2)(ii), which requires a SEF to provide a self-assessment as to the effectiveness of its policies and procedures in the ACR, with existing paragraph (e)(1), and renumber the consolidated requirement to paragraph (d)(1). Further, the Commission proposes to consolidate and amend existing subparagraph (e)(2)(iii), which requires an ACR to discuss areas for improvement and recommend potential or prospective changes or improvements to a SEF's compliance program and resources, with existing paragraph (e)(3) and renumber the consolidated requirement to paragraph (d)(2). The Commission expects that the CCO will provide more nuanced and in-depth discussions through these consolidated provisions, rather than merely providing generalized responses.

[825] The Commission proposes to eliminate these requirements under existing paragraph (e)(4).

[826] The Commission proposes to renumber the remaining requirements under existing paragraph (e)(4) to paragraph (d)(3) and adopt minor non-substantive amendments.

[827] The Commission proposes to renumber this requirement under existing paragraph (e)(5) to paragraph (d)(4) and adopt the amendments as described above and other non-substantive amendments.

[828] The Commission proposes to eliminate these enumerated mechanisms under existing paragraph (e)(5).

[829] The Commission proposes to renumber existing paragraph (e)(6) to paragraph (d)(5) and amend the requirement as described.

[830] The Commission proposes to renumber existing subsection (f) to subsection (e). The Commission also proposes to retitle subsection (e) to ''Submission of annual compliance report and related matters'' from ''Submission of annual compliance report'' based on the proposed changes described below.

[831] 17 CFR 37.1501(f)(1).

[832] *Id.*

[833] *Id.*

[834] 17 CFR 37.1501(f)(2).

[835] 17 CFR 37.1501(f)(3).

request an extension to file the ACR with the Commission based on substantial, undue hardship in filing the ACR on time.[836]

The Commission proposes several amendments to simplify the ACR submission procedures. First, the Commission proposes to provide SEFs with an additional thirty days to file the ACR with the Commission, but no later than ninety calendar days after a SEF's fiscal year end.[837] This proposed extension is consistent with the basis provided by Commission staff in granting current no-action relief to SEFs that provides an additional thirty days to prepare and file an ACR.[838] In particular, the Commission recognizes that in addition to the ACR, a CCO has other reporting obligations, such as the fourth quarter financial report required to be submitted under Core Principle 13 and other year-end reports; SEFs have indicated that these multiple reporting obligations present resource constraints on SEFs and their CCOs.[839] In addition to an extended deadline, the Commission proposes to replace the ''substantial and undue hardship'' standard required for filing ACR extensions with a ''reasonable and valid'' standard.[840] Further, the Commission proposes to eliminate the requirement that each SEF must document the submission of the ACR to the SEF's board of directors or senior officer in board minutes or some other similar written record;[841] the Commission notes that the Core Principle 15 recordkeeping requirement under proposed § 37.1501(f), as discussed further below, would incorporate this requirement.[842] The Commission also proposes to require a CCO to submit an amended ACR to the SEF's board of directors or, in the absence of a board of directors, the senior officer of the SEF, for review prior to submitting the amended ACR to the Commission; this approach is the same as the requirements that exist for submitting an initial ACR.[843]

In addition to the proposed amendments described above related to submitting the ACR, the Commission proposes certain non-substantive amendments to the remaining provisions under proposed § 37.1501(e).[844]

Request for Comment

The Commission requests comment on all aspects of proposed § 37.1501(e).

6. § 37.1501(f)—Recordkeeping[845]

Existing Section 37.1501(g)(1) currently requires a SEF to maintain a copy of written policies and procedures adopted in furtherance of compliance with the Act and the Commissions regulations;[846] copies of all materials created in furtherance of the CCO's duties under existing §§ 37.1501(d)(8)–(9);[847] copies of all materials in connection with the review and submission of the ACR;[848] and any records relevant to the ACR.[849] Existing § 37.1501(g)(2) requires the SEF to maintain these records in accordance with § 1.31 and part 45 of the Commission's regulations.[850]

The Commission proposes streamline the recordkeeping requirements that pertain to the CCO's duties and the preparation and submission of the ACR. Accordingly, the Commission proposes a revised general requirement under proposed § 37.1501(f) that would require the SEF to keep all records demonstrating compliance with the duties of the CCO and the preparation and submission of the ACR consistent with the recordkeeping requirements under §§ 37.1000–1001.

7. § 37.1501(g)—Delegation of Authority[851]

Section 37.1501(h)—''Delegation of authority''—currently delegates the authority to grant or deny a SEF's request for an extension of time to file its ACR to the Director of DMO.[852] In addition to renumbering the provision based on the amendments described above, the Commission proposes to adopt non-substantive amendments that conform to the proposed amendments to the Core Principle 15 regulations discussed above.

XXI. Part 36—Trade Execution Requirement

The Commission is proposing regulations under part 36 to address the broadened scope of swaps that will become subject to the trade execution requirement based on the proposed interpretation of ''makes the swap available to trade'' in CEA section 2(h)(8). In addition to an implementing regulation, the Commission proposes several exemptions from the requirement for certain types of swap transactions, as discussed below. Further, the Commission proposes to require that SEFs and DCMs file a standardized form with the Commission that details the swaps that they respectively list for trading that are subject to the requirement. The Commission also proposes a new provision to compel the Commission to establish a centralized registry on its website that reflects (i) the SEFs and DCMs that list swaps subject to the requirement; and (ii) the particular swaps listed on each of those entities. To transition trading of additional swaps onto SEFs or DCMs pursuant to the requirement, the Commission additionally proposes a revised compliance schedule.

A. § 36.1—Trade Execution Requirement

1. § 36.1(a)—Trade Execution Requirement

The Commission proposes § 36.1(a) to codify the statutory language of the trade execution requirement, which requires counterparties to execute a swap that is subject to the clearing requirement on a DCM, a SEF or an exempt SEF unless no such entity ''makes the swap available to trade'' or the swap is subject to a clearing exception in CEA section 2(h)(7).[853] The

[836] 17 CFR 37.1501(f)(4).

[837] The Commission proposes to renumber existing paragraph (f)(2) to paragraph (e)(2) and amend the requirement as described. The Commission also proposes to add a title to this paragraph—''Submission of annual compliance report to the Commission.''

[838] NAL No. 17–61 at 4.

[839] *Id.* at 2–3.

[840] The Commission proposes to renumber existing paragraph (f)(4) to paragraph (e)(4) and amend the provision as described. The Commission also proposes to add a title—''Request for extension.''

[841] The Commission proposes to eliminate this requirement under existing paragraph (f)(1).

[842] The Commission notes that existing § 37.1501(g) sets forth recordkeeping requirements for SEFs related to the CCO's duties. As discussed below, the Commission is proposing to amend those requirements. *See infra* Section XX.A.6.—§ 37.1501(f)—Recordkeeping.

[843] The Commission proposes to renumber existing paragraph (f)(3) to paragraph (e)(3) and add a title—''Amendments to annual compliance report.'' The Commission proposes to adopt this requirement under subparagraph (e)(3)(i). The Commission notes that under proposed subparagraph (e)(3)(ii), an amended ACR would be subject to the amended certification requirement, *i.e.,* a CCO must certify that the ACR is accurate and complete in all material respects.

[844] The Commission proposes to renumber existing paragraph (f)(1) to paragraph (e)(1), adopt non-substantive amendments to the existing language, and add a title—''Furnishing the annual compliance report prior to submission to the Commission.''

[845] The Commission proposes to renumber existing subsection (g) to subsection (f).

[846] 17 CFR 37.1501(g)(1)(i).

[847] 17 CFR 37.1501(g)(1)(ii).

[848] 17 CFR 37.1501(g)(1)(iii).

[849] 17 CFR 37.1501(g)(1)(iv).

[850] 17 CFR 37.1501(g)(2).

[851] The Commission proposes to renumber existing subsection (h) to subsection (g) based on the changes described above.

[852] 17 CFR 37.1501(h).

[853] 7 U.S.C. 2(h)(8)(B). The Commission interprets ''swap execution facility'' in CEA section 2(h)(8)(B)

Commission believes that the statutory phrase ''makes the swap available to trade'' specifies the listing of a swap by a DCM, a SEF, or an exempt SEF on its facility for trading.[854] Accordingly, § 36.1(a) would specify that counterparties must execute a transaction subject to the clearing requirement on a DCM, a SEF, or an Exempt SEF that lists the swap for trading.[855]

The Commission also proposes to exempt certain types of swap transactions from the trade execution requirement pursuant to its exemptive authority in CEA section 4(c). For the purposes of promoting responsible economic or financial innovation and fair competition, CEA section 4(c)(1) provides the Commission with the authority to exempt any agreement, contract, or transaction from any CEA provision, subject to specified factors.[856] CEA section 4(c)(2) prohibits the Commission from providing an exemption from any requirements in CEA section 4(c)(1), unless the Commission determines that (i) the requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought; (ii) the exemption would be consistent with the public interest and the purposes of the Act; (iii) the agreement, contract, or transaction at issue will be entered into solely between appropriate persons; [857] and (iv) the agreement, contract, or transaction at issue will not have a material adverse effect on the ability of the Commission or exchange to discharge its regulatory or self-regulatory duties under the Act.[858]

As discussed below, the Commission specifically proposes exemptions from the trade execution requirement for the following transactions that would otherwise be subject to that requirement: (i) Swap transactions involving swaps that are listed for trading only by an Exempt SEF; (ii) swap transactions for which the clearing exceptions in CEA section 2(h)(7) or the clearing exceptions or exemptions under part 50 apply; (iii) swap transactions that are executed as a component of a package transaction that includes a component that is a new issuance bond; and (iv) swap transactions between ''eligible affiliate counterparties'' (''inter-affiliate counterparties'') that elect to clear such transactions, notwithstanding their ability to elect the relevant clearing exemption under § 50.52.

2. § 36.1(b)—Exemption For Certain Swaps Listed Only By Exempt SEFs

The Commission proposes § 36.1(b) to establish an exemption from the trade execution requirement that may be elected by counterparties to a swap that is subject to the trade execution requirement, but is listed for trading only by Exempt SEFs.[859] The Commission believes that exempting these types of transactions from the trade execution requirement would be consistent with the objectives of CEA section 4(c).

As noted above, CEA section 2(h)(8)(A) provides that counterparties to transactions involving a swap subject to the clearing requirement must execute the transaction on a DCM designated under CEA section 5, a SEF registered under CEA section 5h or a SEF that is exempt from registration under CEA 5h(g).[860] CEA section 2(h)(8)(B), however, specifies that this requirement does not apply if no DCM or *swap execution facility* makes the swap available to trade (emphasis added).[861] The Commission interprets the phrase ''swap execution facility'' in CEA section 2(h)(8)(B) to include both registered SEFs and SEFs that are exempt from registration pursuant to section 5h(g), given the references in section 2(h)(8)(A) and the applicability of section 5h to both types of entities.[862] Therefore, under the Commission's proposed interpretation of ''makes the swap available to trade,'' either a registered SEF or an Exempt SEF that lists a swap subject to the clearing requirement for trading can make the swap ''available to trade,'' thereby triggering the trade execution requirement for that swap.

While the Commission interprets CEA section 2(h)(8) to mean that the listing of a swap by an Exempt SEF would trigger the trade execution requirement, the Commission believes that it would be appropriate to exempt such listings from the requirement, given that the Commission does not oversee the listing of swaps by Exempt SEFs. To list new contracts SEFs submit their products for Commission review pursuant to the part 40 filing requirements.[863] The Commission reviews a new swap contract to ensure that it is consistent with the CEA and applicable Commission regulations, including the requirement that the contract not be susceptible to manipulation. Upon listing, a SEF, under Commission oversight, remains responsible for ensuring that the contract continues to comport with the CEA and applicable Commission regulations. In contrast, the Commission does not have oversight authority with respect to the listing of new contracts by Exempt SEFs.

The Commission believes that exempting swaps subject to the clearing requirement that are listed exclusively by Exempt SEFs should have little practical impact on the number of products that become subject to the trade execution requirement. Given the internationally competitive nature of the swaps industry, the Commission believes that SEFs and DCMs will likely list many of the same swaps listed by Exempt SEFs. The Commission also emphasizes that once the trade execution requirement is triggered for a particular swap by a SEF or DCM that lists the swap, the requirement may be satisfied by executing the swap on not only a SEF or DCM, but also on an Exempt SEF as well.

to include a swap execution facility that is exempt from registration pursuant to CEA section 5h(g). *See supra* note 10. *See also supra* Section IV.I.4.a.—§ 36.1(a)—Trade Execution Requirement.

[854] *See supra* Section IV.I.4.a.—§ 36.1(a)—Trade Execution Requirement. As discussed below, the Commission is proposing an exemption from the requirement for swap transactions involving swaps that are listed for trading only by an Exempt SEF. *See infra* Section XXI.A.2.—§ 36.1(b)—Exemption For Certain Swaps Listed Only By Exempt SEFs.

[855] *See supra* Section IV.I.4.a.—§ 36.1(a)—Trade Execution Requirement.

[856] 7 U.S.C. 6(c)(1). CEA section 4(c)(1) is intended to allow the Commission to ''provid[e] certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.'' House Conf. Report No. 102–978, 102d Cong. 2d Sess. at 81 (Oct. 2, 1992), *reprinted in* 1992 U.S.C.C.A.N. 3179, 3213.

[857] 7 U.S.C. 6(c)(3). CEA section 4(c)(3) includes a number of specified categories of persons within ''appropriate persons'' that are deemed as appropriate to enter into swaps exempted pursuant to CEA section 4(c). This includes persons the Commission determines to be appropriate in light of their financial profile or other qualifications, or the applicability of appropriate regulatory protections. For purposes of considering the CEA section 4(c) exemptions within this proposal, the Commission believes that ECPs would qualify as ''appropriate persons.''

[858] 7 U.S.C. 6(c)(2). Notwithstanding the adoption of exemptions from the Act, the Commission emphasizes that their use is subject to the Commission's antifraud and anti-manipulation enforcement authority. In this connection, § 50.10(a) prohibits any person from knowingly or recklessly evading or participating in, or facilitating, an evasion of CEA section 2(h) or any Commission rule or regulation adopted thereunder. 17 CFR 50.10(a). Further, § 50.10(c) prohibits any person from abusing any exemption or exception to CEA section 2(h), including any associated exemption or exception provided by rule, regulation, or order. 17 CFR 50.10(c).

[859] The Commission notes, however, that once a swap subject to the clearing requirement is listed by a SEF or a DCM, then counterparties may not use this exemption and would be required to comply with the trade execution requirement.

[860] 7 U.S.C. 2(h)(8)(A).

[861] 7 U.S.C. 2(h)(8)(B).

[862] *See supra* note 10.

[863] 17 CFR 40.2–3.

a. Discussion of CEA Section 4(c) Enumerated Factors

For the reasons stated above, the Commission believes that exempting a swap subject to the clearing requirement that is listed for trading only on an Exempt SEF from triggering the trade execution requirement would be consistent with the objectives of CEA section 4(c).

Given that the number of swaps that are subject to the clearing requirement and only listed by Exempt SEFs is likely small, the Commission believes that the proposed exemption is appropriate and would be consistent with the public interest and purposes of the CEA. The Commission believes that the proposed regulation would not have a material adverse effect on the ability of the Commission or any SEF or DCM to discharge its regulatory or self-regulatory duties under the Act. The Commission notes that under the proposed exemption, swap agreements, contracts, and transactions would still be entered into solely between ECPs,[864] who the Commission believes, for purposes of this proposal, to be appropriate persons.

Request for Comment

The Commission requests comment on all aspects of proposed § 36.1(b), including whether the proposed exemptive relief is consistent with the public interest and the other requirements of CEA section 4(c). In particular, the Commission requests comment on the following question:

(92) Pursuant to its authority in CEA section 4(c), should the Commission exempt swaps that are subject to the clearing requirement and listed for trading only by an Exempt SEF from the trade execution requirement, until such swaps are listed by a SEF or DCM?

3. § 36.1(c)—Exemption for Swap Transactions Excepted or Exempted From the Clearing Requirement Under Part 50

The Commission proposes § 36.1(c) to establish an exemption to the trade execution requirement for swap transactions for which an exception or exemption has been elected pursuant to part 50. The proposed exemption would apply to any transaction for which (i) a clearing exception under § 50.50 or a clearing exemption under § 50.51 or § 50.52 has been elected; or (ii) a future exemption that has been adopted by the Commission under part 50 would apply. The Commission has determined that exempting these types of transactions from the trade execution requirement would be consistent with the objectives of CEA section 4(c).

The Act and the Commission's regulations specify that certain transactions that are not subject to the clearing requirement are not subject to the trade execution requirement. CEA section 2(h)(8) clearly establishes that transactions that are not subject to the clearing requirement pursuant to a clearing exception in CEA section 2(h)(7) are not subject to the trade execution requirement.[865] CEA section 2(h)(7), *i.e.,* the end-user exception, provides a clearing exception to a swap transaction if one of the counterparties (i) is not a financial entity; (ii) is using the swap to hedge or mitigate commercial risk; and (iii) notifies the Commission about how it generally meets its financial obligations associated with entering into uncleared swaps.[866] The Commission adopted requirements under § 50.50 to implement this exception.[867]

In contrast to swaps that are eligible for the end-user exception, however, swaps that are not subject to the clearing requirement based on other statutory authority are currently not expressly exempted from the trade execution requirement. Pursuant to its exemptive authority in CEA section 4(c), the Commission has provided additional exemptions from the clearing requirement for swaps between certain types of entities, as well as for certain types of swap transactions. Section 50.51 allows certain cooperatives—those that otherwise consist entirely of entities that would qualify for the end-user exception—to elect a clearing exemption for swaps executed with a member of an exempt cooperative.[868] Section 50.52 allows inter-affiliate counterparties who have ''eligible affiliate counterparty status'' to elect a clearing exemption for swaps that are entered into between the affiliated parties.[869] The Commission notes that it has also proposed, pursuant to CEA section 4(c), to exempt transactions by eligible bank holding companies, savings and loan holding companies, and community development financial institutions from the clearing requirement.[870]

The Commission believes that applying the trade execution requirement to swaps that are eligible for a clearing exception or clearing exemption potentially mitigates the benefits that are associated with that exception or exemption. For example, a counterparty that determines not to clear a swap pursuant to a clearing exemption, but otherwise remains subject to the trade execution requirement, would be limited in where it may trade or execute that swap and may incur additional costs related to SEF onboarding. Therefore, in order to fully preserve the benefits of a clearing exception or clearing exemption, the Commission believes swaps that are excepted or exempted from the clearing requirement should not be subject to the trade execution requirement.

a. Discussion of CEA Section 4(c) Enumerated Factors

For the reasons stated above, the Commission believes that exempting a swap transaction, for which a clearing exception or clearing exemption have been elected pursuant to part 50, from the trade execution requirement would be consistent with the objectives of CEA section 4(c).

Given that the scope of this proposed exemption is limited and applies to transactions that are already excepted or exempted from the clearing requirement, the Commission believes that the proposed regulation would not have a material adverse effect on the ability of the Commission or any SEF or DCM to discharge its regulatory or self-regulatory responsibilities under the CEA and the Commission's regulations. The Commission believes that under the proposed exemption, swap transactions would still be entered into solely between ECPs, who the Commission believes, for purposes of this proposal, to be appropriate persons.[871]

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[864] As noted above, pursuant to CEA section 2(e), it is unlawful for any U.S. person other than an ECP, as defined in CEA section 1a(18), to enter into a swap unless the swap is entered into on, or subject to the rules of, a DCM. 7 U.S.C. 2(e).

[865] 7 U.S.C. 2(h)(8)(B).

[866] 7 U.S.C. 2(h)(7).

[867] 7 U.S.C. 2(h)(7). Among other things, § 50.50 establishes when a swap transaction is considered to hedge or mitigate commercial risk; specifies how to satisfy the reporting requirement; and exempts small financial institutions from the definition of ''financial entity.'' 17 CFR 50.50.

[868] 17 CFR 50.51. The exemption applies to swaps that are executed in connection with originating a loan or loans for the member of the cooperative, or hedging or mitigating commercial risk related to member loans or arising from swaps related to originating loans for members. 17 CFR 50.51(b)(1)–(2).

[869] 17 CFR 50.52. Counterparties have ''eligible affiliate counterparty status'' if one counterparty, directly or indirectly, holds a majority ownership interest in the other counterparty; or a third party, directly or indirectly, holds a majority ownership interest in both counterparties. 17 CFR 50.52(a)(1)(i)–(ii). To elect the exemption, such counterparties must also meet additional conditions, including reporting requirements. 17 CFR 50.52(b)–(c).

[870] Amendments to Clearing Exemption for Swaps Entered Into by Certain Bank Holding Companies, Savings and Loan Holding Companies, and Community Development Financial Institutions, 83 FR 44001 (proposed Aug. 29, 2018).

[871] *See supra* note 857 (discussing the scope of ''appropriate persons'').

Request for Comment

The Commission requests comment on all aspects of proposed § 36.1(c), including whether the proposed exemptive relief is consistent with the public interest and the other requirements of CEA section 4(c). In particular, the Commission requests comment on the following question:

(93) Pursuant to its authority in CEA section 4(c), should the Commission exempt swap transactions that are subject to a clearing exception or clearing exemption under part 50 from the trade execution requirement?

4. § 36.1(d)—Exemption for Swaps Executed With Bond Issuance

The Commission proposes § 36.1(d) to establish an exemption to the trade execution requirement for swap transactions that are components of a ''New Issuance Bond'' package transaction. The Commission believes that exempting these types of transactions from the trade execution requirement would be consistent with the objectives of CEA section 4(c). This proposed approach is consistent with the time-limited no-action relief provided by Commission staff for this category of package transactions.[872]

New Issuance Bond package transactions include at least one individual swap component that is subject to the trade execution requirement and at least one individual component that is a bond [873] issued and sold in the primary market.[874] An underwriter (on behalf of an issuer) arranges the issuance of a bond packaged with a fixed-to-floating IRS that features the issuer as a counterparty. The terms of the IRS, which include tenor and payment terms, typically match the terms of the bond issuance. By issuing a bond with a fixed-to-floating IRS, issuers are able to effectively turn fixed-rate liabilities into variable rate liabilities, or vice versa.[875] To correspond the terms between these two components and facilitate the bond issuance in an efficient and cost-effective manner, the IRS component is customized and negotiated in a manner that closely corresponds to the bond issuance process.

Given the role of the issuer in the package transaction—both as issuer of the bond and a counterparty to the swap—and the process under which the swap is negotiated,[876] this type of package transaction has not been conducive to execution on a SEF trading system or platform. The Commission notes that the no-action relief that has been provided by Commission staff for these swaps components reflects the ongoing lack of an available execution method on an appropriate venue.[877] Based on the integral role of the bond issuance in facilitating the component swap execution, the Commission believes that the IRS component is not suitable for execution on a SEF, even where a SEF may offer flexible means of execution.

Therefore, consistent with current no-action relief provided by Commission staff, the Commission proposes to exempt swap components of a New Bond Issuance package transaction from the trade execution requirement. The proposed exemption would establish that a ''package transaction'' consists of two or more component transactions executed between two or more counterparties, where (i) execution of each component transaction is contingent upon the execution of all other components transactions; and (ii) the component transactions are priced or quoted together as one economic transaction with simultaneous or near simultaneous execution of all components. The Commission recognizes the inherent challenges in trading or executing these swap components on a SEF or DCM and, therefore, recognizes the benefits of continuing to allow market participants to maintain established market practices with respect to this type of package transaction.

a. Discussion of CEA Section 4(c) Enumerated Factors

The Commission believes that exempting swap components of New Issuance Bond package transactions from the trade execution requirement would be consistent with the objectives of CEA section 4(c).

The Commission recognizes the importance of new bond issuances in helping market participants to raise capital and fund origination loans for businesses and homeowners. Accordingly, the Commission recognizes that allowing the swap components of New Bond Issuance package transaction to be executed away from a SEF or DCM—consistent with current market practice—is integral to facilitating the bond issuance. Further, the Commission recognizes that the proposed exemption is limited in nature, *i.e.,* the swap transaction remains subject to all other applicable Commission rules and regulations.

The Commission believes, therefore, that the proposed exemption from the trade execution requirement for swap components of New Issuance Bond package transactions is appropriate and would be consistent with the public interest and purposes of the CEA. The Commission further believes that the proposed regulation would not have a material adverse effect on the ability of the Commission or any SEF or DCM to discharge its regulatory or self-regulatory duties under the CEA. The Commission notes that under the proposed exemption, swap transactions would still be entered into solely between ECPs, who the Commission believes, for purposes of this proposal, to be appropriate persons.

Request for Comment

The Commission requests comment on all aspects of the proposed exemption of swap components of New Issuance Bond package transactions from the trade execution requirement under proposed § 36.1(d), including whether the proposed exemptive relief is consistent with the public interest and the other requirements of CEA section 4(c). The Commission specifically requests comment on the following questions:

(94) Pursuant to its authority in CEA section 4(c), should the Commission exempt the swap components of a New Issuance Bond package transaction from the trade execution requirement?

(95) Is the proposed definition of ''package transaction'' in proposed § 36.1(d)(1) appropriate?

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[872] *See supra* note 334 (describing the no-action relief from the trade execution requirement provided by Commission staff for categories of package transactions).

[873] The Commission notes that this proposed exemption would not apply to swap components of package transactions that include sovereign debt, such as U.S. Treasury bonds, notes, and bills.

[874] The Commission understands that a bond issued and sold in the primary market that may constitute part of a package transaction is a ''security,'' as defined in section 2(a)(1) of the Securities Act of 1933 or section 3(a)(10) of the Securities Exchange Act of 1934. To the extent that counterparties may be facilitating package transactions that involve a security, or any component agreement, contract, or transaction over which the Commission does not have exclusive jurisdiction, the Commission does not opine on whether such activity complies with other applicable law and regulations.

[875] For example, a bond issuer seeks to pay variable rates on its bonds, but prospective investors may seek a fixed rate of return. By arranging a New Issuance Bond package transaction, the bond issuer can issue a fixed-rate bond and simultaneously enter into an offsetting IRS. The IRS enables the issuer to receive a fixed rate that matches the fixed rate on its bond to be issued, while paying the variable rate that it originally sought. Ultimately, this arrangement may allow the bond issuer to issue the fixed-rate bond at a lower cost.

[876] The Commission notes that these types of package transactions differ from other package transactions that involve the purchase or sale of a security in the secondary market, given that they involve the issuance of a new security.

[877] NAL No. 17–55 at 2–3.

(96) Are there additional package transactions that should be exempt from the trade execution requirement? If so, then please describe in detail why such package transactions should be exempt from the trade execution requirement, especially in light of the flexible means of execution the Commission is proposing to allow for all swaps listed by a SEF.

5. § 36.1(e)—Exemption for Swaps Executed Between Affiliates That Elect To Clear

The Commission proposes § 36.1(e) to establish an exemption from the trade execution requirement that may be elected by inter-affiliate counterparties to a swap that is submitted for clearing. Counterparties would be eligible to elect the exemption by meeting the conditions set forth under § 50.52(a) for ''eligible affiliate counterparty'' status.[878] The Commission notes that this proposed exemption would apply to transactions that inter-affiliate counterparties elect to clear, notwithstanding their ability to elect the clearing exemption.

Based on time-limited no-action relief granted by Commission staff, inter-affiliate counterparties that do not elect the § 50.52 clearing exemption are executing swaps away from a SEF or DCM that are otherwise subject to the trade execution requirement.[879] The relief has been granted to address the difficulty cited by market participants in executing inter-affiliate swap transactions through the required methods of execution prescribed for swaps subject to the trade execution requirement under § 37.9, *i.e.,* Order Book and RFQ System. In particular, executing these transactions via competitive means of execution would be difficult because inter-affiliate swaps are generally not intended to be executed on an arm's-length basis or based on fully competitive pricing.[880] Rather, such swaps are used as tools to manage risk between affiliates and are carried out through internal accounting processes.[881] Market participants have asserted that forcing these transactions to be executed through a SEF would impose unnecessary costs and inefficiencies without any related benefits.[882] The Commission believes that requiring these types of transactions to be executed on a SEF would likely confer less benefit to the overall swaps markets and inhibit inter-affiliate counterparties from efficiently executing these types of transactions for operational purposes.

a. Discussion of CEA Section 4(c) Enumerated Factors

The Commission believes that exempting a swap executed between inter-affiliate counterparties that is submitted for clearing from the trade execution requirement would be consistent with the objectives of CEA section 4(c).

As noted above, these transactions are not intended to be arm's-length, market-facing, or competitively executed under any circumstance, irrespective of the type of swap involved. Therefore, the nature of these transactions mitigates the potential benefits of their execution on a SEF or a DCM. The Commission believes this proposed exemption would ensure that inter-affiliate counterparties would be able to efficiently utilize the risk management approach that best suits their individual needs, such as clearing inter-affiliate swaps, without being unduly influenced by whether that choice would require them to execute swaps on a SEF. Notably, the Commission's proposed rules would allow SEFs to provide more flexible means of execution and, thus, could address some of the issues currently cited with respect to executing inter-affiliate transactions on a SEF. Nevertheless, the Commission believes that the policy justifications described above support an exemption for such inter-affiliate swap transactions from the trade execution requirement.

The Commission believes, therefore, that the proposed exemption from the trade execution requirement for inter-affiliate counterparties is appropriate, and it would be consistent with the public interest and purposes of the CEA. Given the limited applicability of this proposed exemption to transactions only executed between inter-affiliates, the Commission believes that the proposed regulation would not have a material adverse effect on the ability of the Commission or any SEF or DCM to discharge its regulatory or self-regulatory duties under the CEA. Finally, the Commission notes that under the proposed exemption, swap transactions would still be entered into solely between ECPs, who the Commission believes, for purposes of this proposal, to be appropriate persons.[883]

Request for Comment

The Commission requests comment on all aspects of proposed § 36.1(e), including whether the proposed exemptive relief is consistent with the public interest and the other requirements of CEA section 4(c). In particular, the Commission requests comment on the following questions:

(97) Pursuant to its authority in CEA section 4(c), should the Commission exempt transactions between inter-affiliate counterparties who do not elect the inter-affiliate clearing exemption from the trade execution requirement?

(98) Should the Commission also consider exempting end-users that meet the criteria for a clearing exception in CEA section 2(h)(7) from the trade execution requirement regardless of whether they elect to use the end-user clearing exception?

B. § 36.2—Registry of Registered Entities Listing Swaps Subject to the Trade Execution Requirement; Appendix A to Part 36—Form TER

The Commission currently provides information on its website regarding the swaps that are subject to the trade execution requirement. In addition to providing a chart that identifies those swaps,[884] the Commission also posts the

[878] *See supra* note 869 (describing requirements for meeting ''eligible affiliate counterparty'' status).

[879] CFTC Letter No. 17–67, Re: Extension of No-Action Relief from Commodity Exchange Act Section 2(h)(8) for Swaps Executed Between Certain Affiliated Entities that Are Not Exempt from Clearing Under Commission Regulation 50.52 (Dec. 14, 2017) (''NAL No. 17–67''); CFTC Letter No. 16–80, Re: Extension of No-Action Relief from Commodity Exchange Act Section 2(h)(8) for Swaps Executed Between Certain Affiliated Entities that Are Not Exempt from Clearing Under Commission Regulation 50.52 (Nov. 28, 2016); CFTC Letter No. 15–62, Re: Extension of No-Action Relief from Commodity Exchange Act Section 2(h)(8) for Swaps Executed Between Certain Affiliated Entities that Are Not Exempt from Clearing Under Commission Regulation 50.52 (Nov. 17, 2015); CFTC Letter No. 14–136, Re: Extension of No-Action Relief from Commodity Exchange Act Section 2(h)(8) for Swaps Executed Between Certain Affiliated Entities that Are Not Exempt from Clearing Under Commission Regulation 50.52 (Nov. 7, 2014); CFTC Letter No. 14–26, Time-Limited No-Action Relief from the Commodity Exchange Act Section 2(h)(8) for Swaps Executed Between Certain Affiliated Entities Not Electing Commission Regulation § 50.52 (Mar. 6, 2014). As discussed above, the Commission previously stated that transactions subject to the inter-affiliate exemption from clearing would also be exempt from the trade execution requirement. *See supra* Section XXI.A.3.—§ 36.1(c)—Exemption for Swap Transactions Excepted or Exempted from the Clearing Requirement under Part 50.

[880] *See* NAL No. 17–67 at 2.

[881] In the 2013 Inter-Affiliate Final Rule, commenters explained that corporate groups can use a single conduit in the market on behalf of multiple affiliates within the group, which permits the corporate group to net affiliates' trades. This netting effectively reduces the overall risk of the corporate group and the number of open positions with external market participants, which in turn reduces operational, market, counterparty credit, and settlement risk. Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750, 21753–54 (Apr. 11, 2013).

[882] NAL No. 17–67 at 2.

[883] *See supra* note 857 (discussing the scope of ''appropriate persons'').

[884] CFTC, Industry Filings—Swaps Made Available to Trade, *available at https://*

corresponding MAT determinations submitted pursuant to part 40's rule filing procedures.[885] While this approach has been effective in informing market participants about the limited number of swaps currently subject to the trade execution requirement, the Commission expects that the number of swaps that would be subject to the requirement will increase. To ensure that market participants have notice of the swaps that are subject to the trade execution requirement and the venues listing those swaps, the Commission proposes to create a registry under § 36.2(a) that will set forth the swaps that are subject to the trade execution requirement, and the SEFs and DCMs that list such swaps.[886]

To help the Commission publish and maintain such a registry, the Commission also proposes a requirement under § 36.2(b) and Appendix A to part 36 that SEFs and DCMs submit a standardized Form TER. Form TER would detail the swaps that they list that are subject to or subsequently become subject to the clearing requirement. The Commission further proposes to require that a SEF or DCM submit a Form TER concurrently with any § 40.2 or § 40.3 product filing that consists of a swap that is subject to the clearing requirement. In addition, the Commission proposes that SEFs and DCMs file a Form TER, for any swaps they currently list that are subject to the clearing requirement, ten business days prior to the effective date of any final rule adopted from this notice. To effectuate this proposed change initially, the Commission is proposing that the effective date for proposed § 36.2 occur twenty days prior to effective date for the rest of this proposed rule. The Commission believes that this earlier effective period would provide SEFs and DCMs sufficient time to file their initial Form TERs and give Commission staff sufficient time to review and process these initial Form TERs. Finally, for swaps that are listed by a SEF or DCM that subsequently become subject to the clearing requirement, the Commission proposes to require that SEFs and DCMs file Form TER ten business days prior to the effective date of that requirement for such swaps. By requiring SEFs and DCMs to file Form TER prior to the effective date of such requirements, Commission staff would have sufficient time to review, compile Form TERs, and publish its trade execution requirement registry on its website.

Form TER in Appendix A to part 36 would require a SEFs or DCM to provide the specific relevant economic terms of the swaps that it lists for trading. Each SEF or DCM that lists a swap that is subject to or becomes subject to the clearing requirement would be required to file an initial Form TER that details all such listed swaps. Any subsequent changes to a SEF's or DCM's listing of such swaps, such as additional listed swaps that later become subject to the clearing requirement, would require the SEF or DCM to amend its Form TER to reflect that scope. For IRS listed for trading, Form TER would require a SEF or DCM to specify (i) product class/specification; (ii) currency; (iii) floating rate index; (iv) stated termination date; (v) optionality; (vi) dual currencies; and (vii) conditional notional amounts. For CDS listed for trading, Form TER would require a SEF or DCM to specify (i) product class/specification; (ii) reference entities; (iii) region; (iv) indices; (v) tenor; (vi) applicable series; and (vii) tranche. The Commission notes that the scope of required information corresponds to the scope of information provided under § 50.4 for IRS and CDS that are subject to the clearing requirement.

The Commission believes that Form TER would provide the information needed to efficiently produce a trade execution requirement registry under § 36.2. Given the potentially large number of filings and swaps that would comprise the trade execution requirement registry, the Commission believes that uniform submissions through a standardized Form TER will foster efficient processing of the submissions and uniform presentation of relevant information in the registry.

The Commission also proposes to require under § 36.2(c) that DCMs and SEFs publicly post their respective Form TER filings on their respective websites, and promptly amend any inaccurate Form TERs.

Request for Comment

The Commission requests comment on all aspects of proposed § 36.2 and proposed Form TER in Appendix A to part 36. In particular, the Commission requests comment on the following questions:

(99) Does the proposed Form TER request appropriate and sufficient information? If not, then what information should the Commission request, and why?

(100) What information should the Commission include in the trade execution requirement registry, and why?

C. § 36.3—Trade Execution Requirement Compliance Schedule

The Commission observes that with the proposed elimination of the existing MAT determination process and the expanded scope of swaps that would be subject to the trade execution requirement under proposed § 36.1, counterparties may require additional time to prepare and update their business practices and technological and operational capabilities to trade and execute these swaps on a SEF or DCM. For example, market participants would have to directly on-board to a SEF or DCM, or otherwise avail themselves of other means of access, to continue trading those swaps that become newly subject to the trade execution requirement. Therefore, the Commission proposes to eliminate the existing trade execution requirement compliance schedule [887] and to replace it with a new compliance schedule, based on participant type, for the additional swaps that become subject to the expanded trade execution requirement. The proposed compliance schedule would be triggered on the effective date of any final rule adopted from this notice. The Commission has designed this proposed compliance schedule to ensure a smooth and timely implementation of the expanded requirement.

In formulating the proposed compliance schedule, the Commission considered the expanded scope of swaps that would become subject to the trade execution requirement. The Commission also referred to the compliance schedule previously established for the initial implementation of the clearing requirement, with a focus on the defined categories of market participants and respective levels of swap trading activity.[888] Accordingly, the proposed approach recognizes that different categories of counterparties have different abilities and resources for achieving compliance and is designed to provide counterparties with sufficient time to adapt to the expanded trade execution requirement.

www.cftc.gov/idc/groups/public/@otherif/documents/file/swapsmadeavailablechart.pdf.

[885] CFTC, Industry Filings—Swaps Made Available to Trade Determination, *available at https://sirt.cftc.gov/sirt/sirt.aspx?Topic=%20SwapsMadeAvailableToTradeDetermination.*

[886] The Commission notes that the proposed registry would not include information regarding the swaps subject to the trade execution requirement that are listed by Exempt SEFs. The Commission, however, anticipates that it will provide a list of the Exempt SEFs on which market participants may execute those swaps, subject to their availability on those facilities.

[887] 17 CFR 37.12, 38.11.

[888] 17 CFR 50.25.

The proposed schedule would establish different compliance dates for different categories of counterparties, as described below. As specified under proposed § 36.3(d), however, nothing in this proposed compliance schedule should be construed to prohibit counterparties from voluntarily complying with the trade execution requirement sooner than prescribed in the proposed compliance schedule. Finally, the Commission notes that pursuant to proposed § 36.3(b), the compliance schedule would not apply to swaps that are already subject to the trade execution requirement before the effective date of any final rule. Accordingly, market participants must continue to comply with the existing trade execution requirement for those swaps.

1. § 36.3(c)(1)—Category 1 Entities

Under § 36.3(c)(1), a Category 1 entity, which would include swap dealers, major swap participants, security-based swap dealers, or major security-based swap participants, would have ninety days to comply with the expanded trade execution requirement when it executes a swap transaction with another Category 1 entity or a non-Category 1 entity that voluntarily seeks to execute the swap on a SEF, a DCM, or an Exempt SEF. The Commission believes that a ninety-day time frame would be a reasonable period for these entities because they possess experience in the swaps market and resources to comply with the requirement sooner than other counterparties. Further, the Commission believes that Category 1 entities are generally the most active participants in the swaps market, often serving as market makers and liquidity providers to other participants. As the initial category of participants that are required to comply with the expanded trade execution requirement, the Commission believes that Category 1 entities are best equipped to work internally and with the trading venues, *i.e.,* SEFs and DCMs, to operate under the expanded trade execution requirement.

The Commission also believes that ninety days is a reasonable period of time for SEFs and DCMs to prepare to facilitate trading in additional swaps that would become subject to the expanded trade execution requirement. In particular, the Commission notes that some SEFs already list many of the types of swaps that would become subject to the expanded requirement.[889] Therefore, the Commission expects that the SEFs and DCMs that list these types of swaps would be both technologically and operationally ready to offer the expanded number of swaps within ninety days.

2. § 36.3(c)(2)—Category 2 Entities

The Commission proposes § 36.3(c)(2) to provide Category 2 entities with 180 days to comply with the expanded trade execution requirement when they execute swap transactions with a Category 1 entity, another Category 2 entity, or other counterparties that voluntarily seek to execute the swap on a SEF, a DCM, or an Exempt SEF. Category 2 entities would include commodity pools; private funds as defined in section 202(a) of the Investment Advisers Act of 1940; or persons predominantly engaged in activities related to the business of banking, or in activities that are financial in nature as defined in section 4(k) of the Bank Holding Company Act of 1956.

The Commission believes that a significant amount of swaps trading would migrate to SEFs or DCMs upon the compliance date for Category 2 entities because they consist of many active liquidity takers. Nevertheless, the Commission believes that an additional ninety days to comply with the expanded trade execution requirement would be reasonable for Category 2 entities, given that they may not have the same level of swaps trading expertise or resources as Category 1 entities. The Commission believes that it is essential for these entities to have sufficient time to transition their trading to venue-based environments.

3. § 36.3(c)(3)—Other Counterparties

The Commission proposes § 36.3(c)(3) to provide all entities that are not either Category 1 entities or Category 2 entities with 270 days to comply with the expanded trade execution requirement. The Commission believes that entities that do not qualify as either a Category 1 entity or Category 2 entity should be provided the greatest amount of time to comply with the expanded trade execution requirement because they likely have less sophistication in swaps trading. Of all of the participants in the swaps market, the Commission believes that the participants in this category are least likely to have on-boarded to or have experience trading swaps through SEFs or DCMs. Further, the Commission understands that onboarding onto such venues can be an intensive and time-consuming process. Therefore, the Commission believes that this additional time will help ensure that these participants have sufficient time to onboard or establish means of access and are prepared to trade on a SEF or DCM.

4. § 36.3(e)—Future Compliance Schedules

Under proposed § 36.3(e), the Commission would devise an appropriate compliance schedule when additional swaps listed by a SEF or DCM are subject to the trade execution requirement in the future *i.e.,* after the effective date of any final rules that are associated with this part and upon the issuance of additional clearing requirement determinations. The Commission believes that this approach will provide it with sufficient flexibility to promote compliance in a manner that balances the Commission's policy goal of promoting trading on SEFs and DCMs while also accounting for different considerations, such as the nature of the swap products, their availability on multiple trading venues, and the readiness of relevant market participants to trade those products through a SEF or DCM.

Request for Comment

The Commission requests comment on all aspects of the proposed compliance schedule in proposed § 36.3. The Commission specifically requests comment on the following questions:

(101) Are the proposed compliance schedules for Category 1 Entities, Category 2 Entities, and all other entities appropriate? If not, then should the Commission consider longer or shorter compliance time frames and why?

(102) Are the entities included in Category 1 and Category 2 appropriate? If not, then please explain why. Should additional entities be included within either Category 1 or Category 2 and why?

(103) Are the compliance schedule time frames adequate for SEFs and DCMs to be technologically and operationally ready for the expanded trade execution requirement? If not, then what alternative compliance schedule time frame should the Commission consider and why?

(104) How should the Commission handle the compliance schedules for any future expansions of the trade execution requirement?

XXII. Part 43—§ 43.2—Definition of ''Block Trade''

Section 43.2 defines a swap ''block trade'' as a publicly reportable swap transaction that (i) involves a swap that is listed on a SEF or DCM; (ii) occurs away from the SEF's or DCM's trading system or platform and is executed pursuant to the SEF's or DCM's rules

[889] *See supra* note 280.

and procedures; (iii) has a notional or principal amount at or above the appropriate minimum block trade size applicable to such swap; and (iv) is reported subject to the rules or procedures of the SEF or DCM and the rules set forth under part 43, including the appropriate time delay requirements set forth under § 43.5.[890] In specifying these elements, the Commission considered the treatment of block trades in various swap and non-swap markets.[891] In particular, the Commission looked to the futures markets, where futures block trades are ''permissible, privately-negotiated transaction[s] that equal[ ] or exceed[ ] a DCM's specified minimum quantity of futures or options contracts and is executed away from the DCM's centralized market but pursuant to its rules.'' [892] Accordingly, the Commission's regulatory definition of a ''block trade'' for swaps closely tracks this futures market concept of a block trade.

Similar to futures block trades, the Commission requires that swap block trades ''occur away'' from a SEF's or a DCM's trading system or platform, but pursuant to the SEF's or a DCM's rules and procedures.[893] The Commission clarified the ''block trade'' definition by stating that ''[a]ny swap that is executed on a SEF or a DCM's trading system or platform, regardless of whether it is for a size at or above the appropriate minimum block size for such swap, is not a block trade under this definition. . . .'' [894] Accordingly, to receive the fifteen-minute public reporting delay that block trades are entitled to under § 43.5(d), the swap transaction not only must have a notional amount at or above the appropriate minimum block size, but must also ''occur away'' from the SEF's or the DCM's trading system or platform.[895]

Given that block trades must occur away from a SEF's or a DCM's trading system or platform, the enumerated prohibition on pre-arranged trading as an abusive trading practice under § 37.203(a) allows block trades as an exception.[896] This exception allows transactions that meet or exceed the requisite block size to be privately negotiated to avoid potentially significant, adverse price impacts that would occur if traded on trading systems or platforms that offer pre-trade price transparency.

A. § 43.2—Definition—Block Trade; § 37.203(a)—Elimination of Block Trade Exception to Pre-Arranged Trading

During the part 37 implementation process, SEFs and market participants informed the Commission that for swap transactions that are intended to be cleared, requiring that such swaps to ''occur away'' from a SEF's trading system or platform creates an issue with carrying out pre-execution credit screening.[897] These market participants note that, in many cases, clearing FCMs are unable to conduct pre-execution credit screening for such block trades because they are unaware that a block trade has occurred away from a SEF until after it has been executed and reported to the SEF.[898] Accordingly, SEFs were unable to facilitate pre-execution credit checks for block trades.

DMO acknowledged this operational challenge and accordingly has granted ongoing no-action relief from the requirement that swap block trades ''occur away'' from a SEF.[899] Based on Commission staff no-action relief, a SEF may allow market participants to execute swap block trades that are intended to be cleared on a SEF's non-Order Book trading system or platform.[900] As a result, FCMs and SEFs have been able to comply with their respective pre-execution credit screening obligations.

The Commission proposes to revise certain elements of the ''block trade'' definition under § 43.2. First, the Commission proposes to eliminate the ''occurs away'' requirement for swap block trades. Second, the Commission proposes to require that to the extent counterparties seek to execute any swap that has a notional or principal amount at or above the appropriate minimum block trade size applicable to such swap on a SEF, they must do so on a SEF's trading system or platform. For swaps listed by a SEF for trading that participants intend to execute on the SEF and submit for clearing, the Commission believes that the proposed revised definition would (i) allow FCMs to conduct pre-execution credit screenings in accordance with § 1.73; and (ii) allow SEFs to facilitate those screenings in accordance with the Commission's proposed requirement under § 37.702(b).[901] In addition, for swaps listed by a SEF that participants intend to execute on the SEF, but do not intend to submit for clearing, participants would no longer be permitted to submit an already-executed block trade to the SEF pursuant to its rules; such transactions would be required to be executed on the SEF.

The Commission notes that this revised block trade definition is consistent with the provisions of the Dodd-Frank Act. CEA section 2(a)(13), as amended by the Dodd-Frank Act, directs the Commission to prescribe criteria for determining what constitutes a block trade for the purpose of establishing appropriate post-trade reporting time delays. The provision, however, does not set forth any pre-trade requirements, such as a requirement that the transaction be executed away from a SEF. Second, requiring block trades to be executed on a SEF for those swaps listed by the SEF, rather than allowing them to be executed away from the SEF, would also facilitate the statutory SEF goal of promoting swaps trading on SEFs.[902]

[890] 17 CFR 43.2.

[891] Real-Time Public Reporting of Swap Transaction Data, 75 FR 76140, 76159 (proposed Dec. 7, 2010) (discussion of block trades with respect to futures).

[892] *Id.*

[893] 17 CFR 43.2.

[894] Procedures To Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, 78 FR 32866, 32904 n.425 (May 31, 2013).

[895] CEA section 2(a)(13) requires the Commission to establish rules that govern the real-time reporting of swap transaction and pricing data to the public, but also directs the Commission, among other things, to prescribe rules that specify the appropriate reporting time delay for block trades, including the criteria for determining what constitutes a block trade. 7 U.S.C. 2(a)(13).

[896] ''Pre-arranged trading'' is prohibited as an abusive trading practice under § 37.203(a). This prohibition generally applies to market participants who communicate with one another to pre-negotiate the terms of a trade away from a trading system or platform, but then execute the trade on the trading system or platform in a manner that appears competitive and subject to market risk. Accordingly, the Commission intended the prohibition to maintain the integrity of price competition and market risk that is incident to trading in the market. *See supra* Section VI.A.2.—§ 37.203(a)—Pre-Arranged Trading Prohibition; § 37.9—Time Delay Requirement.

[897] For the Commission's discussion of pre-execution credit screening requirements, *see supra* Section XII.B.2.b.(3)—§§ 37.702(b)(2)–(3)—Pre-Execution Credit Screening.

[898] CFTC Letter No. 17–60, Re: Extension of No-Action Relief for Swap Execution Facilities from Certain ''Block Trade'' Requirements in Commission Regulation 43.2 at 2 (Nov. 14, 2017) (''NAL No. 17–60'').

[899] NAL No. 17–60; CFTC Letter No. 16–74, Re: Extension of No-Action Relief for Swap Execution Facilities from Certain ''Block Trade'' Requirements in Commission Regulation 43.2 (Oct. 7, 2016); CFTC Letter No. 15–60, Re: Extension of No-Action Relief for Swap Execution Facilities from Certain ''Block Trade'' Requirements in Commission Regulation 43.2 (Nov. 2, 2015); CFTC Letter No. 14–118, No-Action Relief for Swap Execution Facilities from Certain ''Block Trade'' Requirements in Commission Regulation 43.2 (Sept. 19, 2014).

[900] NAL No. 17–60 at 2–3.

[901] The Commission notes that proposed § 37.702(b) applies to SEFs that list (i) swaps that are subject to the clearing requirement; and/or (ii) swaps that are not subject to the clearing requirement, but for which the SEF facilitates processing and routing to a DCO for clearing. *See supra* Section XII.B.3.—Applicability of § 37.702(b) to SEFs that Do Not Facilitate Clearing.

[902] *See* 7 U.S.C. 7b–3(e).

The revised definition also corresponds with other proposed changes to the SEF regulatory framework. For example, the Commission believes that allowing SEFs to use flexible means of execution for swap transactions negates the need to allow swap block trade execution to occur away from SEFs. Similarly, the Commission's proposed approach to pre-execution communications should facilitate swap block trade execution on SEFs; proposed § 37.201(b) would generally prohibit participants from conducting such communications away from the SEF, except for communications regarding a listed swap that is not subject to the trade execution requirement, among other exceptions.[903] Accordingly, participants may pre-negotiate block trades with one another for those swaps away from a SEF and submit them to the SEF for execution. This approach would allow participants to comply with the proposed definition, *i.e.,* the swap must be executed on a SEF, but also facilitate compliance with pre-execution credit screening requirements if the swap is intended to be cleared.

To conform to the amended block trade definition, the Commission also proposes to eliminate the block trade exception to the pre-arranged trading prohibition under § 37.203(a). Given that block trades would no longer occur away from a SEF, but would be executed on a SEF via flexible means of execution, the Commission expects that market participants will have sufficient ability to continue to execute such transactions through a SEF's trading system or platform.

Request for Comment

The Commission requests comments on all aspects of proposed § 43.2. The Commission specifically requests comment on the following questions:

(105) Should the Commission limit the type of execution methods that may be utilized to permit block trades to receive a public reporting delay as set forth in Commission regulation § 43.5(d)? If so, then which methods of execution for block trades should be precluded from receiving a public reporting delay, and why? Would views on this question change if the public dissemination delay for a block trade was extended beyond fifteen minutes? If so, then please explain why.

(106) Should the Commission allow all swap block trades on SEFs to be negotiated through pre-execution communications and then submitted to SEFs for execution? Please explain why or why not.

XXIII. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act [904] requires Federal agencies, in promulgating regulations, to consider the impact of those regulations on small businesses. The regulations adopted herein will directly affect SEFs, DCMs, DCOs, SDs, MSPs and certain ECPs. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the Regulatory Flexibility Act.[905] The Commission has also previously determined that SEFs,[906] DCMs,[907] DCOs,[908] SDs,[909] MSPs [910] and ECPs [911] are not small entities for the purpose of the Regulatory Flexibility Act.

Therefore, the Chairman, on behalf of the Commission, pursuant to 5 U.S.C. 605(b), hereby certifies that the proposed rules will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* (''PRA'') imposes certain requirements on Federal agencies (including the Commission) in connection with conducting or sponsoring any ''collection of information,'' [912] as defined by the PRA. Among its purposes, the PRA is intended to minimize the paperwork burden to the private sector, to ensure that any collection of information by a government agency is put to the greatest possible uses, and to minimize duplicative information collections across the government.[913]

The PRA applies to all information, regardless of form or format, whenever the government is obtaining, causing to be obtained, or soliciting information, and includes required disclosure to third parties or the public, of facts or opinions, when the information collection calls for answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.[914] The PRA requirements have been determined to include not only mandatory, but also voluntary information collections, and include both written and oral communications.[915]

The Commission's proposed amendments would result in a collection of information within the meaning of the PRA, as discussed below. Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget (''OMB''). The proposed rulemaking would amend parts 9, 36, 37, 38, 39, and 43 of the Commission's regulations to include new information collections, eliminate certain existing information collections, and modify existing information collections.[916]

OMB control number 3038–0074 currently covers, among other things, all information collections arising in part 37 (other than the information collections related to existing § 37.10) and part 9.[917] OMB control number

[903] *See supra* Section VI.A.2.a.—§ 37.201(b)—Pre-Execution Communications.

[904] 5 U.S.C. 601 *et seq.*

[905] Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618 (Apr. 30, 1982)(''1982 Policy Statement'').

[906] Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33548 (Jun. 4, 2013).

[907] 1982 Policy Statement.

[908] A New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609 (Aug. 29, 2001).

[909] Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,'' 77 FR 30596, 30701 (May 23, 2012).

[910] *Id.*

[911] *See* 66 FR 20740, 20743 (Apr. 25, 2001).

[912] For purposes of this PRA discussion, the terms ''information collection'' and ''collection of information'' have the same meaning, and this section will use the terms interchangeably.

[913] 44 U.S.C. 3501.

[914] 44 U.S.C. 3502.

[915] 5 CFR 1320.3(c)(1).

[916] The proposed amendments would not substantially or materially modify existing information collection burdens, or create new information collection burdens, under parts 9, 39, and 43.

[917] The Commission notes that this OMB control number covers all information collections in part 37, including Subpart A and the SEF core principles, *i.e.,* Subparts B through P, and the appendices thereto, *i.e.,* Appendix A (Form SEF), Appendix B (guidance and acceptable practices), and proposed Appendix C (guidance to Core Principle 3). This OMB control number also includes all information collections related to part 9 to the extent applicable to SEFs. For clarity, existing § 37.10(a) is not covered under this OMB control number, but rather is subject to a separate information collection under OMB control number 3038–0099. The Commission further notes that in the most recent request for an extension of OMB control number 3038–0074, the Commission stated in the renewal notice that OMB control number 3038–0074 ''covers all information collections in part 37 of the Commission's regulations, including Subpart A and the SEF core principles (*i.e.,* Subparts B and C) . . . . [other than] any information collections related to § 37.10 . . . .'' The Commission notes that the reference to ''Subparts B and C'' should specify ''Subparts B through P'' instead. Agency Information Collection Activities Under OMB Review, 81 FR 65630, n.1 (Sep. 23, 2016) (''2016 Part 37 PRA Renewal'').

3038–0052 covers, among other things, information collections arising in part 38 (other than the information collections related to § 38.12).[918] OMB control number 3038–0099 covers the information collections related to the ''available to trade'' determination (''MAT determination'') process under § 37.10 and § 38.12. Accordingly, the proposed rulemaking would amend OMB control numbers 3038–0074 and 3038–0052; however, the Commission proposes to eliminate OMB control number 3038–0099 along with the corresponding MAT determination information collections under § 37.10 and § 38.12. Instead, the Commission proposes to transfer the corresponding MAT determination information collections under § 37.10 and § 38.12 to part 36, and the related information collections related to the MAT determination process for SEFs and DCMs will be incorporated under OMB control numbers 3038–0074 and 3038–0052, respectively. The Commission, therefore, is submitting this proposal to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11.

The collections of information under these proposed amendments are necessary to implement certain provisions of the CEA, as amended by the Dodd-Frank Act. Among other provisions in the CEA, CEA section 8a(5) provides the Commission with authority to promulgate rules as reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA.[919]

If the proposed amendments are adopted, responses to the proposed collections of information generally would be mandatory, although certain collections of information could vary based upon a SEF's discretion or level of business. For example, a SEF has the discretion to establish the scope of its trading operations, *e.g.,* determining which swaps to list for trading, which may affect the various burden hours discussed herein.

The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, ''Commission Records and Information.'' In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

As discussed in the preamble to the final rules for part 37 (''SEF Core Principles Final Rule''), the methodology the Commission used to formulate the proposed estimates reflect an average across all SEFs (and in respect to proposed part 36, all SEFs and DCMs).[920] By definition, averages are meant to serve as only a reference point; the Commission understands that due to both discretionary and mandatory requirements, some SEFs may go above the estimated burden hours to complete information collection requirements, while others may stay below those estimates.[921]

1. Information Provided by Reporting Entities/Persons

The following is a brief description of the information collections for SEFs, and as applicable DCMs and other market participants, under the proposed amendments to parts 36, 37 and 38.[922] To the extent that the Commission does not identify a specific provision, the Commission does not believe that any associated change substantively or materially modifies an existing information collection burden or creates a new one.[923]

The Commission notes that some of the proposed amendments are covered by other OMB control numbers. For example, some amendments would require SEFs to promulgate new rules that are required to be submitted to the Commission pursuant to part 40 of the Commission's regulations.[924] PRA burdens, if any, related to the submission by a SEF to the Commission of new rules, policies and procedures, and amendments have been accounted for in the previous information collection burden estimate associated with part 40, which governs the process by which SEFs must submit rules and amendments to the Commission.[925] Additionally, some of the hours associated with those information collections would not be deemed to be ''burden hours'' if they result from ''usual and customary'' business practices.[926]

a. § 37.3(a)—Requirements for Registration

The Commission expects that as a result of the proposed application of the SEF registration requirement under § 37.3(a), additional swaps broking entities will register as SEFs. For PRA purposes, the Commission previously had revised the current number of registered SEFs from 23 [927] to the current 25 [928] and had estimated approximately 4 new SEF applicants per year.[929]

The Commission notes that based on data from the National Futures Association (''NFA''), more than 300 interdealer brokers that are registered

[918] The Commission notes that this OMB control number covers all information collections in part 38 of the Commission's regulations, including Subpart A and the DCM core principles, *i.e.,* Subparts B through X. This OMB control number also includes all information collections related to part 9 to the extent applicable to DCMs. The Commission also notes for clarity that existing § 38.12 is not covered under this OMB control number, but rather is subject to a separate information collection with OMB control number 3038–0099.

[919] The full authority provided under part 37 of the Commission's regulations includes: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a–2, 7b–3, and 12a, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, tit. VII–VIII, 124 Stat. 1376 (2010).

[920] Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33551 (Jun. 4, 2013).

[921] *Id.*

[922] As noted above, the Commission proposes to eliminate the MAT determination process for DCMs under § 38.12.

[923] For the purposes of the PRA discussion herein, the Commission will not discuss the proposed amendments to parts 9, 39, and 43 because it has determined that they would not impose new information collection burdens or substantively or materially modify existing burdens therein. Further, the Commission will not discuss any proposed amendments to parts 36, 37, and 38 unless the Commission has determined that such changes would create, eliminate, or substantively or materially modify existing information collections or related burden hours.

[924] For example, proposed §§ 37.201(a)(1)–(3) would require a SEF to establish rules governing its operation that specify (i) the protocols and procedures for trading and execution, including entering, amending, cancelling, or executing orders for each execution method; (ii) the manner or circumstances in which the swap execution facility may exercise discretion in facilitating trading and execution for each execution method; and (iii) the sources and methodology for generating any market pricing information provided to facilitate trading and execution for each execution method.

[925] Provisions Common to Registered Entities, 76 FR 44776, 44789 (July 27, 2011).

[926] 5 CFR 1320.3(b)(2). For example, proposed § 37.6(b)(2)(iii) would require a SEF to establish and enforce rules to require the intermediary to transmit the confirmation or trade evidence record to the respective counterparty ''as soon as technologically practicable'' upon receipt of the confirmation or trade evidence record from the SEF. The Commission notes that SEF members and market participants acting in an intermediary capacity and executing swaps on behalf of customers, as a matter of industry practice, generally make such confirmations available to their customers, *i.e.,* the swap counterparties. Accordingly, this proposed amendment reflects an existing ''usual and customary practice'' that would create a new information collection but would not impose any associated burden hours.

[927] 2016 Part 37 PRA Renewal at 65631.

[928] Agency Information Collection Activities: Notice of Intent To Revise Collection Numbers 3038–0052 and 3038–0074, Core Principles and Other Requirements for Designated Contract Markets, and Core Principles and Other Requirements for Swap Execution Facilities, 83 FR 1609, 1611 (Jan. 12, 2018).

[929] 2016 Part 37 PRA Renewal at 65631.

with the NFA as ''introducing brokers'' are also ''swap firms,'' *i.e.,* interdealer brokers that are registered as introducing brokers and also designated to deal with swap products. The Commission, however, does not expect that proposed § 37.3(a) will result in all swap interdealer brokers registering as SEFs. The Commission understands that some of these entities may (i) already be affiliated with current SEFs and could operate as part of their respective affiliated SEFs rather than registering as new, separate SEFs; (ii) merge, become affiliated with, or otherwise be acquired by registered SEFs; or (iii) adjust their business practices such that they would not be required to register as a SEF. Additionally, some of these entities may be currently registered as introducing broker swap firms, but are not currently in the business of swaps trading and therefore do not trigger the SEF registration requirement. Additionally, the Commission notes that certain non-U.S. interdealer brokers may also be affiliated with platforms that are currently exempt or may become exempt in the future from Commission registration, and therefore, would not need to separately register as SEFs.

The Commission initially estimates that up to 60 swaps broking entities, including interdealer brokers, and one Single-Dealer Aggregator Platform would register as SEFs as a result of the proposed application of the SEF registration requirement under § 37.3(a).[930] Consequently, for the purposes of this PRA analysis, the Commission estimates that the proposed application of § 37.3(a) will impose an initial, non-recurring information collection burden of 295 burden hours associated with the SEF registration process for these 60 entities.[931] The Commission does not believe that the proposed application of the SEF registration requirement in § 37.3(a) would impose new information collection burdens or substantively or materially modify existing burdens for registered SEFs.

In connection with the Commission's proposed clarification of the registration requirement, the Commission would propose to delay the application of the registration requirement with respect to (i) swaps broking entities, including interdealer brokers for a six-month period; and (ii) foreign swaps broking entities, including foreign interdealer brokers that facilitate swaps trading for U.S. persons for two-year period, provided that in each case the subject entity submits a request to the Commission with certain information.[932] As noted above, the Commission expects in the aggregate that approximately 60 such entities, including swaps broking entities and foreign swaps broking entities, would be required to register as SEFs, and the Commission estimates that all such relevant entities would request a delay. Accordingly, the Commission estimates that the voluntary request to delay the registration requirement will impose an initial, non-recurring information collection burden of 1 burden hour associated with the SEF registration process for each of these 60 entities. The Commission does not believe that the clarification in proposed § 37.3(a) would impose new information collection burdens or substantively or materially modify existing burdens for registered SEFs.

b. § 37.3(b)—Procedures for Registration

Proposed § 37.3(b) would streamline Form SEF by consolidating, amending, and eliminating several of the existing exhibits.[933] The Commission believes that these changes would establish a clearer and more simplified application for SEF applicants that would still provide the Commission with sufficient information needed to determine compliance. The Commission believes that the proposed streamlined Form SEF will reduce the initial, non-recurring burden hours associated with the application process for SEF registration by approximately 5 burden hours.

c. § 37.3(c)—Amendment to an Order of Registration

Proposed § 37.3(c) would eliminate the requirement that a SEF amend Form SEF when requesting an amended order of registration from the Commission. Instead, a registered SEF would file a request with the Commission for an amended order pursuant to proposed § 37.3(c), but would no longer be required to file updated exhibits to Form SEF, although a SEF would be required to provide the Commission with any additional information and documentation as the Commission deems necessary.[934] The Commission estimates that approximately 1 SEF per year seeks to amend its registration order and that the proposed change would save that SEF approximately 2 burden hours.

d. § 37.5(c)—Provision of Information Relating to a Swap Execution Facility

Proposed § 37.5(c) would amend the existing notification requirements related to transfers of equity interest in a SEF. Proposed § 37.5(c)(1) would require a SEF to file a notice with the Commission regarding any transaction that results in the transfer of direct or indirect ownership of fifty percent or more of the equity interest of a SEF as opposed to only direct ownership transfers as currently required.[935] As part of that notification, a SEF may

[930] The Commission estimates that approximately 40–60 swaps broking entities, including interdealer brokers would be required to register as SEFs as a result of the proposed application of the SEF registration requirement in § 37.3(a). Similarly, the Commission is aware of one Single-Dealer Aggregator Platform, which is affiliated with a SEF. For the purposes of this PRA, the Commission estimates and assumes that 60 such swaps broker entities and the one Single-Dealer Aggregator Platform of which it is aware would register as SEFs. For further discussion, *see infra* Section XXIII.C.3.c.—Costs (cost discussion related to the SEF registration requirement).

[931] As noted below, based on the proposed changes to the SEF registration requirements described herein, the Commission is reducing the estimated burden hours associated with the registration process by 5 hours from 300 hours to 295 hours.

[932] The request would include the (i) entity's name as it appears in the entity's charter; (ii) name and address of the entity's ultimate parent company; (iii) any names under which the entity does business; (iv) address of principal executive office; (v) a contact person's name, address, phone number, and email address; (vi) asset classes and swap products for which the entity facilitates trading; and (vii) any registrations, authorizations, or licenses held. Foreign broking entities additionally would need to provide (viii) certification that it currently arranges or negotiates swap transactions for U.S. persons; (ix) home country regulator or regulators; and (x) any registrations, authorizations, or licenses held in the entity's home country.

[933] For further discussion on the specific changes, *see supra* Section IV.C.3.b.—§ 37.3(b)(1)—Application for Registration.

[934] The Commission notes that it proposes to eliminate the existing language under § 37.3(b) that specifies the use of part 40 to file application amendments subsequent to registration. The Commission emphasizes that not all of the information from the Form SEF exhibits need to be updated pursuant to part 40 subsequent to registration—for example, certain part 37 provisions already require SEFs to update their information on an ongoing basis. Under § 37.1306, a SEF is required to file financial reports, including fiscal year end reports, which precludes the need to amend new Exhibit G (existing Exhibit I) and file it through part 40. As discussed above, the Commission clarifies that part 40 only applies to information from application exhibits that constitute a ''rule,'' as defined under § 40.1(i). The Commission generally interprets the § 40.1(i) rule definition broadly to encompass governance documentation (proposed Exhibit C); fees (proposed Exhibit H); rulebooks (proposed Exhibit J); compliance manuals (proposed Exhibit K); participant agreements (proposed Exhibit L); SDR-related agreements (proposed Exhibit M); clearing-related agreements (proposed Exhibit N); other third-party agreements (proposed Exhibit O); and information related to execution methods (proposed Exhibit P). Therefore, registered SEFs have already been submitting changes to these types of documentation pursuant to the part 40 rule filing procedures.

[935] Transfer of ownership in an ''indirect'' manner may occur through a transaction that involves the transfer of ownership of a SEF's direct parent or an indirect parent, and therefore, implicates effective change in ownership of the SEF's equity interest.

incur burdens that are similar to those incurred when providing a notice of a direct change, including providing details of the proposed transaction and how the transaction would not adversely impact the SEF's ability to comply with the SEF core principles and the Commission's regulations, responding to any requests for supporting documentation from the Commission, and updating any ongoing changes to the transaction. Accordingly, the Commission estimates that approximately 1 additional SEF per year would need to notify the Commission as a result of an indirect equity transfer and that the proposed amendment would impose a one-time, non-recurring information collection of approximately 10 burden hours on such SEF.

e. § 37.6(b)(1)—Legally Binding Documentation

Proposed §§ 37.6(b)(1)(i)–(ii) would amend the existing swap documentation requirements by establishing separate transaction documentation requirements for cleared and uncleared swaps, respectively. Under existing § 37.6(b), a SEF is required to provide each counterparty to a transaction with a written ''confirmation'' that contains all of the terms of a swap transaction at the time of the swap's execution for both cleared and uncleared swap transactions, including (i) ''economic terms'' specific to the transaction and (ii) non-transaction specific ''relationship terms'' governing the relationship between the two counterparties.[936] To include all of the terms of a uncleared swap into a confirmation, a SEF would comply with § 37.6(b) by incorporating by reference the relevant terms set forth in the previously-negotiated agreements and documents, as long as the SEF had obtained these agreements prior to execution.[937]

Proposed § 37.6(b)(1)(i), which would continue to apply the existing confirmation requirement to cleared swap transactions, would not alter the information collection burdens with respect to cleared swaps. For uncleared swaps, however, proposed § 37.6(b)(1)(ii) would require a SEF to provide a ''trade evidence record'' that memorializes the terms that are agreed upon by the counterparties on the SEF. In contrast to the requirement for cleared swaps, proposed § 37.6(b)(1)(ii) would not require the trade evidence record to include all the terms of the swap transaction, including relationship terms contained in underlying documentation between the counterparties, nor would the SEF need to obtain or maintain the underlying agreements prior to the execution of the swap transaction.[938] To the extent that such terms either (i) are agreed upon between the counterparties in underlying documentation established away from the SEF and continue to govern the transaction post-execution or (ii) are not required to establish legal certainty for a specific transaction, a SEF would not be required to incorporate those terms into a trade evidence record. The proposed approach would address the challenges that have prevented SEFs from fully complying with § 37.6(b) by reducing the administrative burdens for SEFs, who under the proposal would not be required to obtain, incorporate, or reference those previous agreements; and for counterparties, who would not be required to submit all of their relevant documentation with other potential counterparties to the SEF.

As a result, the Commission believes that the proposed amendments would reduce a SEF's annual recurring information collection burden for uncleared swap transactions. Accordingly, the Commission estimates that proposed § 37.6(b)(1)(ii) would reduce annual recurring information collection burdens by about 375 hours per SEF.[939]

f. § 37.203(d)—Automated Trade Surveillance System

Proposed § 37.203(d) would eliminate the prescriptive automated trade surveillance system capabilities requirements enumerated in existing § 37.203(d), except for the ability of a SEF to reconstruct sequence of market activity, and would instead require that a SEF's automated trade surveillance system be capable of detecting and ''reconstructing'' potential trade practice violations.[940]

As a result, the proposed rule would provide each SEF with the flexibility to determine what capabilities its automated trade surveillance system must have, based on the nature of the SEF's trading systems or platforms, to satisfy its core principle compliance responsibilities. Although it is possible that SEFs use their discretion to decrease the information collections and related burden hours, SEFs would still be obligated to comply with the same underlying core principle obligations with which they must currently comply. As a result, the Commission estimates and assumes that SEFs would continue to fulfill their information collection burdens in a manner similar to the status quo. Accordingly, the Commission assumes that proposed § 37.203(d) would not impose new information collection burdens or substantively or materially affect SEFs' total burden hours.

g. § 37.203(e)—Error Trade Policy

Proposed § 37.203(e) would require SEFs to establish an error trade policy that, among other things, would notify all market participants of (i) any swap transaction that is under review; (ii) any determination by the SEF that the swap transaction under review either has been determined to be or not to be an error trade; and (iii) the resolution of any error trade, including any trade term adjustment or trade cancellation. To the extent that SEFs currently are not explicitly required to provide market participants with notice of any of these events, proposed § 37.203(e) would impose a new information collection burden on SEFs.[941] The Commission

[936] As noted above, economic terms include, for example, swap product, price, trade date, settlement date, and notional amount. ''Relationship terms'' generally govern all transactions between two counterparties, *e.g.,* default provisions, margin requirements, and governing law. *See supra* Section IV.F.—§ 37.6—Enforceability.

[937] SEF Core Principles Final Rule at 33491 n.195.

[938] The Commission anticipates that the terms listed in a trade evidence record would include, at a minimum, the transaction's ''economic terms,'' *e.g.,* trade date, notional amount, settlement date, and price.

[939] The Commission previously estimated that the process to obtain, review, incorporate, and maintain the previously-negotiated agreements takes approximately 1.5 hour per SEF participant and that on average, a SEF has about 375 participants. For purposes of this PRA discussion herein, however, the Commission is revising its estimate of the number of burden hours that the proposal would eliminate and will assume that each such agreement takes approximately 1.0 hours per SEF participant. Accordingly, 375 participants × 1.0 hour per participant = 375 estimated burden hours. The Commission also notes that this estimate of 375 burden hours includes the burden estimates in connection with § 37.1001, which establishes a SEF's recordkeeping obligations. Supporting Statement for New and Revised Information Collections, Core Principles and Other Requirements for Swap Execution Facilities, OMB Control Number 3038–0074, (Sept. 23, 2016), *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201609-3038-005*.

[940] The Commission notes that this proposed change is consistent with the proposed amendments to §§ 37.205(b)(2)–(3), as discussed below, that would similarly limit a SEF's electronic transaction history database and electronic analysis capability requirements. The Commission, however, emphasizes that a SEF must continue to have the capability to load and process all executed trades, including those resulting from orders entered by voice or certain other electronic communications, such as instant messaging and email.

[941] The Commission notes that existing § 37.203(e) provides SEFs with the authority to

Continued

estimates that proposed § 37.203(e) would increase a SEF's annual recurring information collection burden by approximately 15 burden hours, based on an estimate that a SEF on average would incur approximately 15 error trade reviews per year.[942] Because most SEFs already have established and currently maintain the necessary personnel and systems to provide such notices to its market participants, the Commission believes that the proposed amendment would not require SEFs to expend initial, non-recurring burden hours in order to comply.

h. § 37.205(a)—Audit Trail Required

Proposed § 37.205(a) would make several changes to SEFs' audit trail compliance obligations. First, the proposed amendment would replace the requirement that SEFs must ''detect, investigate, and prevent'' customer and market abuse with a requirement instead that SEFs must be able to ''reconstruct all trading on its facility, detect and investigate customer and market abuses, and take appropriate disciplinary action.'' Second, the Commission proposes to move the requirement that audit trail data shall be sufficient to reconstruct all indications of interest, requests for quotes, orders and trades, to the guidance to Core Principle 2 in Appendix B.[943] Third, the Commission proposes to eliminate the requirement that SEFs capture post-execution allocation information in their audit trail data; in lieu of requiring the audit trail track a customer order through ''fill, allocation, or other disposition,'' the Commission proposes to require SEFs to capture the audit trail data only through execution on the SEF since the Commission has learned from SEFs' representations that SEFs are unable to routinely obtain post-allocation information as required by §§ 37.205(a) and (b)(2) from third parties, such as DCOs and SDRs.

To the extent that the Commission is providing SEFs with greater discretion in fulfilling their information collection obligations with respect to audit trail requirements under § 37.205, the Commission estimates and assumes that SEFs would continue to fulfill their information collection burdens in a manner similar to the status quo. Accordingly, the Commission assumes that proposed § 37.205(a) would not substantively or materially affect a SEF's total information collection burden hours.[944]

i. § 37.205(b)—Elements of an Acceptable Audit Trail Program

Proposed § 37.205(b) would narrow the scope of audit trail data that must be captured in a transaction history database under existing § 37.205(b)(2) by eliminating the requirement that SEFs include in their electronic transaction history database ''all indications of interest, requests for quotes, and order and trades entered into'' a SEF's trading system or platform. Instead, the SEFs would be required to include only ''trades'' executed via voice or via entry into a SEF's electronic trading system but must include all ''orders'' that are entered into an electronic trading system. The Commission additionally proposes to eliminate the remaining requirements of § 37.205(b)(2) detailing the information that must be included in transaction history database. Consistent with the changes to § 37.205(b)(2), the Commission further proposes to amend § 37.205(b)(3) to clarify that a SEF's electronic analysis capability must enable the SEF to reconstruct transactions, rather than ''indications of interest, requests for quotes, orders, and trades.''

To the extent that the Commission is providing SEFs with greater discretion in fulfilling their information collection obligations with respect to audit trail requirements under § 37.205, the Commission estimates and assumes that SEFs would continue to fulfill their information collection burdens in a manner similar to the status quo. Accordingly, the Commission assumes that proposed § 37.205(b) would not substantively or materially affect a SEF's total information collection burden hours.

j. § 37.205(c)—Audit Trail Reconstruction

Proposed § 37.205(c) would eliminate the existing requirements for a SEF to establish an annual audit trail review and a related enforcement program and instead require the SEF to ''establish a program to verify its ability to comprehensively and accurately reconstruct all trading on its facility. . . .'' The Commission believes that this change will provide SEFs with discretion regarding what records they must maintain in order to comply with their information collection requirements, *i.e.,* to determine what components of their audit, if incomplete or inaccurate, could impair their ability to conduct effective surveillance, and to determine and implement the most effective means for enforcing compliance with their audit trail and recordkeeping requirements.[945] The Commission also proposes to adopt guidance to Core Principle 2 in Appendix B specifying that an effective audit trail reconstruction program should annually review an adequate sample of executed and unexecuted orders and trades from each execution

cancel or adjust prices for error trades if necessary to mitigate market disruption; in connection with this authority, existing § 37.203(e) also requires SEFs to make any such adjustments and cancellations transparent to market participants. 17 CFR 37.203(e). To the extent that proposed § 37.203(e) requires SEFs to provide notice to market participants for error trades in additional circumstances, the proposed amendment imposes a new collection of information.

[942] As noted above, proposed § 37.203(e) would require a SEF to provide market participants with a first notice upon the initiation of a review of an alleged error trade, a second notice upon any determination as to whether such swap transaction is or is not an error trade, and a third notice upon the resolution of the review, including any trade term adjustment or trade cancellation. The Commission estimates that each notice requires about ⅓ burden hours, for a total of 1 burden hour per error trade (⅓ burden hours × 3 notices = 1 burden hour per error trade for notices). Further, the Commission estimates that each SEF on average will have approximately 15 error trade reviews per year. Accordingly, 1 burden hour × 15 error trade reviews per year = 15 burden hours per year. The Commission notes, however, that certain error trades may be resolved more quickly than 1 hour or take longer than 1 hour depending on the availability and coordination of the counterparties and relevant SEF personnel.

[943] The Commission proposes to add this guidance to paragraph (a)(4) to Core Principle 2 in Appendix B. The Commission proposes to eliminate the existing language in paragraph (a)(4). *See infra* Section VII.E.2.—§ 37.206(b)—Disciplinary Program.

[944] As the Commission discussed above, certain existing requirements under § 37.205(a) are either unfeasible or impose greater information collection burdens than the Commission originally had estimated, *e.g.,* the requirement to collect post-execution trade allocation information. Subsequently, Commission staff provided no-action relief with respect to such obligations. *See, e.g.,* CFTC Letter No. 15–68, Re: No-Action Relief for Swap Execution Facilities from Certain Audit Trail Requirements in Commission Regulation 37.205 Related to Post-Execution Allocation Information (Dec. 22, 2015) (subsequently extended in CFTC Letter No. 17–54, Re: No-Action Relief for Swap Execution Facilities from Certain Audit Trail Requirements in Commission Regulation 37.205 Related to Post-Execution Allocation Information (Oct. 31, 2017)). Accordingly, the 2016 Part 37 PRA Renewal took into consideration in its revised PRA burden hour estimates the unfeasibility with complying with such requirements and the corresponding no-action relief. As a result, the Commission's proposal to eliminate such information collections under the proposal would not result in a net change to a SEF's aggregate burden hours because the 2016 Part 37 PRA Renewal already considered such relief and non-compliance with such requirements in its revised estimate. The Commission notes that, otherwise, the burden hour estimate in the 2016 Part 37 PRA Renewal would have been even greater.

[945] Notwithstanding these proposed changes, the Commission notes that to comply with the general audit trail requirement under proposed § 37.205(a), a SEF must capture all audit trail data necessary to reconstruct all trading on its facility, detect and investigate customer and market abuses, and take disciplinary action, the SEF must ensure that market participants are submitting accurate and complete audit trail data.

method offered to verify compliance with § 37.205(c).[946]

To the extent that the Commission is providing SEFs greater discretion in fulfilling their information collection obligations with respect to audit trail requirements under § 37.205, the Commission estimates and assumes that SEFs would continue to fulfill their information collection burdens in a manner similar to the status quo. Accordingly, the Commission will assume that proposed § 37.205(c) would not substantively or materially affect a SEF's total information collection burden hours.

k. §§ 37.206(b)–(d)—Disciplinary Program

The Commission proposes to eliminate the existing requirements under (i) § 37.206(c), which currently specify certain minimum requirements for a SEF disciplinary hearing, including providing a transcript of the hearing to a respondent under certain conditions; and (ii) § 37.206(d), which requires that a disciplinary panel render a written decision promptly following a hearing, along with a detailed list of information that the SEF must include in the decision. Proposed § 37.206(b) would generally require a SEF to establish a disciplinary program to enforce its rules and provide the SEF with the discretion to administer that program through compliance staff instead of mandatory disciplinary panels. The Commission also proposes to add guidance to Core Principle 2 in Appendix B to specify that a SEF's rules governing the adjudication of a matter by the SEF's disciplinary panel should be fair, equitable, and publicly available and that a SEF's rules should require the disciplinary panel to promptly issue a written decision following a hearing or the acceptance of a settlement offer.[947]

To the extent that the Commission is providing SEFs greater discretion in fulfilling their information collection requirements with respect to carrying out disciplinary hearing and issuing hearing decisions, the Commission estimates and assumes that SEFs would continue to fulfill their information collection burdens in a manner similar to the status quo. Accordingly, the Commission will assume that proposed §§ 37.206(b)–(d) would not substantively or materially affect a SEF's total information collection burden hours.

l. § 37.401—General Requirements for Monitoring of Trading and Trade Processing

Proposed § 37.401(b) would require that a SEF collect and evaluate data on its market participants' trading activity outside of the SEF ''as necessary'' rather than ''on an ongoing basis'' as currently required.[948] Similarly, proposed § 37.401(c) would require a SEF to monitor and evaluate general market data to detect and prevent manipulative activity ''as necessary.'' [949] The Commission anticipates that this will reduce annual recurring information collection burden hours by approximately 50 burden hours per SEF.

m. § 37.1301(b)—General Requirements for Financial Resources

Proposed § 37.1301(b) would permit SEFs that also operate as DCOs to file a single financial report under § 39.11 that covers both the SEF and DCO. Because this proposed approach would streamline and simplify the SEF financial reporting requirement process under § 37.1306, the Commission estimates that the proposed change would decrease annual recurring information collection burden by 5 burden hours. The Commission also estimates that 1 SEF will take advantage of this approach per year.

n. § 37.1306—Financial Reporting to the Commission

Proposed § 37.1306 would make several changes that would affect SEFs' information collection burden hours. First, proposed § 37.1306(a) would require SEFs' quarterly financial statement to be prepare in accordance with GAAP.[950] Because GAAP-compliant financial statements generally require additional effort compared to non-GAAP compliance financial statements, the Commission estimates that the proposed change would increase annual recurring information collection burden hours by 10 burden hours and not impose an initial, non-recurring burden.

Second, proposed § 37.1306(c), among other things, would require a SEF to determine all of the costs that a SEF would incur to wind down its operations and the amount of time for the projected wind-down period, as well as explain the basis for its determinations. The Commission estimates that proposed § 37.1306(c) will impose an initial, non-recurring information collection of 20 burden hours associated with the SEF's obligation to provide a description of the costs and timing of a projected wind-down scenario, along with the basis for its determination. Additionally, the Commission estimates that this information collection burden would impose 5 annual recurring information collection burden hours after the initial year to update this information.[951]

o. § 37.1401(g)—Program of Risk Analysis and Oversight Technology Questionnaire

Proposed § 37.1401(g) would require a SEF to annually submit an up-to-date questionnaire that would be located in Appendix A to part 37 (''Questionnaire'') based on the existing Operational Capability Technology Questionnaire located in Exhibit V to Form SEF in Appendix A.[952] A SEF

[946] The Commission proposes to add this guidance to paragraph (a)(5) to Core Principle 2 in Appendix B. 17 CFR part 37 app. B. As discussed below, the Commission proposes to eliminate the existing language in paragraph (a)(5) to Core Principle 2 in Appendix B, *see supra* Section VII.E.2.—§ 37.206(b)—Disciplinary Program.

[947] The Commission proposes to add this guidance as part of a new paragraph (a)(7) to Core Principle 2 in Appendix B.

[948] The proposed amendment would renumber existing subsection (a) to subsection (b).

[949] The proposed amendment would renumber existing subsection (b) to subsection (c).

[950] Alternatively, if a SEF is not domiciled in the United States and is not otherwise required to prepare financial statements in accordance with GAAP, then proposed § 37.1306(a)(2)(ii) would allow the SEF to submit financial statements prepared in accordance with either International Financial Reporting Standards issued by the International Accounting Standards Board, or a comparable international standard that the Commission may otherwise accept in its discretion.

[951] The Commission notes that existing § 37.1306(c) requires a SEF to provide ''[s]ufficient documentation'' explaining both the methodology it used to compute its financial resources requirement as well as the basis for its determinations regarding its liquidity requirements. In addition to the change discussed above, proposed § 37.1306(c) would clarify the type of information that SEFs must include in the financial statements they submit to the Commission, including (i) list all of its expenses, without exclusion, and (ii) identification of all expenses that the SEF excluded or pro-rated in its projected operating cost calculations and explain the basis for excluding or pro-rating any expenses. The Commission believes that these changes are neither an addition nor modification to existing burden hours since the Commission is merely clarifying the type of documentation that must be provided to be deemed ''sufficient'' and are not intended to increase burden hours or the information that the Commission originally intended for SEFs to provide. Accordingly, other than as discussed above, the Commission believes that the proposed amendment to § 37.1306(c) would not impose new information collection burdens on SEFs or substantively or materially modify existing burdens.

[952] The Commission notes that based on the proposed amendments to Form SEF in Appendix A, Exhibit V would be re-designated as Exhibit Q of Form SEF. The up-to-date questionnaire would be called the ''Program of Risk Analysis and Oversight Technology Questionnaire'' and would be located in Appendix A to part 37. To the extent that still-current information and documents were provided in the most recent update to the Questionnaire, a SEF responding to a System Safeguards Examination document request would be able to

Continued

would only need to submit new changes to the Questionnaire and would not need to resubmit any information that has not changed. An applicant for SEF registration is required to file the Questionnaire pursuant to Form SEF in order to demonstrate compliance with Core Principle 14 and § 37.1401.[953] The majority of the updated Questionnaire would remain unchanged, although the proposal would additionally include enterprise technology risk assessments, board of director and committee information, third-party service provider information, and cybersecurity threat intelligence capabilities in order to keep up-to-date with the rapidly changing field of system safeguards and cybersecurity.

The Commission believes that the aggregate burden hours imposed on SEFs are mitigated for several reasons. First, an annually-updated Questionnaire would limit the work required of SEFs in responding to a System Safeguards Examination document requests to providing updated information and documents for sections of Exhibit Q that have changed since the last annual filing. Second, SEFs currently must provide similar information under existing §§ 37.1401(f)–(g).[954] Third, much of the information comprising a SEF's annual compliance report would be able to be used for the Questionnaire. Accordingly, the Commission estimates that proposed § 37.1401(g) would establish a new collection of information with annual recurring burden hours of 8 burden hours per SEF.

p. § 37.1501(d)—Preparation of Annual Compliance Report

Proposed § 37.1501(d) [955] would make several changes that would generally reduce burden hours for SEFs. First, under proposed § 37.1501(d) a SEF would no longer need to include in its annual compliance report (''ACR'') either a review of all the Commission regulations applicable to a SEF or identify the written policies and procedures designed to ensure compliance with the Act and Commission regulations. Instead, the Commission believes that requiring an ACR to include a description and self-assessment of the effectiveness of the SEF's written policies and procedures to ''reasonably ensure'' compliance with the Act and applicable Commission regulations is more closely aligned with the corresponding provisions of Core Principle 15 and would still allow the Commission to properly assess the SEF's compliance and self-regulatory programs. Accordingly, the Commission estimates that proposed § 37.1501(d) would reduce annual recurring information collection burden hours by approximately 10 burden hours per SEF.

Second, proposed § 37.1501(d)(3) would maintain the current requirement that an ACR describe the ''financial, managerial, and operational resources'' set aside for compliance with the Act and Commission regulations, but would eliminate the requirement that a SEF specifically discuss its compliance staffing and structure; a catalogue of investigations and disciplinary actions taken over the last year; and a review of disciplinary committee and panel performance. The Commission estimates that proposed § 37.1501(d)(3) would reduce annual recurring information collection burden hours by approximately 5 burden hours per SEF.

Third, to facilitate the Commission's ability to assess a SEF's written policies and procedures regarding compliance matters, proposed § 37.1501(d)(4) would require a SEF to discuss only material noncompliance matters and explain the corresponding actions taken to resolve such matters.[956] The Commission believes that requiring SEFs to focus on describing material non-compliance matters, rather than describing all compliance matters in similar depth, will streamline this requirement and provide more useful information to the Commission. Further, the Commission proposes to eliminate the enumerated mechanisms for identifying non-compliance issues, which conforms to the ability of a chief compliance officer (''CCO'') to establish procedures to address non-compliance issues through ''any means,'' as described above. Accordingly, the Commission estimates that this change would reduce annual recurring information collection burden hours per SEF by 3 burden hours.

Fourth, proposed § 37.1501(d)(5) would limit a SEF CCO's certification of an ACR's accuracy and completeness to ''all material respects'' of the report. The Commission understands that CCOs have been hesitant to certify that an entire ACR is accurate and complete under the penalty of the law, without regard to whether a potential inaccuracy or omission would be a material error or not. Accordingly, since the Commission believes that the proposed change would entail fewer burdens for a CCO to collect the necessary information to enable the CCO to certify the ACR, the Commission estimates that this change would reduce annual recurring information collection burden hours per SEF/CCO by 10 burden hours.

q. Part 36—Trade Execution Requirement

Proposed part 36 would address the swap trade execution requirement and would eliminate the MAT determination process under existing § 37.10 and § 38.12, as well as the associated compliance schedules set forth under § 37.11 and § 38.11. Proposed § 36.2 would require SEFs and DCMs to each respectively file a standardized form (''Form TER'') to the Commission that details the swaps that they list for trading that are subject to the trade execution requirement, as well as include such information on their respective websites. The Commission estimates that filing these forms and providing the related information on their website will create a new information collection with an initial, non-recurring burden of approximately 5 burden hours per SEF to complete and submit Form TER. Additionally, the Commission estimates that this

reference that fact, rather than resubmitting such information and documents.

[953] The current version of the Questionnaire requests documents and information pertaining to the following nine areas of an applicant's program of risk analysis and oversight, including: (i) Organizational structure, system descriptions, facility locations, and geographic distribution of staff and equipment, including organizational charts and diagrams; (ii) enterprise risk management program and governance, including information regarding the Board of Directors, audits, and third-party providers; (iii) information security, including storage of records, access controls, and cybersecurity threat intelligence capabilities; (iv) business continuity and disaster recovery plan and resources, including testing and recovery time objectives; (v) capacity planning and testing; (vi) system operations, including configuration management and event management; (vii) systems development methodology, including quality assurance; (viii) physical security and environmental controls; and (ix) testing, including vulnerability, penetration, and controls testing.

[954] The Commission notes that proposed subsection (h) (renumbered from existing subsection (g)) requires a SEF to provide to the Commission system safeguards-related books and records, including (1) current copies of its business continuity-disaster recovery plans and other emergency procedures; (2) all assessments of its operational risks or system safeguards-related controls; (3) all reports concerning system safeguards testing and assessment required by this chapter; and (4) all other books and records requested by Commission staff in connection with Commission oversight of system safeguards or maintenance of a current profile of the SEF's automated systems. Moreover, § 37.1401(f) requires a SEF to provide Commission staff with timely advance notice of all material planned changes to automated systems that may impact reliability, security, or adequate scalable capacity of such systems and planned changes to the SEF's program of risk analysis and oversight.

[955] The proposed amendment would renumber existing subsection (e) to subsection (d).

[956] The Commission proposes to renumber paragraph (e)(5) to paragraph (d)(4) and adopt the amendments as described above and other non-substantive amendments.

requirement will impose approximately 5 annual recurring burden hours per SEF related to updating, or confirming no changes need to be made to, Form TER. As noted above, there are 25 SEFs currently registered with the Commission, and the Commission expects up to another 60 SEFs to register as a result of the Commission's proposed application of the SEF registration requirement. Accordingly, the Commission estimates that the information collection burdens related to Form SEF will impose an aggregate of 425 initial, non-recurring burden hours across 85 entities and an aggregate of 425 annual recurring burden hours across the same.[957]

2. Information Collection Comments

The Commission invites the public to comment on any aspect of the paperwork burdens discussed herein, particularly for those provisions for which the Commission proposes to eliminate specific requirements and instead provide SEFs with discretion in complying with their information collection obligations. Copies of the supporting statements for the collections of information from the Commission to OMB are available by visiting *RegInfo.gov*. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to (i) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information proposed to be collected; and (vi) minimize the burden of the proposed collections of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology.

Those desiring to submit comments on the proposed information collection requirements should submit them directly to the Office of Information and Regulatory Affairs, OMB, by fax at (202) 395–6566, or by email at *OIRAsubmissions@omb.eop.gov*. Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the **ADDRESSES** section of this notice of proposed rulemaking for comment submission instructions to the Commission.

C. Cost-Benefit Considerations

1. Introduction

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders.[958] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors further below. Prior to the section 15(a) consideration for each set of rules, the Commission separately discusses the costs, benefits, and potential alternatives to the approach for the proposed regulations, organized in the following manner:

- SEF Registration
  - (1) Application of SEF Registration Requirement
  - (2) SEF Registration Process and Related Forms
- Market Structure and Trade Execution
  - (1) Elimination of Minimum Trading Functionality and Execution Method Requirements
  - (2) Trade Execution Requirement and Elimination of MAT Process
  - (3) Pre-Execution Communications and Block Trades
  - (4) Impartial Access
- Compliance and SRO Responsibilities
  - (1) SEF Trading Specialists
  - (2) Rule Compliance and Enforcement
  - (i) Definition of ''Market Participant''
  - (ii) Audit Trail and Surveillance Program
  - (iii) Compliance and Disciplinary Programs
  - (iv) Regulatory Service Provider
  - (3) Error Trade Policy
  - (4) Chief Compliance Officer
  - (5) Recordkeeping, Reporting, and Information-Sharing
  - (i) Equity Interest Transfer
  - (ii) Confirmation and Trade Evidence Record
  - (iii) Information-Sharing
  - (6) System Safeguards
- Design and Monitoring of Swaps
  - (1) Swaps Not Readily Susceptible to Manipulation
  - (2) Monitoring of Trading and Trade Processing
- Financial Integrity of Transactions
- Financial Resources

The Commission recognizes that the proposed rules may impose costs, but currently lacks the requisite data and information to reasonably estimate them. This lack of data and information is attributable in part to the discretion that a SEF would have under the proposed rules to achieve compliance by adopting different measures. Accordingly, the Commission cannot predict the approach that each SEF would adopt to achieve such compliance. Additionally, the initial and recurring compliance costs for any particular SEF or market participant would depend on the size, existing infrastructure, level of swap activity, and practices and cost structure of the relevant entity. Costs or benefits may be impacted, for example, if certain entities seek to avoid the regulations attendant to SEFs by reducing their swap activities. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of the applicable proposed rules in qualitative terms.

The Commission notes that this consideration is based on its understanding that the swaps market functions internationally with (i) transactions that involve U.S. firms occurring across different international jurisdictions; (ii) some entities organized outside the U.S. that are prospective Commission registrants; and (iii) some entities typically operating both within and outside the U.S. who follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the cost-benefit discussion below refers to the effects of the proposed rules on all subject swaps

[957] The current 25 registered SEFs + the 60 entities that the Commission expects would register as a result of the Commission's proposed application of the SEF registration requirement = 85 total entities. Accordingly, 85 total entities × 5 hours per entity = 425 total hours for all SEF entities. The Commission notes that the related burden hours for the current MAT determination process are included in separate OMB control number 3038–0099, which estimates 5 annual recurring responses that average 16 burden hours per response, for a total estimate of 80 annual recurring burden hours across all SEFs and DCMs. The Commission proposes to eliminate OMB control number 3038–0099 and transfer the relevant burden to OMB control numbers 3038–0052 and 3038–0074. While the Commission expects additional swap products and transactions would become subject to the Commission's revised interpretation of the trade execution requirement in CEA section 2(h)(8), the Commission also expects that 60 additional entities would register as SEFs as a result of the Commission's application of the SEF registration requirement. *See supra* Section XXIII.B.1.a.—§ 37.3(a)—Requirements for Registration. Accordingly, the Commission expects that any additional burden hours associated with any increase in the number of swap products traded on SEF or in swap transaction volume would be covered by the additional burden hours associated with the 60 new entities that the Commission expects to register as SEFs.

[958] 7 U.S.C. 19(a).

activity, whether based on their actual occurrence in the U.S. or on their connection with, or effect on, U.S. commerce pursuant to CEA section 2(i).[959]

The Commission generally requests comment on all aspects of its cost-benefit considerations, including the identification and assessment of any costs and benefits not discussed therein; the potential costs and benefits of the alternatives that the Commission discussed in this release; data and any other information to assist or otherwise inform the Commission's ability to quantify or qualitatively describe the costs and benefits of the proposed rules; and substantiating data, statistics, and any other information to support positions posited by commenters with respect to the Commission's discussion. Commenters may also suggest other alternatives to the proposed approach where the commenters believe that they would be appropriate under the CEA and would provide a more appropriate cost-benefit profile.

2. Baseline

The primary focus of the proposed rules is to amend requirements set forth for swap execution facilities under part 37 of the Commission's regulations;[960] the process for a SEF or DCM to make a swap ''available to trade'' under parts 37 and 38, respectively;[961] and related regulations under parts 39 and 43. Hence, the Commission believes that the baseline for the consideration of costs and benefits is the existing regulations set forth in part 37; § 37.10 and § 38.12; § 39.12(b)(7); and § 43.2. For this reason, the Commission is considering the changes to costs and benefits, as compared to the baseline, resulting from the proposed regulations discussed herein. The Commission notes that some of the proposed rules would codify existing, time-limited no-action relief and other guidance issued by Commission staff that market participants and SEFs may have relied upon to alter their compliance practices with respect to certain existing rules. To the extent that market participants have relied upon such relief or staff guidance, the magnitude of the actual costs and benefits of the proposed rules may not be as significant. The Commission's cost-benefit discussion will note instances where the Commission believes that market participants or SEFs have operated under relevant no-action relief or staff guidance.

3. SEF Registration

a. Overview

(1) Application of SEF Registration Requirement

The Commission proposes to apply the SEF registration requirements in CEA section 5h(a)(1) and § 37.3(a)(1) to both (i) swaps broking entities, including interdealer brokers, that facilitate multiple-to-multiple swaps trading away from SEFs; and (ii) Single-Dealer Aggregator Platforms that aggregate single-dealer pages. Accordingly, these entities would be required to either register as a SEF or become a part of an existing SEF. Other alternatives, however, include adjusting their activity to avoid the SEF registration requirement; or in the case of foreign swaps broking entities, which includes foreign interdealer brokers that currently facilitate trading, *i.e.,* negotiation or arrangement, of swaps transactions for U.S. persons (''Eligible Foreign Swaps Broking Entities''), working with the appropriate regulator within their country of domicile to seek an exemption from registration pursuant to CEA section 5h(g).[962]

The Commission is also proposing to delay the compliance date of any final rule that applies the SEF registration requirement. For foreign swaps broking entities, the Commission proposes to delay the compliance date for a period of two years. This proposed delay would provide more time for the Commission to further develop its cross-border regulatory regime, including clarifying the cross-border jurisdictional reach of the SEF registration requirement under CEA section 2(i). For U.S. swaps broking entities, including interdealer brokers, the Commission proposes to delay the compliance date for a period of six months in order to provide such entities time to obtain SEF registration.

(2) SEF Registration Process and Related Forms

The Commission proposes several clarifying and streamlining amendments to Form SEF. Some of the proposed amendments would amend or eliminate several of the information requirements set forth in the existing exhibits. For example, the Commission is proposing to consolidate certain exhibits regarding governance (existing Exhibits C and G) and personnel (existing Exhibits E and F), as well as eliminate an exhibit regarding the financial resources of any affiliates (existing Exhibit J). The Commission is also proposing to clarify certain information requirements not explicitly enumerated in the existing requirements, but which have been incorporated in practice as part of the existing SEF application review process. For example, SEF applicants would need to provide additional information in Form SEF about, among other things, the asset classes the SEF applicant intends to list and submit for clearing (new Exhibit N). The Commission is also proposing to eliminate the requirement to use Form SEF to request an amended order of registration; under the proposed rules, a registered SEF would be able to file a request with the Commission for an amended order of registration.

Finally, the Commission proposes to revise § 37.4 to exclude product submissions from the SEF registration process. Section 37.4 currently permits a SEF applicant to submit the terms and conditions of swaps that it intends to list for trading as part of its application for registration. Section 37.4 also requires the Commission to consider such swaps for approval at the time that the Commission issues a SEF's registration order or, for a dormant SEF, reinstatement of registration. As proposed, a SEF applicant would have to obtain registration prior to submitting product terms and conditions or related amendments under § 40.2 or § 40.3, which govern the submission of new product terms and conditions or related amendments by registered entities.

b. Benefits

(1) Application of SEF Registration Requirement

The Commission believes that ensuring that all entities operating trading systems or platforms that facilitate swaps *trading* between multiple market participants are subject

[959] Pursuant to CEA section 2(i), activities outside of the U.S. are not subject to the swap provisions of the CEA, including any rules prescribed or regulations promulgated thereof, unless those activities either have a direct and significant connection with activities in, or effect on, commerce of the United States; or contravene any rule or regulation established to prevent evasion of a Dodd-Frank Act-enacted provision of the CEA. 7 U.S.C. 2(i).

[960] The Commission adopted the part 37 regulations in 2013. Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476 (Jun. 4, 2013) (''SEF Core Principles Final Rule'').

[961] The Commission adopted the regulation establishing the process for a SEF or DCM to make a swap ''available to trade'' in 2013. Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 FR 33606 (Jun. 4, 2013) (''MAT Final Rule'').

[962] Pursuant to CEA section 5h(g), the Commission may exempt facilities from SEF registration if the facility is subject to comparable, comprehensive supervision and regulation on a consolidated basis by the appropriate governmental authorities in the home country of the facility. 7 U.S.C. 7b–3(g).

to the SEF registration requirement would impart substantial benefits on the swaps market (emphasis added). Ensuring that ''multiple-to-multiple'' swaps trading activity occurs on a registered SEF should concentrate the liquidity formation on SEFs and provide oversight benefits and efficiencies that enhance market integrity. The proposed application of the SEF registration requirement should help to ensure that the entire swaps trading process, including pre-trade and post-trade protocols, occurs on a SEF in most cases; combined with the proposed interpretation of the trade execution requirement discussed below, which would require additional swaps to be executed on a SEF, the proposed application of the registration requirement should bring a material amount of swaps trading activity under SEF oversight. The transition of greater trading to a SEF should improve market oversight by allowing a SEF to monitor a broader swath of the swaps market, which would result in an enhancement of the Commission's own oversight capabilities.

Further, increased swaps trading on a SEF also should benefit market participants, including, among other things, protections to mitigate abusive trading or other market disruptions via a facility's audit trail, trade surveillance, market monitoring, recordkeeping, and anti-fraud and market manipulation rules. Additionally, the use of SEF mechanisms would help to enhance post-trade efficiencies and facilitate compliance with related Commission requirements, including pre-trade credit screening and the submission of transactions for clearing and reporting. Among other things, the Commission believes that access to such services could benefit certain market participants more than others, in particular those who have not previously established access to such services.

(2) SEF Registration Process and Related Forms

The proposed amendments to Form SEF may benefit potential SEF applicants, including those swaps broking entities and Single-Dealer Aggregator Platforms that the Commission anticipates would elect to register as SEFs, by making a more efficient and potentially less burdensome SEF registration process. The Commission anticipates that certain changes to Form SEF would reduce duplicative information requirements, while also continuing to ensure that it receives sufficient information to determine whether the applicant is in compliance with the core principles and Commission regulations. The additional proposed information requirements include information that Commission staff has been requesting in practice as part of the SEF registration process after applicants submit Form SEF. Thus, requiring this information on Form SEF should increase the efficiency of the SEF registration process by reducing the number of follow-up questions and requests. The Commission also anticipates that these proposed requirements will reduce the amount of time that the Commission needs to review a completed application.

The Commission also proposes conforming amendments to Form SEF that are consistent with the proposed regulations. The proposed amendments prompting the revision or elimination of certain existing information requirements relate to, among other things, proposed amendments to existing execution method and financial resource requirements, as discussed below. The proposal to eliminate the temporary registration provisions that have expired should have no direct impact on costs or benefits. Additionally, the Commission proposes to exclude product submissions from the SEF application process. The Commission believes that separating these two processes would likely promote efficiency for both Commission staff and SEF applicants. Otherwise, the review of a SEF applicant's registration application could be unnecessarily delayed or stayed because Commission staff may require additional consideration or analysis of the novelty or complexity of the proposed product.

c. Costs

(1) Application of SEF Registration Requirement

Any swaps broking entity or Single-Dealer Aggregator Platform that elects to register as a SEF would incur the costs of registering, owning, and operating a SEF. The Commission previously discussed the costs of registering and operating a SEF in the SEF Core Principles Final Rule; [963] these costs and benefits are further modified by the proposed amendments described in the preamble above and cost-benefit considerations discussed further below.

These entities are likely to incur initial setup costs to upgrade or create their existing systems or platforms to comply with the SEF core principles and Commission regulations applicable to SEFs, including the SEF registration requirement. The Commission recognizes that the additional ongoing marginal and fixed costs of maintaining a SEF could be significant for some of these entities. For example, some of these entities would have to educate their employees on SEF compliance practices; hire additional employees such as a CCO; and develop additional functions such as audit trail, trade surveillance, recordkeeping, and market monitoring.

To avoid or mitigate some of these costs, some swaps broking entities may become a part of a SEF with whom they are affiliated, thereby leveraging existing resources; nevertheless, they would likely still incur one-time costs and some ongoing costs. The Commission also notes that many swaps broking entities are currently registered with the Commission as introducing brokers (''IBs''); as such, they already follow certain similar regulatory requirements, including those related to oversight and recordkeeping. Therefore, the SEF registration costs to these entities would likely be lower since they already adhere to similar regulatory obligations. A Single-Dealer Aggregator Platform also would need to register as or join a SEF, thereby likely incurring similar costs.[964] Similarly, the Commission believes that the cost for an unaffiliated Single-Dealer Aggregator Platform to become a SEF or join a SEF would be greater than the cost for a Single-Dealer Aggregator Platform already affiliated with a SEF.

The Commission estimates that there are approximately 40–60 swaps broking entities, including interdealer brokers, that would need to either register as a SEF or join a SEF as a result of the Commission's proposed application of the SEF registration requirement.[965] For some of these entities, the cost to become a SEF or affiliate with a SEF may compel them to cease operating trading systems or platforms that facilitate multiple-to-multiple swaps trading between market participants. To mitigate these registration costs, the Commission is proposing a six-month delay to the compliance date for applicable U.S. swaps broking entities. This proposed delay would provide additional time for U.S. swaps broking entities to become registered as SEFs, thereby increasing the opportunity for

[963] SEF Core Principles Final Rule at 33567.

[964] The Commission is aware of one Single-Dealer Aggregator Platform that is currently affiliated with a SEF.

[965] These estimates are based on introducing broker information made available from the National Futures Association (''NFA''). The NFA information indicates that there more than 300 registered IBs currently designated as a ''swap firm'' that broker swap products.

them to continue operating without interruption.

Smaller swaps broking entities or smaller Single-Dealer Aggregator Platforms may be more likely than larger entities or platforms to abstain from SEF activities to avoid the SEF registration requirement. Smaller entities or platforms are less likely to have existing technology and procedures or available resources to comply with new SEF requirements; therefore, their initial costs of compliance with those requirements may be larger or have a proportionally greater effect on smaller entities. Market participants may also bear some costs if some entities abstain from SEF activities. For example, market participants who have utilized these entities to trade swaps would no longer be able to do so for swaps that must be traded on a SEF or swaps that they would otherwise want to execute on a SEF. Therefore, these participants would incur costs that could include search and transition costs to identify and onboard to new SEFs. In transitioning to a new platform, those market participants may incur less favorable financial terms or have access to reduced services.

The Commission estimates that approximately 10–20 of the swaps broking entities that would potentially need to either register as a SEF or join a SEF are located outside of the U.S. or otherwise have operations outside of the U.S. (''Eligible Foreign Swaps Broking Entities''). To mitigate these registration costs, the Commission is proposing a two-year delay to the compliance date for Eligible Foreign Swaps Broking Entities. The proposed delay is likely sufficient for these entities either to register as SEFs in an orderly manner or to become subject to comparable and comprehensive supervision from their home regulators, and thus become eligible for an exemption to the SEF registration requirement pursuant to CEA section 5h(g). This proposed delay would also allow these entities more time to avoid operational disruptions, which should mitigate costs for these entities and limit disturbances in the swaps markets, while the Commission addresses the application of CEA section 2(i).

The delayed compliance date for Eligible Foreign Swaps Broking Entities would also delay the prospective benefits discussed above for those swaps trading on these foreign entities. However, the Commission does not anticipate that this delay would draw trading volume away from domestic SEFs. The Commission understands that market participants generally use Eligible Foreign Swaps Broking Entities to trade swaps outside of standard business hours in the U.S. and/or to access liquidity in other non-U.S. markets. The proposed six-month implementation window for U.S. swaps broking entities would also delay the benefits discussed above, but the amount of time needed for an entity to obtain SEF registration renders the compliance with the registration requirement by the compliance date of any final rule impractical.

Additionally, some customers of swaps broking entities and Single-Dealer Aggregator Platforms may incur the costs of ''onboarding'' with a SEF, to the extent that these market participants are not currently customers of a SEF. The Commission's proposal to expand the trade execution requirement to include all swaps subject to the clearing requirement that are listed on a SEF would prevent market participants from trading these swaps off-SEF in most instances. Accordingly, those market participants who wish to continue to trade these swaps would have to onboard to a SEF. The Commission estimates that up to 807 market participants in the interest rate swaps (''IRS'') market trade cleared swaps exclusively off-SEF and thus may need to onboard to a SEF.[966] While the IRS market is the largest market by both trading volume and by notional amount outstanding [967] among all swap asset classes, additional market participants trading cleared swaps in the credit asset class may also need to onboard to a SEF.[968] Market participants that must onboard to a SEF would incur costs to integrate their system with a SEF's interface as well as to train personnel to comply with a SEF's rulebook. For some market participants, this may require programming new ways to view, receive, and export information. Onboarding would also subject these market participants and their trading to the SEF's jurisdiction, which market participants may view as another disadvantage. As a result of the costs related to onboarding and trading on SEFs, certain market participants may reduce their use of swaps.[969]

To the extent that a market participant's swaps are already executed on a SEF after being arranged by a swaps broking entity, however, the Commission does not anticipate that the market participant would incur significant additional internal costs by using the SEF for the entire trading process. Some SEFs may charge higher fees for these trades due to the additional oversight the Commission contemplates that the SEF would provide.

(2) SEF Registration Process and Related Forms

The Commission proposes to reduce some information requirements as part of the proposed Form SEF, but would require additional information in other areas. As a result, the Commission believes that some proposed changes to Form SEF would reduce costs while others would increase costs. However, the Commission believes that the cost of preparing Form SEF, as proposed to be amended, is likely to be comparable to the cost of preparing the existing Form SEF. Since the additional information required by Form SEF generally consists of information that the Commission has been requesting as part of the registration process, SEF applicants already likely incur the costs associated with providing that information. Additionally, the Commission proposes to remove the product submission process from the SEF application process. SEF applicants may incur additional administrative costs associated with completing the product submission apart from a SEF

[966] To estimate the number of market participants in the IRS market that would choose to onboard with a SEF, the Commission first analyzed IRS trading during January 2018 and identified market participants who traded cleared IRS but did not trade an IRS on a SEF during that month. Then, the Commission compared the list of legal entity identifiers (''LEIs'') associated with those market participants to the LEIs of market participants who transacted on a SEF within the 2017 calendar year and identified the LEIs that have never transacted on a SEF during the sample period analyzed. The Commission identified 807 unique LEIs who traded a cleared IRS in January 2018 but did not trade an IRS on a SEF in 2017 or in January 2018. The Commission notes that these 807 LEIs made up 21 percent of total IRS notional traded in January 2018 and accounted for 38 percent of the trades.

[967] According to the International Swaps and Derivatives Association (''ISDA'') SwapsInfo, the notional volume of trading in IRS in 2017 was about $192 trillion, as compared to about $7 trillion for credit. ISDA, ISDA SwapsInfo Weekly Analysis: Week Ending December 22, 2017, *http://analysis.swapsinfo.org/2017/12/ird-and-cds-weekly-trading-volume-week-ending-december-22-2017/* (''2017 ISDA SwapsInfo Weekly Analysis''). According to the Bank of International Settlement statistics on the global OTC derivatives market, IRS constitute 69 percent of the total OTC derivatives market, by notional. Bank of International Settlement, *https://stats.bis.org/statx/srs/table/d5.1*.

[968] The Commission has not estimated the number of additional market participants in the credit asset class (who do not also trade IRS) that may onboard to a SEF as a result of the proposal.

[969] Similar to the point made above regarding entities potentially refraining from SEF activities, any perceived disadvantages of transacting on SEFs may cause some market participants to alter their risk management processes to avoid or reduce their transactions on SEFs. If these market participants were to use more costly or less effective risk management strategies in place of swaps, this could increase the cost or reduce the effectiveness of risk management in general.

application.[970] However, the Commission believes these additional costs will mostly be related to the format and manner of submission, as the content of a product submission would materially remain the same.

d. Section 15(a) Factors [971]

(1) Protection of Market Participants and the Public

The Commission believes that the proposed application of the statutory SEF registration requirement to certain entities not currently registered as SEFs should protect market participants and the public by helping to ensure that entities that meet the SEF definition provide the protections associated with SEF core principles and the Commission's regulations. As noted above, these protections include audit trail, trade surveillance, market monitoring, recordkeeping, and anti-fraud and market manipulation rules. The proposed amendments to the SEF registration process should maintain the protection of market participants and the public by continuing to help ensure that SEF applicants provide the Commission with the information it needs to determine whether the SEF applicant will be able to comply with the SEF core principles and Commission regulations.

(2) Efficiency, Competitiveness, and Financial Integrity of Markets

The Commission believes that the proposed application of the statutory SEF registration requirement to certain entities not currently registered should enhance the competitiveness and financial integrity of markets since these registered SEFs would be subject to relevant SEF core principles, including, among others, Core Principles 2, 4, and 15. The Commission also believes that the proposal would subject entities providing similar services to comparable regulations, thus increasing the competitiveness of SEFs. The greater use of SEF functions, such as pre-trade credit screening, submission to DCOs for clearing, and reporting to SDRs should also enhance efficiencies in the swaps market. Proposed Form SEF should continue to provide a means for SEF applicants to demonstrate compliance with core principles related to financial integrity, including Core Principle 13 regarding SEF financial resources.

(3) Price Discovery

The Commission believes that the application of the statutory SEF registration requirement to certain entities not registered as SEFs may further price discovery in swaps, given that more swap transactions would be traded on SEFs and more market participants would be participating on SEFs. This increased trading may enhance the liquidity of the swaps market on SEFs. The Commission believes that, generally, market participants would have access to better price discovery in more liquid markets.

(4) Sound Risk Management Practices

The Commission believes that the proposed application of the statutory SEF registration requirement to certain entities not currently registered as SEFs may further sound risk management practices by helping to ensure that swaps trading occurs subject to the rules of the SEF and receive the protections associated with the SEF core principles and Commission regulations.

(5) Other Public Interest Considerations

The Commission believes that the proposal that entities that meet the SEF definition must register as SEFs should further the public interest consideration of promoting trading of swaps on SEFs as stated in CEA section 5h(e).

Request for Comment

The Commission requests comment on all aspects of the consideration of the costs and benefits of the provisions related to SEF registration. The Commission estimates that there would be 40 to 60 newly-registered SEFs. For those newly-registered SEFs, and with the understanding that costs will vary depending on the entity, what would be the average cost for a newly-registered SEF to comply with the Commission's proposed new SEF regime? If possible, please provide itemized costs per requirement. What would be the on-going costs to comply with that regime?

The Commission believes that many swaps broking entities, including interdealer brokers, are currently affiliates of a registered SEF. As a result, the cost of integrating a swaps broking entity's non-registered SEF into its current SEF registration regime will be significantly less than those of newly-registered SEFs, *i.e.,* those entities that do not have a registered SEF as an affiliate. Is the Commission's assumption correct? If not, then why not? What would be the cost of integrating and updating an entity's compliance program to reflect the proposed rule's new and amended requirements? What would be the on-going costs to comply?

4. Market Structure and Trade Execution

a. Overview

(1) Elimination of Minimum Trading Functionality and Execution Method Requirements

Based on its increased understanding of swaps trading dynamics and the increased scope of swaps that would become subject to the trade execution requirement, the Commission proposes to eliminate the prescribed execution methods under § 37.9 for swaps subject to the trade execution requirement. In addition, the Commission proposes to eliminate the minimum trading functionality and Order Book provisions under §§ 37.3(a)(2)–(3). As a result, for any swap that it lists, a SEF would be able to offer any execution method that is consistent with the SEF definition in CEA section 1a(50) and the general rules related to trading and execution consistent with the SEF core principles and proposed part 37 rules. In particular, a SEF would be allowed to offer flexible methods of execution for any swap that it lists for trading, regardless of whether or not the swap is subject to the trade execution requirement.

In order to effect Core Principle 2, the existing rules under § 37.201 would be replaced with new general, disclosure-based trading and execution rules that would apply to any execution method offered by a SEF. Proposed § 37.201(a) would require a SEF to specify (i) the protocols and procedures for trading and execution; (ii) the extent to which the SEF may use its ''discretion'' in facilitating trading and execution; and (iii) the sources and methodology for generating any market pricing information.

(2) Trade Execution Requirement and Elimination of MAT Process

The Commission proposes to eliminate the ''Made Available to Trade'' (''MAT'') process and proposes to interpret the trade execution requirement in CEA section 2(h)(8) to require swaps to be executed on a SEF or DCM if a swap is both subject to the

[970] The Commission notes that this change—and the concomitant benefits and costs—also would affect dormant SEFs, which like SEF applicants currently may include proposed products as part of their process to obtain reinstatement of their registration from dormancy.

[971] The discussion here and in the other section 15(a) discussions below cover the proposed amendments that the Commission has identified as being relevant to the areas set out in section 15(a) of the CEA: (i) Protection of market participants and the public; (ii) efficiency, competitiveness, and financial integrity of futures markets; (iii) price discovery; (iv) sound risk management practices; and (v) other public interest considerations. For proposed amendments that are not specifically addressed within the respective CEA section 15(a) factor discussion, the Commission has not identified any effects.

clearing requirement in section 2(h)(1) of the Act and listed for trading on a SEF or DCM. The current rule, by contrast, creates a process for a swap to be categorized as ''MAT'' under § 37.10 and § 38.12 that is largely driven by a registered SEF or DCM.

The Commission further proposes to use its authority pursuant to CEA section 4(c) [972] to exempt four different types of swap transactions from the trade execution requirement. Specifically, the Commission proposes that counterparties be exempted from the trade execution requirement for (i) swap transactions involving swaps that are listed for trading only by an Exempt SEF (as opposed to a registered SEF or DCM); (ii) swap transactions that are subject to and meet the requirements of the clearing exception under 2(h)(7) of the Act or the clearing exceptions or exemptions under part 50 of the Commission's regulations; (iii) swap transactions that are executed as a component of a package transaction that includes a component that is a new issuance bond; and (iv) swap transactions between ''eligible affiliate counterparties'' (''inter-affiliate counterparties'') that elect to clear such transactions, notwithstanding their ability to elect the clearing exemption under § 50.52.

To facilitate compliance with the proposed interpretation of the trade execution requirement, the Commission proposes a compliance schedule, based on participant type, for the additional swaps that would become subject to the trade execution requirement. Under the proposal, entities would fall into categories based on their swaps trading experience and resources: Category 1 entities would have a 90-day compliance timeframe; Category 2 entities would have 180 days, and all other relevant entities would have 270 days to allow them to onboard onto a SEF, a DCM, or an Exempt SEF and to comply with the trade execution requirement. The Commission also is proposing to establish a centralized registry on its website to identify those SEFs and DCMs that list swaps subject to the trade execution requirement and the particular swaps listed on each entity. To establish the registry, the Commission is proposing to require SEFs and DCMs to file a standardized Form TER, concurrently with any § 40.2 or § 40.3 product filing, that would detail the swaps that they list for trading that are subject to the clearing requirement. In turn, Form TER would provide a streamlined process to allow the Commission to provide market participants with a public registry of the SEFs and DCMs that list particular swaps for trading. Finally, the Commission is also proposing that DCMs and SEFs be required to publicly post their Form TER on their respective websites.

(3) Pre-Execution Communications and Block Trades

For swaps subject to the trade execution requirement, proposed § 37.201(b) would require a SEF to prohibit its market participants from engaging in pre-execution communications away from its facility, including negotiating or arranging the terms and conditions of a swap prior to its execution on the SEF via the SEF's methods of execution. In conjunction with prohibiting pre-execution communications and pre-arranged trading under § 37.203, the Commission is eliminating the fifteen-second time delay requirement under § 37.9(b). Under proposed § 37.203, SEFs must prohibit pre-arranged trading for trading systems or platforms such as Order Books, where pre-arranged trading would be considered to be an abusive trading practice. This prohibition, however, would be subject to certain proposed exceptions. First, swap transactions that are not subject to the trade execution requirement would be excluded from the proposed prohibition. Second, package transactions that also include components that are not subject to the trade execution requirement would also be excluded from that proposed prohibition.

The Commission also proposes to revise the definition of ''block trade'' in existing § 43.2 to eliminate the ''occurs away'' requirement for swap block trades on SEFs. Pursuant to the revised definition, counterparties that seek to execute swaps at or above the block trade size on a SEF must do so on a SEF's trading system or platform, rather than away from the SEF pursuant to its rules as currently required. For swaps subject to the trade execution requirement, counterparties would not be able to conduct pre-execution communications to negotiate or arrange a block trade away from the SEF.[973] Commission staff has provided time-limited no-action relief from the ''occurs away'' requirement of the block trade definition under § 43.2, and the Commission understands that some market participants have elected to execute their block trades on-SEF pursuant to that relief.[974]

(4) Impartial Access

Proposed § 37.202 would modify the impartial access requirements to allow a SEF to devise its participation criteria based on its own trading operations and market. Specifically, a SEF would be required to establish rules that set forth impartial access criteria for accessing its markets, market services, and execution methods; such impartial access criteria must be transparent, fair, and non-discriminatory and applied to all similarly situated market participants. Based on this approach, the Commission would not require a SEF to maintain impartial access in a manner that promotes an ''all-to-all'' trading environment. Rather, a SEF would be allowed to serve different types of market participants or have different access criteria for different execution methods in order to facilitate trading for a desired market.

In addition to amending the impartial access requirement, the Commission also proposes several other related amendments. Under proposed § 37.202(a)(1), a SEF would no longer be required to provide impartial access to ISVs. Further, under proposed § 37.202(a)(2), a SEF would be allowed to establish fee structures in a fair and non-discriminatory manner. This revision would eliminate the existing requirement under § 37.202(a)(3), which requires a SEF to set ''comparable fees'' for ''comparable access.''

b. Benefits

(1) Elimination of Minimum Trading Functionality and Execution Method Requirements

The Commission believes that eliminating the minimum trading functionality requirement would provide several benefits. Based on its experience, the Commission has observed that market participants have generally not used Order Books for swaps trading on SEFs despite their availability for all SEF-listed swaps.[975]

[972] CEA section 4(c) empowers the Commission, if certain conditions are met and subject to certain limitations, to ''promote responsible economic or financial innovation and fair competition'' by exempting any transaction or class of transactions, including swaps, from the provisions of the CEA. 7 U.S.C. 6(c).

[973] The Commission notes that market participants may pre-negotiate or pre-arrange block trades for swaps that are not subject to the trade execution requirement subject to an exception to the proposed prohibition on pre-execution communications under proposed § 37.201(b).

[974] CFTC Letter No. 17–60, Re: Extension of No-Action Relief for Swap Execution Facilities from Certain ''Block Trade'' Requirements in Commission Regulation 43.2 (Nov. 14, 2017).

[975] A recent research study finds that for index CDS, a minimal amount of trading activity on the two highest-volume SEFs occurs via an order book. Lynn Riggs, Esen Onur, David Reiffen & Haoxiang Zhu, Mechanism Selection and Trade Formation on

The Commission recognizes that market participants view Order Books as unsuitable for trading in a large segment of the swaps market and believes that eliminating this requirement would reduce costs by enabling SEFs to discontinue their use as a method of execution or limit their availability, based on their own discretion, to swaps that are liquid enough to support such trading.[976] Moreover, new SEFs would be able to register without setting up an Order Book, which should significantly reduce the cost of establishing a SEF.

The Commission also believes that eliminating the required methods of execution for swaps subject to the trade execution requirement and instead allowing flexible means of execution on SEFs together with expanding the scope of swaps subject to the trade execution requirement, may further the statutory goal of promoting the trading of swaps on SEFs more effectively than the current SEF framework. As a result of their bespoke or customized structure, the Commission recognizes that swaps that currently are not MAT, but that would become subject to the trade execution requirement under the Commission's proposal, may be less liquid than current MAT swaps, and therefore, may be less suited for execution via an Order Book or a request-for-quote system that sends a quote to no less than three unaffiliated market participants and operates in conjunction with an Order Book (''RFQ System'').

Under the proposed approach, market participants would be allowed to utilize execution methods that best suit their trading needs and the swap being traded.[977] These needs may include the desire to minimize potential information leakage and front-running risks and/or the need to account for market conditions for those swaps at a given time.[978] Allowing market participants to choose the appropriate method of execution for their trading needs may increase market efficiency and lower transaction costs since market participants are expected to seek out the most efficient and cost-effective method of execution to carry out their swaps trading needs and to select the appropriate level of pre-trade transparency for their transactions.[979] For example, a market participant whose primary goal is obtaining best execution in the market can choose the execution method that provides the appropriate degree of pre-trade transparency, based on the swap's characteristics and the trader's execution options and their individual trading needs, including submitting a RFQ to more than three liquidity providers. A market participant that perceives benefits from maintaining a relationship with a particular liquidity provider (such a relationship may extend beyond the swap market) can choose an execution method that facilitates that goal.[980]

SEFs would have broader latitude to innovate and develop new and different methods of execution tailored to their markets. Accordingly, the proposed flexibility would enable SEFs to provide their market participants with additional choices for executing swaps subject to the trade execution requirement beyond the Order Book or RFQ System. Such methods could be more efficient for a broader range of swaps and various market liquidity conditions, which may allow SEFs to effectively promote appropriate counterparty and swap-specific levels of pre-trade price transparency.[981] This potential innovation of efficient, transparent, and cost-effective trading means would facilitate natural market evolution via SEFs, which may ultimately lower transaction costs and increase trading efficiency.

This approach may also increase SEF competition as SEFs seek to differentiate from one another based on execution methods that they offer. The Commission believes that such increased competition may lead to reduced costs and increased transparency for market participants. The Commission further believes that flexible means of execution may provide opportunities for new entrants in the SEF market. New entrants would be able to utilize unique or novel execution methods that are not currently offered by incumbent SEFs. The Commission believes that new entrants would help increase competition in the market, which may lead to reduced transaction costs.

The Commission anticipates that SEFs with active Order Books would continue to offer them, such that customers who wish to transact on Order Books would continue to be able to do so. The Commission also notes that swap transactions on SEFs will continue to be subject to the part 43 real-time reporting requirements, so market participants would continue to benefit from the post-trade transparency associated with access to information about the most recent transaction price.

While the Commission is proposing to allow SEFs to utilize flexible methods of execution, the Commission is concurrently proposing under § 37.201(a) to require that SEFs implement various trading and execution-related rules, which would require SEFs to disclose in their rulebook the protocols and procedures of the execution methods they offer, including any discretion the SEF may have in facilitating trading and execution, *e.g.,* in regards to price formation or bid/offer matching. The Commission believes that these rules should provide market participants a requisite level of transparency by requiring SEFs to disclose information regarding their execution methods, trading systems, and operations. By requiring such disclosure, the Commission believes that SEFs would provide market participants with a consistent level of information so that they are better able to make fully informed decisions when selecting a SEF or particular execution method.

Swap Execution Facilities: Evidence from Index CDS 10 (2017), *https://www.cftc.gov/idc/groups/public/@economicanalysis/documents/file/oce_mechanism_selection.pdf* (''2017 Riggs Study'').

[976] The Commission notes that additional factors, such as the use of name give-up and the lack of certain trading features, may have also contributed to the limited use of Order Books.

[977] For example, Michael Barclay, Terrence Hendershott and Kenneth Kotz studied mechanism choice for U.S. Treasury securities and have found that Treasury securities move from primarily electronic trading to primarily voice trading when there is an exogenous decline in trading volume. Michael Barclay, Terrence Hendershott, Terrence & Kenneth Kotz, *Automation versus intermediation: Evidence from Treasuries going off the run,* 61 J. Fin. 2395–14 (2006).

[978] The 2017 Riggs Study finds that in the index CDS market customers exercise discretion over transacting via RFQ versus streaming quotes depending on the size of their trades or the urgency of their trading needs. The study also shows that customers can choose to send RFQs to more than the minimum required number of three participants when their trade size is smaller and again when their transactions are more urgent. 2017 Riggs Study at 10.

[979] Terrence Hendershott and Ananth Madhavan looked at trading in corporate bonds where customers can trade bonds either through voice solicitation of dealer quotes or through an electronic exchange that initiates an RFQ. Broadly speaking, Hendershott and Madhavan find that bonds that have characteristics associated with more frequent trading are more likely to be traded through the RFQ process, while trading tends to move to a voice mechanism when bonds go off-the-run and liquidity falls. Comparing the costs between execution methods, they found that electronic trades are associated with lower trading costs for small trades, but that voice solicitation is cheaper for larger trades. Terrence Hendershott & Ananth Madhavan *Click or call? Auction versus search in the over-the-counter market,* 70 J. Fin. 419–47 (2015).

[980] The 2017 Riggs Study finds that in the index CDS market, customers are more likely to seek quotes via the RFQ process from dealers affiliated with their clearing members, as well as from dealers who make up a larger fraction of the customer's past trading volume. 2017 Riggs Study at 27.

[981] For example, Darrell Duffie and Haoxiang Zhu suggest that work-ups can sometimes be a more efficient means of transacting than a limit order book. *See* Darrell Duffie & Haoxiang Zhu, *Size Discovery,* 30 Rev. Fin. Stud. 1095–1150 (2017).

The Commission believes that promoting such transparency also helps promote market efficiency and integrity.

(2) Trade Execution Requirement and Elimination of MAT Process

The Commission believes that expanding the scope of swaps that must be traded and executed on SEFs or DCMs would directly promote more SEF trading, which is one of the Dodd-Frank Act's statutory goals. As noted above, data analyzed by Commission staff indicates that the percentage of IRS trading volume that is subject to the trade execution requirement declined from approximately 10 to 12 percent of total reported IRS volume in 2015 to approximately 7 to 9 percent of total reported IRS volume in 2017 and the first half of 2018.[982] According to an ISDA analysis, the share of total reported IRS volumes that occurred on SEFs since 2015 has ranged between approximately 55 to 57 percent of total reported IRS volumes.[983]

A recent ISDA analysis also shows that more than 85 percent of IRS trading volume is subject to the clearing requirement.[984] The Commission believes that much, but not all, of that trading volume consists of swaps that are listed for trading on a SEF. With respect to credit default swaps (''CDS''), ISDA's analysis has shown that 71 to 79 percent of trading volume in index CDS has occurred on SEFs since 2015,[985] while just over 89 percent of CDS trading volume is subject to the clearing requirement.[986] Since only a portion of IRS and CDS trading that is also subject to the clearing requirement has occurred on SEFs, the Commission believes that additional IRS and CDS trading may transition to SEFs as a result of the proposed expansion of the trade execution requirement to cover all swaps that are subject to the clearing requirement and listed for trading on a SEF or DCM.

The Commission believes that the expanded trade execution requirement would ensure that more swaps trading occurs on SEFs. In turn, increased swaps trading on SEFs would help foster and concentrate liquidity and price discovery on SEFs. This may help increase market efficiency and competition between market participants, which would further decrease transaction costs. Further, the Commission believes that a broad trade execution requirement, in conjunction with the proposed prohibition on pre-execution communications, would ensure that swaps trading occurs on SEFs, which may further amplify the preceding benefits.

Bringing more swaps trading on to SEFs, including the entire liquidity formation process, would allow these swap trades to directly benefit from SEF oversight (including audit trail, trade surveillance, market monitoring, recordkeeping, and anti-fraud and market manipulation rules) and services that enhance market integrity (including pre-trade credit checks, straight through processing, and reporting to SDRs). Additionally, the Commission expects liquidity pools on SEFs to improve for various products that would become subject to the expanded trade execution requirement as a result of an increase in the number of market participants. This may further improve liquidity, and an increase in the number of products traded on SEFs, which would allow market participants to have direct access to more price observations for these products compared to the current SEF framework. With an increase in the amount of transactions on SEFs, the Commission also believes, that since SEFs would have more market data, they may be better equipped to fulfill their Core Principle 4 duties, as discussed further below. As such, the Commission believes that with direct access to more trades, a SEF may be better situated to prevent manipulation, price distortion, or disruptions to the functioning of an orderly market, which is likely to benefit all market participants.

In conjunction with the Commission's proposed interpretation of the trade execution requirement, the Commission is proposing to exempt certain transactions from this requirement. The proposed exemptions in CEA section 4(c) cover (i) swap transactions involving swaps that are listed for trading only by an Exempt SEF; (ii) swap transactions that are subject to and meet the requirements of the clearing exception in CEA section 2(h)(7) or the clearing exceptions or exemptions under part 50 of the Commission's regulations; (iii) swap transactions that are executed as a component of a package transaction that includes a component that is a new issuance bond;[987] and (iv) swap transactions between inter-affiliate counterparties that elect to clear such transactions, notwithstanding their ability to elect the clearing exemption under § 50.52. The Commission believes that exempting these swap transactions that would otherwise be subject to the trade execution requirement would be beneficial for the swaps markets. These exemptions would appropriately calibrate the trade execution requirement to appropriate market participants and swap transactions, which can reduce the cost of trading.

The Commission is proposing to exempt swaps that are listed only by an Exempt SEF from triggering the trade execution requirement. Since it may be burdensome for a U.S. person to identify and onboard with an Exempt SEF that is the only platform listing a swap that is subject to the expanded trade execution requirement, the Commission believes that exempting these swaps from the trade execution requirement until they are listed by a registered SEF or a DCM would reduce such burdens.

The Commission is also proposing to exempt from the expanded trade execution requirement those transactions that are excepted or exempted from the clearing

[982] Commission staff conducted an analysis of publicly available data accessed via Clarus Financial Technology (''Clarus''). In a separate analysis, ISDA found that only 5 percent of trading volume in IRS during 2015 and the first three quarters of 2016 consisted of IRS subject to the trade execution requirement. ISDA, ISDA Research Note: Trends in IRD Clearing and SEF Trading 1, 3, 11 (Dec. 2016), *https://www.isda.org/a/xVDDE/trends-in-ird-clearing-and-sef-trading1.pdf* (''2016 ISDA Research Note'').

[983] *See, e.g.,* ISDA, ISDA SwapsInfo Weekly Analysis: Week Ending October 19, 2018, *http://analysis.swapsinfo.org/2018/10/interest-rate-and-credit-derivatives-weekly-trading-volume-week-ending-october-19-2018/* (''2018 ISDA SwapsInfo Weekly Analysis''); ISDA, ISDA SwapsInfo Weekly Analysis: Week Ending December 22, 2017, *http://analysis.swapsinfo.org/2017/12/ird-and-cds-weekly-trading-volume-week-ending-december-22-2017/* (''2017 ISDA SwapsInfo Weekly Analysis''); ISDA, ISDA SwapsInfo Weekly Analysis: Week Ending December 24, 2015, *http://analysis.swapsinfo.org/2015/12/ird-and-cds-weekly-analysis-week-ending-december-24-2015/* (''2015 ISDA SwapsInfo Weekly Analysis'').

[984] ISDA, ISDA Research Note: Actual Cleared Volumes vs. Mandated Cleared Volumes: Analyzing the US Derivatives Market 3 (July 2018), *https://www.isda.org/a/6yYEE/Actual-Cleared-Volumes-vs-Mandated-Cleared-Volumes.pdf* (''2018 ISDA Research Note'').

[985] *See, e.g.,* 2018 ISDA SwapsInfo Weekly Analysis; 2017 ISDA SwapsInfo Weekly Analysis; 2015 ISDA SwapsInfo Weekly Analysis. These market share estimates are based on total SEF volume in the asset class divided by total volume in the asset class. In both cases, the volume is expressed in notional amount and includes both cleared and uncleared swaps. Since ISDA uses part 43 data that contains capped notional amounts pursuant to § 43.4(h), while the actual notional amounts are not capped, the Commission notes that these estimates likely overstate SEF market share.

[986] 2018 ISDA Research Note at 15–16.

[987] The Commission understands that a bond issued and sold in the primary market that may constitute part of a package transaction is a ''security,'' as defined in section 2(a)(1) of the Securities Act of 1933 or section 3(a)(10) of the Securities Exchange Act of 1934. To the extent that counterparties may be facilitating package transactions that involve a security, or any component agreement, contract, or transaction over which the Commission does not have exclusive jurisdiction, the Commission does not opine on whether such activity complies with other applicable law and regulations.

requirement. The Commission believes that swap transactions exempted from the clearing requirement may benefit from the proposed exemption by providing counterparties with flexibility regarding where they can trade or execute such swaps, which the Commission believes may help counterparties reduce transaction costs that they would otherwise incur from mandatory trading or execution on a SEF.

Furthermore, the Commission is proposing to exempt ''package transactions'' that involve swap and new issuance bond components. In light of the involvement of the bond issuer and the underwriter in arranging and executing a package transaction in conjunction with a new issuance bond and the unique negotiation and fit-for-purpose nature of these package transactions, the Commission understands that it remains difficult or impossible to trade these package transactions on a SEF. Market participants currently may rely on Commission staff's temporary no-action relief to trade MAT swaps that involve new issuance bonds away from a SEF.[988] The proposed rule would ensure that package transactions involving new issuance bonds can be traded off-SEF on an ongoing basis.

Finally, the Commission proposes to exempt from the trade execution requirement any swap transaction between inter-affiliate counterparties that elect to clear such transactions, notwithstanding their ability to elect the clearing exemption under § 50.52. Under the current rules, inter-affiliate transactions are only exempt from the trade execution requirement if the inter-affiliate counterparties elect not to clear the transaction. However, despite these transactions not being intended to be price-forming or arm's length and therefore not suitable for trading on SEFs, inter-affiliate counterparties that elect to clear their inter-affiliate transactions are subject to the trade execution requirement. This proposal instead would treat cleared and uncleared inter-affiliate swap transactions the same with respect to the trade execution requirement. The Commission believes that this approach would be beneficial because inter-affiliate swap transactions do not change the ultimate ownership and control of swap positions (or result in netting) and permitting them to be executed internally (provided that they qualify for the clearing exemption under existing § 50.52) may reduce costs relative to requiring that they be executed on SEF. Finally, the Commission believes that this exemption may help ensure that inter-affiliate counterparties are not discouraged from clearing their inter-affiliate swap transactions in order to avoid having to trade them on SEFs subject to the trade execution requirement, which may have systemic risk benefits.[989]

The proposed trade execution requirement compliance schedule is intended to recognize that different categories of counterparties have different abilities and resources for achieving compliance with the trade execution requirement. As such, a phased compliance schedule should benefit counterparties by providing them with more time to adapt to the expanded trade execution requirement.

Proposed Form TER, which would provide for a uniform submission by SEFs and DCMs of information on swaps subject to the clearing requirement that are listed by such SEFs and DCMs, is intended to provide the Commission with the information needed to create a trade execution registry. This registry, in combination with the proposal requiring that DCMs and SEFs publicly post their Form TER on their websites, should benefit market participants and the public by facilitating determinations of whether a swap is subject to the trade execution requirement.

(3) Pre-Execution Communications and Block Trades

The Commission proposes to prohibit pre-execution communications for transactions subject to the trade execution requirement. The Commission believes that this prohibition would ensure that for swaps subject to the trade execution requirement, the trading of such swaps actually occurs within the confines of the SEF, which the Commission believes, in conjunction with the proposed interpretation of the trade execution requirement, would help foster and concentrate liquidity and price discovery which may help increase market efficiency and decrease transaction costs, as discussed above. Further, the Commission believes that with trading occurring within the SEF, market participants would receive the protections associated with SEF trading, as discussed above. With an expanded scope of swaps subject to the trade execution requirement, the Commission is concerned that allowing a disproportionate amount of SEF transactions to be pre-arranged or pre-negotiated away from the facility under the pretense of trading flexibility would undercut the impact of the expansion of the requirement. Without a limitation on pre-execution communications that occur away from the SEF, the SEF's role in facilitating swaps trading would be diminished, undermining the statutory goals of promoting greater swaps trading on SEFs and pre-trade price transparency.

The Commission does not intend to impose this prohibition on swap transactions not subject to the trade execution requirement and certain package transactions. These exceptions would allow those participants who wish to voluntarily execute such trades on a SEF to do so without having to alter their current trading practices. These exceptions are intended to recognize the practical realities of executing these types of swaps, which are often highly customized, on SEFs.

The Commission also proposes to amend the block trade definition to require that counterparties that seek to execute swaps that are above the block trade size on a SEF must do so on a SEF's trading system or platform and not away from the SEF pursuant to its rules. Requiring market participants to execute swap block trades on a SEF should help SEFs facilitate the pre-execution screening by futures commission merchants (''FCM'') of transactions against risk-based limits in an efficient manner through SEF-based mechanisms. Further, the proposed amendments regarding block trades on SEFs would promote the statutory goal in CEA section 5h(e) of promoting swaps trading on SEFs. The Commission notes that many market participants currently rely on no-action relief under which some block trades currently trade on-SEFs, and that this benefit has largely already been realized for these swaps.[990]

(4) Impartial Access

Proposed § 37.202 would allow SEFs greater discretion to establish certain

[988] *See* CFTC Letter No. 17–55, Re: Extension of No-Action Relief from Sections 2(h)(8) and 5(d)(9) of the Commodity Exchange Act and from Commission Regulations 37.3(a)(2) and 37.9 for Swaps Executed as Part of Certain Package Transactions (Oct. 31, 2017) (''NAL No. 17–55'').

[989] The Commission notes that the Division of Market Oversight had previously provided no-action relief that mirrors this proposal so these benefits may have already been realized. *See* CFTC Letter No. 17–67, Re: Extension of No-Action Relief from Commodity Exchange Act Section 2(h)(8) for Swaps Executed Between Certain Affiliated Entities that Are Not Exempt from Clearing Under Commission Regulation 50.52 (Dec. 14, 2017) (''NAL No. 17–67'').

[990] *See* CFTC Letter No. 17–60, Re: Extension of No-Action Relief for Swap Execution Facilities from Certain ''Block Trade'' Requirements in Commission Regulation 43.2 at 2 (Nov. 14, 2017) (''NAL No. 17–60'').

types of trading markets for certain types of participants through the use of access criteria, including fees. The Commission recognizes that many SEFs believe they are limited in the types of trading markets and services that they can develop and maintain because the current impartial access rule can be applied to promote an ''all-to-all'' trading environment, which is neither required under Core Principle 2 nor is consistent with swaps market structure. The Commission recognizes that some SEFs would like to target specific sectors of the swaps market and tailor their trading systems or platforms, as well as swap products, for trading among certain types of market participants. The Commission believes that affirmatively allowing SEFs the ability to target and design their SEFs to cater to certain market participants should result in an overall increase in swap market liquidity.

The proposed clarification to the impartial access requirement should allow SEFs to adapt to existing trading practices in the swaps market, which feature different types of access-related practices. For example, the Commission recognizes that some entities in the dealer-to-dealer market, *e.g.,* interdealer broker operations, operate based on fee structures that account for a host of business considerations, including discounts based on past or current trading volume attributable to the market participant, market maker participation, or pricing arrangements related to services provided by a SEF-affiliated entity involving other non-swap products. The Commission's proposed approach to fee requirements under § 37.202(a)(2) would allow these types of entities, which would be subject to the SEF registration requirement under the Commission's clarification of § 37.3(a), to continue to facilitate certain trading markets and maintain existing pools of liquidity. Maintaining certain types of markets, such as the dealer-to-dealer market, should be beneficial to all market participants, including participants in the dealer-to-client market. In particular, the availability of liquidity and certain pricing to a dealer's clients in the dealer-to-client market may be dependent upon the ability of dealers to operate in a dealer-to-dealer market, where it is easier to offload risk. The Commission expects that continuing to apply the existing approach—''comparable fees'' for ''comparable services''—to the dealer-to-dealer environment may diminish the economic benefits of, and therefore impede, SEFs from developing additional services to facilitate trading.

The Commission notes that the benefits from this proposed change may already be realized to some degree as *de facto* dealer-to-dealer SEFs already exist under the current rule, and it is difficult to predict what innovative services, if any, SEFs may offer in the future. However, the proposed rule would explicitly allow SEFs to provide tailored services, as long as they meet the requirement that their access rules are transparent, fair, and non-discriminatory.

c. Costs

(1) Elimination of Minimum Trading Functionality and Execution Method Requirements

The Commission proposes to eliminate the minimum trading functionality requirement that SEFs offer an Order Book for all swap transactions. The Commission notes that some market participants may not perceive a significant cost from the lack of availability of an Order Book because the Order Books on many SEFs exhibit little or no trading activity and contain few or no bids and offers, despite SEFs maintaining them over the past few years. This suggests that market participants are not currently using the available Order Books and may therefore not perceive a cost if the Order Books are eliminated.[991] As noted above, the Commission anticipates that SEFs with active Order Books would continue to offer them; however, the Commission also believes that these existing Order Books, as a result of greater flexibility in execution methods, may see a negative impact to liquidity, which may be offset by an increase in liquidity on SEFs that offer other means of execution. Market participants may incur costs to integrate their systems with the new trading methodologies offered by SEFs. For some market participants, this may require programming new ways to interact with SEFs. Expanding the requirement to use SEFs for swap transactions would also increase the extent of SEFs' jurisdiction over market participants' trading, which market participants may view as a disadvantage or an increased cost. If market participants react to this by using other means of risk management in place of the swaps that are required to be traded on SEF, then their risk management processes may be more disadvantageous or costlier.

As noted above, the Commission anticipates that competitive pressures may drive SEFs to offer flexible execution methods, which may impose additional costs on SEFs. The Commission believes that these additional costs may be mitigated, as SEFs would have the option, under the proposal, of continuing their existing execution practices.

The Commission recognizes that the overall amount of pre-trade price transparency in swap transactions currently subject to the trade execution requirement may decline if the Order Book and RFQ-to-3 requirement under existing § 37.9 are eliminated. This potential reduction in pre-trade price transparency could reduce the liquidity of certain swaps trading on SEFs and increase the overall trading costs. The Commission believes that this increased cost may be most severe for smaller customers that trade infrequently, and therefore may not be aware of current swaps pricing without pre-trade price transparency.

The purpose of the § 37.9 requirement that transactions in swaps subject to the trade execution requirement be executed using an Order Book or an RFQ System is to ensure that all activity in these swaps benefit from a baseline amount of pre-trade price transparency, *i.e.,* knowledge of multiple bids and offers that may be available. While the proposal may result in a reduction of the benefits from the existing system, this cost may be mitigated because every SEF still has the option of offering an Order Book and continuing to offer market participants the ability to submit RFQs to multiple liquidity providers on the SEF. Accordingly, the Commission anticipates that market participants would not need to forgo the pre-trade transparency associated with these means of execution. Further, the Commission notes that to the extent that SEFs and other market participants respond to the proposed approach by offering flexible execution methods, market participants should benefit by having the opportunity to choose an execution method with a more appropriate level of pre-trade transparency for their transactions and their swaps trading needs.

[991] To the extent that requiring SEFs to offer Order Books facilitates their eventual use, the proposed elimination of the minimum trading functionality under § 37.3 creates a potential decrease in future pre-trade price transparency. If SEFs decide to stop offering Order Books pursuant to this proposal, some swaps markets may not be able to move onto an Order Book even if there is future interest from some market participants. This cost would be mitigated to the extent that SEFs can always reinstate their order books in response to customer demand or offer other execution methods that provide similar pre-trade price transparency benefits.

According to a Commission staff research paper [992] that analyzed SEF trading in index CDS [993] subject to the trade execution requirement, approximately 45 percent of the RFQs were sent to three liquidity providers and the remaining 55 percent were sent to four or more. The mean number of RFQ recipients was 4.12.[994] The Commission anticipates that all or most of the market participants making RFQs to four or more liquidity providers would continue to send RFQs to multiple participants, even absent a rule requiring them to do so. Some percentage of those market participants currently sending RFQs to exactly three liquidity providers would probably send requests to only one or two liquidity providers if they were allowed to, but the Commission is unable to estimate what percentage of market participants would choose to send RFQs to fewer liquidity providers. As noted, those market participants sending RFQs to only one liquidity provider would be forgoing pre-trade transparency, but would be doing so voluntarily.

The Commission notes that the cost of a potential decline in pre-trade price transparency may be offset by the possible benefits from greater liquidity by permitting SEFs to offer other execution methods in episodically liquid markets. Additional execution methods like auction systems, to the extent SEFs decide to offer them, and other potential execution methods may be offered in response to the proposal and could be used to facilitate pre-trade price transparency at lower costs, particularly if SEFs also offer indicative quotes or indicative market clearing prices to participants.[995]

Proposed § 37.201(a), which would require SEFs to disclose in their rulebook the protocols and procedures of execution methods they offer, including any discretion in facilitating trading and execution would impose administrative costs on SEFs. The Commission believes that those costs are similar to those imposed by existing § 37.201(a), which establishes similar disclosure requirements, but would be more tailored to existing SEF execution methods.

[992] 2017 Riggs Study at 11.

[993] The Commission has not performed a similar analysis for IRS.

[994] The Commission understands that one of the two SEFs analyzed currently limits the number of liquidity providers receiving a single RFQ-to-five participants.

[995] The Commission is aware of existing periodic auction mechanisms that aim to aggregate the buy and sell interests for a given swap and to clear the market by displaying the market mid-price to the market participants and allowing them to transact on that price.

(2) Trade Execution Requirement and Elimination of MAT Process

The proposed elimination of § 37.10 and § 38.12 and the proposed interpretation of the trade execution requirement as codified under § 36.1(a) would likely require some market participants to onboard to a SEF or DCM, if they have not already done so, in order to continue trading swaps. The costs for a market participant to onboard, along with the time various market participants would have to join a SEF or DCM under the compliance schedule, and trade on a SEF, discussed above, are also relevant.

To the extent more swaps are traded on SEFs or DCMs as a result of the proposed interpretation of the trade execution requirement as set out under § 36.1(a), SEFs and DCMs may incur additional costs, as part of their normal course of business, to update their systems to accommodate the increased number of products listed. Because this would be an expansion built on top of existing systems, the Commission does not expect the costs associated with this expansion to be substantial. Additionally, the Commission believes that the proposed exemptions for certain swaps from the trade execution requirement would not impose new costs on market participants or on SEFs.

The Commission expects there to be some cost to SEFs and DCMs related to the proposed Form TER requirement, where they would have to submit the specific relevant economic terms of the swaps they list for trading to the Commission (and posted on the website) in a timely manner. These costs are discussed in relation to the Commission's analysis above of information collection burdens under the PRA that are affected by the proposed rules.

(3) Pre-Execution Communications and Block Trades

Under the proposal, pre-execution communications for swaps subject to the trade execution requirement would have to occur within the confines of a SEF and could not occur outside of the SEF's facilities. In practice, this would mean that pre-execution communications between dealers and their customers could not occur through non-SEF telephones, email systems, instant messaging systems, or other means of communication outside of the SEF. SEFs would incur costs if they choose to set up telephone conference lines, proprietary instant messaging or email systems, or any other system within the SEF to facilitate pre-execution communications within the confines of the SEF.

SEFs could potentially use existing technology to facilitate pre-execution communications on SEF, thus mitigating some potential costs. The proposal could also impose costs on dealers and their customers since they commonly communicate via telephone or other systems today and may have to change their communication or trading practices to comply with the proposed rule. The costs for market participants would be mitigated to the extent that SEFs elect to incur the costs of providing telephone or other systems for their market participants to use for pre-execution communications, but costs may then increase correspondingly for SEFs.

The proposed amendment to the block trade definition to require that counterparties that seek to execute swaps that are above the block trade size on a SEF must do so on a SEF's trading system or platform would cause these transactions to incur the costs of trading on a SEF as discussed above. To the extent market participants react to these costs by reducing their use of block trades, they may be disadvantaged, incur additional costs, or hinder the effectiveness of their risk management program.

(4) Impartial Access

The proposed changes to the impartial access requirement, which would not require an ''all-to-all'' market as envisioned by the current rules, may inhibit the ability of certain market participants to access certain trading markets and liquidity pools. Under the proposed changes, SEFs may be able to offer markets that feature levels of liquidity and competitive pricing that only a limited category of participants could access. For example, SEFs that desire to serve the dealer-to-dealer segment of the market may have access criteria that certain participants cannot meet, thus preventing those participants from onboarding and from providing bids and offers, which could be disadvantageous to those participants and otherwise reduce access to favorable prices and impede price competition. Although the proposed changes to impartial access would require a SEF to allow those who seek and are able to meet set criteria to participate on its trading system or platform, this approach may still permit SEFs to impose barriers to access.

Additionally, allowing different trading markets to operate and accommodate a limited set of market participants for similar or the same swaps may impose costs through

information asymmetries. For example, a SEF that serves a dealer-to-dealer segment and a SEF that services a dealer-to-client segment may feature different pricing for certain standardized IRS. Participants in the dealer-to-client market, who do not have access to the pricing and volume information of these dealer-to-dealer SEFs, may not have beneficial pricing information available on the latter that would otherwise help to inform their trading. This may increase costs for those market participants with information disadvantages.

The Commission notes, however, that the current SEF market structure and participation have generally continued to develop along these traditional market segments, absent the proposed access criteria. Therefore, the Commission anticipates that costs to market participants may not change much from the current situation.

d. Section 15(a) Factors

(1) Protection of Market Participants and the Public

The Commission anticipates that the proposed interpretation of the trade execution requirement, which may result in an expanded scope of swaps being required to trade on SEFs, coupled with the proposed ban on pre-execution communications for swaps subject to the trade execution requirement away from the facility, would help improve the protection of market participants and the public by allowing SEFs to more effectively surveil their markets and prevent manipulation and disruption to the functioning of an orderly swaps market. The proposed rules are expected to facilitate more transactions on SEFs, ensure that such transactions are executed entirely on SEFs, and facilitate more market participants trading on SEFs, effectively allowing SEFs to have direct access to more data and have direct visibility to a larger portion of the market.

The Commission anticipates that the proposed exemptions for certain swaps from the trade execution requirement should not materially affect the protection of market participants and the public. The proposed exemptions are intended to allow a limited number of swap transactions otherwise subject to the trade execution requirement to occur off-SEF where there is good reason to do so. These include transactions that involve end-users who are eligible for the end-user exception to both the clearing requirement and the trade execution requirement, transactions that are currently exempt under Part 50 from the clearing requirement, and transactions that cannot readily be executed on a registered SEF, even in light of the proposed rules allowing flexibility of execution methods.

The Commission believes that the proposed flexible execution methods should promote protection of market participants and the public by facilitating the trading of swaps on SEFs, including those swaps newly subject to the trade execution requirement. The Commission also believes that the proposed amendment to the block trade definition should help protect market participants and the public by moving block trades to SEFs with the associated protections described above. The proposal to prohibit pre-execution communications for transactions subject to the trade execution requirement away from the facility should help to ensure that the entire process of trading and executing a transaction would occur on SEF. Swaps traded on SEFs receive the protections associated with the SEF core principles and Commission regulations, including, among other things, monitoring of trading and prohibitions against manipulation and other abusive trading practices. The Commission believes that proposed § 37.201(a), which would require SEFs to disclose in their rulebook the protocols and procedures of execution methods they offer, including any discretion in facilitating trading and execution, should help protect market participants and the public by ensuring that they are informed about how these various execution methods operate.

The elimination of the mandatory Order Book and RFQ System execution methods for Required Transactions may reduce the benefits associated with pre-trade price transparency. In the absence of pre-trade price transparency, a counterparty may not obtain swaps at current market prices. However, the Commission believes that the approach taken in the proposed rule should promote pre-trade price transparency in the swaps market by allowing execution methods that maximize participation and concentrate liquidity during times of episodic liquidity.

(2) Efficiency, Competitiveness, and Financial Integrity of Markets

The Commission anticipates that the proposed interpretation of the trade execution requirement, which may result in an expanded scope of swaps being required to trade on SEFs, should improve the efficiency and competitiveness of the swaps markets. Although SEFs and market participants may incur costs in trading an expanded scope of swaps on SEFs, the Commission expects that markets would become more efficient as a whole, since an increase in the number of market participants trading on SEFs should allow liquidity demanders to more efficiently locate liquidity providers and trade with them. These efficiency gains may be attenuated, however, if the costs of SEF trading are higher than expected or if market participants respond to the expanded trading requirement by reducing their use of swaps that are required to be traded on SEF.

The Commission believes competitiveness can also improve through more market participants trading on SEFs that offer a variety of trading mechanisms, some of which can be designed to improve competitiveness and liquidity formation in the market. To the extent these market participants did not have access to such trading mechanisms, they should benefit from increased competition and liquidity formation. Improvements in competiveness would be attenuated, however, if the increase in trading on SEFs is less than anticipated.

The Commission anticipates that the proposed exemptions from the trade execution requirement, as discussed above, may maintain the current efficiency of those trades and thus maintain the financial integrity of the counterparties. The Commission believes that the proposed exemptions are narrowly tailored and thus, should not materially affect the competitiveness of the swap markets.

The Commission believes that the proposed rules allowing flexible execution methods should enhance the efficiency and financial integrity of markets by providing an opportunity for SEFs to offer more execution methods that may be more efficient and cost-effective for their customers than those currently offered. The proposal to prohibit pre-execution communications for transactions subject to the trade execution requirement away from the facility should enhance the financial integrity of markets by helping to ensure that such communications receive the protections to financial integrity associated with SEF core principles, including Core Principle 7. Under the proposal, market participants should continue to have access to pre-trade price transparency, which should continue to promote competitive bid-ask spreads, *e.g.,* by submitting RFQs to multiple liquidity providers or by using additional execution methods that should be just as good at promoting pre-

trade price transparency as order books and RFQ systems.[996]

Additionally, the Commission's proposal to create and publish the trade execution requirement registry on its website should benefit market participants and increase efficiency by reducing uncertainty about whether a swap is required to be traded on a certain platform. Similarly, the Commission's proposal that a SEF publicly post its Form TER on its website also reinforces the efficiency benefit for market participants, albeit at the expense incurred by DCMs and SEFs related to Form TER filings, as discussed above.

The Commission believes that the proposed changes to impartial access may enhance the efficiency, competitiveness, and financial integrity of markets by allowing SEFs to develop trading platforms and fee structures that better reflect the underlying features of the products traded on the SEF and customer needs. This can facilitate competition between liquidity providers, leading to better pricing for all traders that participate in the relevant segment of the market. The proposed revision to the impartial access rule might impair competition by preventing some traders from providing or accessing liquidity on some SEFs or having access to the most up-to-date pricing information. Impaired access to liquidity or pricing information may result in some market participants transacting in swaps at uncompetitive terms.

(3) Price Discovery

The Commission believes that in general market participants should have access to better price discovery in more liquid markets under the proposed rule, because it should result in a higher number of products being traded on SEFs by an increased number of market participants. With increased transactions on SEFs, through an increase in number of products as well as in market participants, SEFs would offer more price points on the same or comparable products and potentially more bids and offers. This increased trading on SEFs may also offset any impairment to price discovery resulting from a loss in pre-trade price transparency from the elimination of the mandate to offer specified trading methods. The Commission expects all of these improvements to culminate in better and faster price discovery for market participants, although improvements in price discovery may be attenuated if the increase in trading on SEFs is less than anticipated.

While, as a general matter, the Commission believes that price discovery in swaps subject to the trade execution requirement should occur on SEFs, the Commission nevertheless believes that the proposed exemptions from the trade execution requirement should not materially impact price discovery in the U.S. swaps markets. Many of the transactions eligible for the exemptions, such as inter-affiliate trades, are not price-forming or involve end-users, while other eligible transactions in swaps that are only listed by Exempt SEFs cannot readily be traded on a registered SEF.

The Commission believes that the proposal to prohibit pre-execution communications for transactions subject to the trade execution requirement away from the facility should further price discovery on SEFs by helping to ensure that all negotiations related to price discovery occur on SEFs. The proposed amendment to the block trade definition would also tend to encourage more price discovery on SEFs. The proposed flexible execution methods would provide SEFs an opportunity to develop innovative execution methods that could enhance the price discovery process.

To the extent that the revised impartial access rules lead to a less competitive market, the market also may suffer from reduced price discovery.

(4) Sound Risk Management Practices

The Commission believes the proposed expansion of the trade execution requirement may further sound risk management practices by requiring that a larger set of swap transactions are negotiated, arranged, and executed in a manner that is subject to the rules of a SEF and that those trades receive the protections associated with SEF core principles and Commission regulations.

The Commission anticipates that the proposed exemptions from the trade execution requirement should not significantly impair the furtherance of sound risk management practices because firms using the exemptions should continue to be able to move swap positions between affiliates and take advantage of the statutory end-user exception from the clearing requirement. Exempting certain transactions that cannot readily be executed on a SEF, such as package transactions involving new issuance bonds and transactions in swaps that are only listed by Exempt SEFs, should allow entities using these swaps to continue their sound risk management practices.

The Commission believes that the proposed rules enabling flexible execution methods and requiring that pre-execution communications for transactions subject to the trade execution requirement occur on-SEF may further sound risk management practices by requiring that these trades are negotiated, arranged, and executed on a SEF and that these trades receive the protections associated with SEF core principles and Commission regulations. Similarly, the Commission believes that the proposed rules enabling flexible execution methods should promote trading on SEFs and increase the number of transactions receiving these protections, thereby facilitating greater choice by market participants in execution methods that better suit their risk management needs, including allowing market participants to reduce potential information leakage and front-running risks. These improvements may be attenuated if the increase in trading on SEFs is less than anticipated. The proposed amendment to the block trade definition may further sound risk management practices by requiring block trades to occur on SEFs, while still allowing reporting delays pursuant to Part 43, which may give liquidity providers time to hedge such block trades before they are reported.

(5) Other Public Interest Considerations

The Commission believes the proposed interpretation of the trade execution requirement and the proposed flexibility in execution methods would further the public interest consideration of promoting trading on SEFs as stated in CEA section 5h(e), while also continuing to provide market participants with access to the pre-trade price transparency offered by certain SEF execution methods. While the Commission is proposing to eliminate the minimum trading functionality requirement that SEFs offer an Order Book or other prescribed trading methods for all swap transactions, the Commission anticipates that market participants would still be able to realize pre-trade price transparency by sending RFQs to multiple market participants or using other multiple-to-multiple execution methods offered by SEFs that seek to encourage transparency and concentrate liquidity formation.

The Commission believes that the proposal to prohibit pre-execution

[996] As noted above, however, to the extent that the Order Book and other methods of execution mandated by the current rule promote pre-trade price transparency, the proposed elimination of this mandate may impair competition if it reduces market participants' ability to observe pre-trade prices, and thereby lose insight into competitive conditions in the market.

communications for transactions subject to the trade execution requirement away from the facility and the proposed amendment to the block trade definition should also further the public interest consideration of promoting trading on SEFs by moving additional trading activity to SEFs.

Request for Comment

The Commission requests comment on all aspects of the consideration of the costs and benefits of the provisions related to market structure and trade execution.

5. Compliance and SRO Responsibilities

a. Overview

(1) SEF Trading Specialists

The Commission is proposing to adopt regulations under § 37.201(c) that would categorize certain persons employed by a SEF as a ''SEF trading specialist.'' The Commission proposes to define a SEF trading specialist as any natural person who, acting as an employee (or in a similar capacity) of a SEF, facilitates the trading or execution of swaps transactions (other than in a ministerial or clerical capacity), or who is responsible for direct supervision of such persons. The Commission proposes to require a SEF to ensure that its SEF trading specialists are not subject to a statutory disqualification under sections 8a(2) or 8a(3) of the Act, have met certain proficiency requirements, and undergo ethics training on a periodic basis. Proposed § 37.201(c) also would require a SEF to establish standards of conduct for its SEF trading specialists, and to diligently supervise their activities.

Proposed § 37.201(c)(2) would prohibit a SEF from permitting a person who is subject to a statutory disqualification under section 8a(2) or 8a(3) of the Act to serve as a SEF trading specialist if the SEF knows, or in the exercise of reasonable care should know, of the statutory disqualification. There are certain exceptions for persons who have retained registration in other categories despite the disqualification.[997]

Proposed § 37.201(c)(3) would require a SEF to establish and enforce standards and procedures, including taking and passing an examination [998] to ensure that its SEF trading specialists have the proficiency and knowledge necessary to fulfill their responsibilities to the SEF as SEF trading specialists; and comply with applicable provisions of the Act, Commission regulations, and the rules of the SEF.

Proposed § 37.201(c)(4) would require a SEF to establish and enforce policies and procedures to ensure that its SEF trading specialists receive ethics training on a periodic basis.

Proposed § 37.201(c)(5) would require a SEF to establish and enforce policies and procedures that require its SEF trading specialists, in dealing with market participants and fulfilling their responsibilities to the SEF, to satisfy standards of conduct as established by the SEF.

Finally, proposed § 37.201(c)(6) would require a SEF to diligently supervise the activities of its SEF trading specialists in facilitating trading on the SEF.

(2) Rule Compliance and Enforcement

(i) Definition of ''Market Participant''

Proposed § 37.2(b) would define ''market participant.'' Part 37 specifies that a SEF's jurisdiction applies to various market participants who may be involved in trading or executing swaps on its facility; to date, SEFs have been relying on preamble language describing a ''market participant'' provided in the SEF Core Principles Final Rule to determine the scope of jurisdiction. By clarifying and codifying the market participant definition in the part 37, the Commission would maintain the existing recordkeeping responsibilities of traders that meet the proposed definition, as well as the jurisdiction SEFs have with respect to those traders. For example, under § 37.404(b), a SEF is required to adopt rules that require its market participants to keep records of their trading, including records of their activity in any index or instrument used as a reference price, the underlying commodity, and related derivatives markets. In addition, a SEF is required to have means to obtain that information.

The key change to the proposed definition of market participant from the existing approach under part 37 is the exclusion of clients of asset managers or other similar situations. As noted above, ''market participants'' are subject to certain recordkeeping requirements, and under this definition, such clients would not be subject to these recordkeeping requirements.

(ii) Audit Trail and Surveillance Program

The Commission proposes a number of changes to the existing rules regarding SEF audit trail and surveillance programs. First, the Commission proposes amending the audit trail requirements by moving certain § 37.205(a) requirements to guidance to Core Principle 2 in Appendix B. This guidance would state that audit trail data should be sufficient to reconstruct all indications of interest, requests for quotes, orders, and trades. The Commission also proposes to remove the requirement to capture post-trade allocation information. Second, the Commission proposes to eliminate the prescriptive requirements that specify the nature and content of the original source documents under § 37.205(b)(1). Third, the Commission would replace § 37.205(c)'s audit trail enforcement requirement with an audit trail reconstruction requirement, which would be focused on verifying a SEF's ability to reconstruct audit trail data rather than enforcing audit trail requirements on market participants. Fourth, the Commission proposes amending § 37.203(d), § 37.205(b)(2), and § 37.205(b)(3) to relieve a SEF's obligation to conduct automated surveillance on orders that are not entered into an electronic trading system or platform, *e.g.,* orders entered by voice or certain other electronic communications, such as instant messaging and email.[999] Fifth, the Commission proposes amending § 37.203(d) to eliminate the enumerated capabilities that every automated surveillance system must have and to instead require that the automated surveillance system be able to detect and reconstruct potential trade practice violations.

(iii) Compliance and Disciplinary Programs

The Commission proposes several amendments to the rules that address a SEF's compliance program. First, the

[997] Specifically, the Commission proposes an exception to the prohibition under § 37.201(c)(2) for any person listed as a principal or registered with the Commission as an associated person of a futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant, or any person registered as a floor broker or floor trader, notwithstanding that such person is subject to a disqualification from registration under sections 8a(2) or 8a(3) of the Act. The Commission is proposing an additional exception to the requirement under § 37.201(c)(2) for any person otherwise subject to a disqualification from registration for whom a registered futures association (''RFA''), provides a notice stating that if the person applied for registration with the Commission as an associated person, the registered futures association would not deny the application on the basis of the statutory disqualification.

[998] Such an examination would be developed and administered by an RFA.

[999] Sections 37.203(d), 37.205(b)(2), and 37.205(b)(3) require a SEF that offers any form of voice trading functionality, as a condition to its registration, to establish a voice audit trail surveillance program to ensure that it can reconstruct a sample of voice trades and review such trades for possible trading violations.

Commission proposes to amend § 37.203(f)(1) to state that SEFs must establish and maintain procedures requiring compliance staff to conduct investigations, including the commencement of an investigation upon the receipt of a request from Commission staff or upon the discovery or receipt of information by the SEF that indicates the existence of a reasonable basis for finding that a violation may have occurred or will occur.[1000] Second, the Commission proposes eliminating existing § 37.203(f)(2)'s 12-month requirement for completing investigations and providing SEFs the ability instead to complete investigations in a timely manner taking into account the facts and circumstances of the investigation.[1001]

Third, the Commission proposes several amendments to the rules that address a SEF's disciplinary program. Proposed § 37.206(b) requires that a SEF administer its disciplinary program through one or more disciplinary panels, as currently allowed, or through its compliance staff. The Commission also proposes to simplify a SEF's disciplinary procedures by eliminating the following requirements: (1) Existing § 37.206(c), which sets forth minimum requirements for a hearing, and (2) existing § 37.206(d)'s requirement that a disciplinary panel render a written decision promptly following a hearing, along with detailed items required to be included in the decision, and replacing it with guidance for proposed § 37.206(b) to specify that a SEF's rules should require the disciplinary panel to promptly issue a written decision following a hearing or the acceptance of a settlement offer. Consistent with the changes to § 37.206(b), the Commission proposes to eliminate paragraphs (a)(11)–(12) from the guidance to Core Principle 2 in Appendix B addressing § 37.206(b), which provides specific guidelines for a SEF's ability to provide rights of appeal to respondents and issue a final decision.

Additionally, proposed § 37.206(c) would establish certain requirements for warning letters that already apply to sanctions, and would allow more than one warning letter within a rolling 12-month period for entities, as well as for individuals for rule violations related to minor recordkeeping or reporting infractions. As a streamlining and conforming change, the Commission also proposes to eliminate the existing warning letter requirement from § 37.203(f)(5), and combine this requirement into proposed § 37.206(c).

(iv) Regulatory Service Provider

The Commission proposes several amendments to the rules that address a SEF's use of regulatory service providers. Proposed § 37.204(a) expands the scope of entities that may provide regulatory services to include any non-registered entity approved by the Commission. The Commission also proposes to combine and amend existing §§ 37.204(b)–(c), resulting in several changes to the supervision requirements of a regulatory services provider (''RSP''). First, proposed § 37.204(b) eliminates the requirement that the SEF hold regular meetings and conduct periodic reviews of the provider and instead allows SEFs to determine the necessary processes for supervising their RSP. Second, under proposed § 37.204(b) a SEF may allow its RSP to make substantive decisions, provided that, at a minimum, the SEF is involved in such decisions. Third, the Commission proposes to eliminate the requirement under § 37.204(c) that a SEF document where its actions differ from the RSP's recommendations, deferring instead to the SEF and its RSP to mutually agree on the method it will use to document substantive decisions.

(3) Error Trade Policy

Proposed § 37.203(e) would require that SEFs establish and maintain rules and procedures that facilitate the resolution of error trades in a fair, transparent, consistent, and timely manner as opposed to the requirement in existing § 37.203(e) that SEFs have the authority to adjust trade prices or cancel trades in certain situations. The definition of ''error trade'' under § 37.203(e) would include any swap transaction executed on a SEF that contains an error in any term of the swap transaction, including price, size, or direction. However, this definition would not include a swap that is rejected from clearing for credit reasons, and a SEF's error policy would not apply.[1002] At a minimum, such error policy would have to provide the SEF with the authority to adjust an error trade's terms or cancel the error trade, and specify the rules and procedures for market participants to notify the SEF of an error trade, including any time limits for notification. The proposed rule would also impose the new requirement that a SEF notify all of its market participants, as soon as practicable of (i) any swap transaction that is under review pursuant to the SEF's error trade rules and procedures; (ii) a determination that the trade under review is or is not an error trade; and (iii) the resolution of any error trade, including any trade term adjustment or cancellation.

(4) Chief Compliance Officer

The Commission proposes several amendments to the chief compliance officer (''CCO'') regulations. First, the Commission proposes to allow the senior officer[1003] of a SEF to have the same oversight responsibilities with respect to the CCO as the SEF's board of directors. Specifically, the Commission proposes to (i) amend existing § 37.1501(b)(1)(i) to allow a CCO to consult with either the board of directors or senior officer of the SEF as the CCO develops the SEF's policies and procedures; (ii) amend existing § 37.1501(c)(1)(iii)[1004] to allow a CCO to meet with either the senior officer of the SEF or the board of directors on an annual basis; (iii) amend existing § 37.1501(c)(1)(iv)[1005] to allow the CCO to provide self-regulatory program information to the SEF's senior officer or to the board of directors; and (iv) eliminate the restriction under existing § 37.1501(c)(3) that removal of the CCO requires approval of a majority of the board of directors or a senior officer if the SEF does not have a board of directors, and instead permit the board of directors or the senior officer to remove the CCO under § 37.1501(b)(3)(i).

Second, the Commission proposes to consolidate and amend existing §§ 37.1501(d)(5)–(6)[1006] to allow a CCO to identify noncompliance matters through ''any means,'' in addition to the currently prescribed detection methods,

[1000] The Commission proposes adding language in the guidance to Core Principle 2 in Appendix B stating that compliance staff should submit all investigation reports to the CCO or other compliance department staff responsible for reviewing such reports and determining next steps in the process, and that the CCO or other responsible staff should have reasonable discretion to decide whether to take any action, such as presenting the investigation report to a disciplinary panel for disciplinary action. 17 CFR part 37 app. B.

[1001] For purposes of § 37.203(f)(2), the Commission proposes to provide SEFs with reasonable discretion to determine the timely manner in which to complete investigations pursuant to the guidance to Core Principle 2 in Appendix B. 17 CFR part 37 app. B.

[1002] Consistent with proposed § 37.702(b)(1), a SEF would deem any swap that is rejected from clearing for credit reasons as void *ab initio.*

[1003] As discussed below, the Commission proposes to define ''senior officer'' to mean the chief executive officer or other equivalent officer of the swap execution facility.

[1004] This requirement is in proposed § 37.1501(b).

[1005] This requirement is in proposed § 37.1501(b)(6).

[1006] This requirement is in proposed § 37.1501(c)(5).

and to clarify that the procedures followed to address noncompliance issues must be ''reasonably designed'' by the CCO to handle, respond, remediate, retest, and resolve noncompliance issues identified by the CCO. The Commission also proposes to amend the CCO's duty to resolve conflicts of interest under existing § 37.1501(d)(2).[1007] The Commission proposes to refine the scope of the CCO's duty to address ''reasonable steps'' to resolve ''material'' conflicts of interest that may arise.

Third, the Commission is proposing certain amendments to the annual compliance report (''ACR'') regulations in existing § 37.1501(e),[1008] that would eliminate duplicative or unnecessary information requirements and streamline existing requirements. The Commission proposes to eliminate existing § 37.1501(e)(2)(i), which requires an ACR to include a review of all of the Commission regulations applicable to a SEF and identify the written policies and procedures designed to ensure compliance with the Act and Commission regulations and eliminate certain specific content required under existing § 37.1501(e)(4).[1009] The Commission also proposes to amend existing § 37.1501(e)(5) [1010] to require a SEF to only discuss material noncompliance matters and explain the corresponding actions taken to resolve such matters, rather than describing all compliance matters. The Commission proposes to amend existing § 37.1501(e)(6) [1011] to limit a SEF CCO's certification of an ACR's accuracy and completeness to ''all material respects'' of the report. The Commission also proposes to streamline and reorganize the remaining ACR content requirements, including consolidating the CCO's required description of the SEF's policies and procedures under existing § 37.1501(e)(1) [1012] with the CCO's required assessment of the effectiveness of these policies and procedures under existing § 37.1501(e)(2)(ii) and also consolidating the CCO's required narrative of any material changes made during the prior year with the CCO's required narrative of any forthcoming recommended changes and areas of improvement to the compliance program as required under existing § 37.1501(e)(3) and existing § 37.1501(e)(2)(iii),[1013] respectively.

Fourth, the Commission proposes several amendments to simplify the ACR submission procedures. The Commission proposes to amend existing § 37.1501(f)(2) [1014] to provide SEFs with an additional 30 days to file the ACR with the Commission, but no later than 90 calendar days after a SEF's fiscal year end. Additionally, the Commission proposes to eliminate the ''substantial and undue hardship'' standard required for filing ACR extensions and replace it with a ''reasonable and valid'' standard currently set forth in existing § 37.1501(f)(4).[1015] The Commission also proposes to clarify existing § 37.1501(f)(3) [1016] to provide that, as required for initial compliance reports, the CCO must submit an amended ACR to the SEF's board of directors or, in the absence of a board of directors, to the senior officer of the SEF, for review prior to submitting the amended ACR to the Commission.

In addition to these substantive changes, the Commission proposes a number of conforming, clarifying, and streamlining changes that would not impose new costs or result in new benefits and are not discussed in the cost and benefit sections below. The Commission proposes to eliminate the CCO's obligations to the regulatory oversight committee (''ROC''), including existing § 37.1501(c)(1)(iii), which requires a quarterly meeting with the ROC, and existing § 37.1501(c)(1)(iv), which requires the CCO to provide self-regulatory program information to the ROC. The proposal would not impact SEFs as there is no requirement that a SEF have a ROC.

Additionally, the Commission proposes to consolidate existing §§ 37.1501(b)–(c) into proposed § 37.1501(b). The Commission proposes to eliminate existing § 37.1501(b)(1), which requires a SEF to designate a CCO, and existing § 37.1501(c)(2), which requires the CCO to report directly to the board of directors or the senior officer of the SEF, as these requirements are already contained under § 37.1500.

The Commission proposes to eliminate the requirement under existing § 37.1501(f)(1) that a SEF must document the submission of the ACR to the SEF's board of directors or senior officer in board minutes or some other similar written record. This requirement is already covered in the general recordkeeping requirements in proposed § 37.1501(f), which is existing § 37.1501(g).

The Commission proposes a non-substantive amendment to § 37.1501(a)(2) to define a ''senior officer'' as ''the chief executive officer or other equivalent officer of the swap execution facility.'' [1017] In addition, proposed § 37.1501(f), currently set forth under § 37.1501(g), would require a SEF to keep records in a manner consistent with the recordkeeping requirements under §§ 37.1000–1001.

Finally, the Commission proposes a new acceptable practice to Core Principle 15 in Appendix B that would provide a non-exclusive list of factors that a SEF may consider when evaluating an individual's qualifications to be a CCO.[1018] The proposal would provide a safe harbor and not impose new obligations.

(5) Recordkeeping, Reporting, and Information-Sharing

(i) Equity Interest Transfer

The Commission is proposing to amend the existing notification requirements related to transfers of equity interest in a SEF. Proposed § 37.5(c)(1) would require a SEF to file a notice with the Commission regarding any transaction that results in the transfer of direct or indirect ownership of fifty percent or more of the equity interest of a SEF as opposed to only direct ownership transfers as currently required. Transfer of ownership in an ''indirect'' manner may occur through a transaction that involves the transfer of ownership of a SEF's direct parent or an indirect parent, and therefore, implicates effective change in ownership of the SEF's equity interest.

(ii) Confirmation and Trade Evidence Record

The Commission is proposing several amendments to the existing confirmation requirement under

[1007] This requirement is in proposed § 37.1501(c)(2).

[1008] This requirement is in proposed § 37.1501(d).

[1009] This requirement is in proposed § 37.1501(d)(3). The proposed eliminated provisions currently require a discussion of the SEF's compliance staffing and structure, a catalogue of investigations and disciplinary actions taken over the last year, and a review of disciplinary committee and panel performance.

[1010] This requirement is in proposed § 37.1501(d)(4).

[1011] This requirement is in proposed § 37.1501(d)(5).

[1012] This requirement is in proposed § 37.1501(d)(1).

[1013] This requirement is in proposed § 37.1501(d)(2).

[1014] This requirement is in proposed § 37.1501(e)(2).

[1015] This requirement is in proposed § 37.1501(e)(4).

[1016] This requirement is in proposed § 37.1501(e)(3).

[1017] In the SEF Core Principles Final Rule, the Commission noted that it would not adopt a definition of ''senior officer,'' but noted that the statutory term would only include the most senior executive officer of the legal entity registered as a SEF. *See* SEF Core Principles Final Rule at 33544.

[1018] 17 CFR part 37 app. B.

§ 37.6(b).[1019] First, the Commission proposes § 37.6(b)(1)(ii)(B) to allow a SEF to issue a ''trade evidence record'' for uncleared swap transactions that are executed on its facility. As defined under proposed § 37.6(b)(1)(ii)(B), a trade evidence record means a legally binding written documentation that memorializes the terms of a swap transaction agreed upon by the counterparties and legally supersedes any conflicting term in any previous agreement that relates to the swap transaction between the counterparties. The trade evidence record, at a minimum, would be required to include the necessary terms to serve as a legally binding record of the transaction that supersedes any conflicting term in any previous agreements, but is not required to contain all of the terms, in particular relationship terms contained in underlying documentation between the counterparties.

Second, the Commission proposes § 37.6(b)(2)(i) to require a SEF to provide counterparties with a confirmation document or trade evidence record ''as soon as technologically practicable'' after the execution of the transaction on the SEF.

Third, the Commission proposes § 37.6(b)(2)(iii) to allow a SEF to issue a confirmation document or trade evidence record to the intermediary trading on behalf of a counterparty, provided that the SEF establish and enforce rules to require transmission of the document or record to the counterparty as soon as technologically practicable.

(iii) Information-Sharing

The Commission proposes to amend § 37.504 to generally allow a SEF to share information with third-parties as necessary to fulfill its self-regulatory and reporting responsibilities by eliminating the specifically enumerated list of entities with whom a SEF must share information.

(6) System Safeguards

The Commission proposes to move the requirement in existing § 37.205(b)(4) that a SEF must protect audit trail data from unauthorized alteration and accidental erasure or other loss to proposed § 37.1401(c). The Commission proposes a new § 37.1401(g) to require SEFs to annually prepare and submit an up-to-date Exhibit Q (existing Exhibit V) [1020] to Form SEF (''Technology Questionnaire'') for Commission staff.

b. Benefits

(1) SEF Trading Specialists

The Commission expects that SEF trading specialists would exercise a level of discretion and judgment in facilitating trading that is informed by their knowledge and understanding of the market and the products traded on it, and their communications with market participants. The role of SEF trading specialists and their use of discretion will likely increase under the Commission's proposed approach to allow SEFs to offer flexible execution methods and to expand the trade execution requirement. The dual and integral role that SEF trading specialists play in exercising that discretion—interacting with market participants, while facilitating fair, orderly, and efficient trading and overall market integrity—calls for a regulatory approach that aims to maintain market integrity and provide appropriate protections for market participants.

The Commission believes that establishing a new category of SEF personnel, ''SEF trading specialists,'' and requiring SEFs to subject SEF trading specialists to fitness requirements, proficiency testing, standards of conduct for SEF trading, and ethics training, and to diligently supervise them, would enhance proficiency and professionalism among SEF trading specialists, and would promote market integrity and confidence of market participants. The Commission also believes that these requirements would increase protection of market participants and the public by promoting fair dealing. Furthermore, diligent supervision of SEF trading specialists would increase compliance with legal and regulatory requirements and SEF rules.

Proposed § 37.201(c)(2)(i) would enhance protections for market participants by seeking to ensure that SEFs do not employ persons subject to a statutory disqualification as a SEF trading specialist, subject to the proposed exception as discussed below. Sections 8a(2) or 8a(3) of the Act set forth numerous bases upon which the Commission may refuse to register a person, including, without limitation, felony convictions, commodities or securities law violations, and bars or other adverse actions taken by financial regulators. The Commission believes that by restricting SEFs from permitting such persons from intermediating and facilitating SEF trading (except in a clerical or ministerial capacity), market participants and the public would be better protected from abusive and fraudulent trading practices. Moreover, given the role SEF trading specialists play in facilitating orderly and fair trading, the Commission believes that proposed § 37.201(c)(2)(i) would enhance market integrity and fairness, and the confidence of SEF market participants.

Proposed § 37.201(c)(2)(ii)(A) would allow SEFs to employ as a SEF trading specialist a person the National Futures Association (''NFA'') has permitted to be listed as a principal or to register with the Commission based on the NFA's determination that the incident giving rise to the person's statutory disqualification is insufficiently serious, recent, or otherwise relevant to evaluating the person's fitness. Similarly, proposed § 37.201(c)(2)(ii)(B) would allow a SEF to employ as a SEF trading specialist a person subject to a statutory disqualification who provides a written notice from an RFA stating that if the person were to apply for registration as an associated person, the RFA would not deny the application on the basis of the statutory disqualification.

Proposed § 37.201(c)(2)(ii) would benefit SEFs and their prospective SEF trading specialists by allowing SEFs to employ a person as a SEF trading specialist where the incident giving rise to the person's statutory disqualification is insufficiently serious, recent, or otherwise relevant to evaluating the person's fitness for registration with the Commission. The Commission believes that, where an RFA provides a notice that such circumstances are present, the benefits of the prohibition under § 37.201(c)(2)(i)—in particular the protection of market participants and the public and enhancing market integrity—are not implicated, and thus a SEF should be permitted to employ such persons as a SEF trading specialist.

Given the level of discretion SEF trading specialists exercise, the Commission believes that proposed § 37.201(c)(3)(i) would benefit market participants and the public by helping to ensure that SEF trading specialists have the requisite proficiency and knowledge to fulfill their responsibilities and to comply with the Act, Commission regulations, and SEF rules. The proficiency examination requirement under § 37.201(c)(3)(ii) would further ensure that all SEF trading specialists maintain a baseline level of proficiency. This would increase protection of market participants and better ensure that trading on SEFs is conducted in a fair, orderly, and efficient manner. The

[1019] The Commission notes that the confirmation requirements in proposed § 37.6(b)(1)(i)(A) are not changing.

[1020] The Commission proposes to renumber existing Exhibit V to Form SEF as proposed Exhibit Q to Form SEF. 17 CFR part 37 app. A.

Commission expects the proposed requirements to enhance the confidence of market participants and the public in the integrity and fairness of SEF markets.

Proposed §§ 37.201(c)(4)–(6) would respectively require a SEF to ensure that SEF trading specialists receive ethics training on a periodic basis, subject SEF trading specialists to standards of conduct in dealing with market participants and fulfilling their responsibilities, and diligently supervise the activities of its SEF trading specialists.

Overall, these proposed rules would promote public and market participants' confidence in the trading of swaps on SEFs and may bring additional volumes of trading and liquidity to SEFs.

(2) Rule Compliance and Enforcement

(i) Definition of ''Market Participant''

The primary benefit of the rule change is an anticipated reduction in recordkeeping costs for clients of asset managers and SEFs.

(ii) Audit Trail and Surveillance Program

Many of the proposed changes to the audit trail and surveillance requirements described above are expected to result in savings in terms of compliance staff and resources for most SEFs. For example, SEFs that offer voice trading are currently required to conduct regular voice audit trail surveillance in lieu of the electronic analysis capability requirements of § 37.205(b)(3). These SEFs dedicate compliance staff and resources to establishing and conducting the voice audit trail surveillance programs, including contracting with the NFA for the performance of the reviews. However, under the proposed changes to § 37.203(d), § 37.205(b)(2), and § 37.205(b)(3), these SEFs would no longer be required to conduct regular automated surveillance on indications of interest, requests for quotes, and orders that are not entered into a SEF's electronic trading system or platform. Therefore, new SEFs would not incur the cost to implement this requirement and all SEFs would not incur the ongoing cost to maintain a regular voice audit trail surveillance program.

Additionally, eliminating § 37.205(c)'s requirement to enforce audit trail requirements through annual reviews should result in cost savings to all SEFs, as they would no longer need resources, either internal compliance staff or the NFA, to perform audit trail reviews.

However, the Commission proposes to replace these requirements with a requirement to perform audit trail reconstructions, which is expected to reduce some of the cost savings as described above.[1021] The proposed changes to the audit trail rules under § 37.205(a) are intended to address the current challenges SEFs face with respect to obtaining post-trade allocation information and conducting surveillance on orders that are not entered into an electronic trading system or platform. Similarly, proposed § 37.203(d) would no longer require SEF automated surveillance systems to have certain capabilities that they cannot perform.

(iii) Compliance and Disciplinary Programs

SEF compliance programs should benefit from the proposed changes related to conducting investigations. For example, changes proposed to § 37.203(f) seek to simplify the procedures for SEFs to conduct investigations and prepare investigation reports. Specifically, eliminating the 12-month requirement for completing investigations under § 37.203(f)(2), and replacing it instead with a general statement that permits SEFs to complete investigations ''in a timely manner taking into account the facts and circumstances of the investigation'' would provide SEFs with greater discretion to manage their workload, and allow them to prioritize their other compliance responsibilities as needed. SEFs also may benefit from the additional clarity and flexibility provided in language related to investigation reports in the guidance to Core Principle 2 in Appendix B. The language states that compliance staff should submit all investigation reports to the CCO or other compliance department staff responsible for reviewing such reports and determining next steps in the process, and that the CCO or other responsible staff should have reasonable discretion to decide whether to take any action, such as presenting the investigation report to a disciplinary panel for disciplinary action.

SEFs may realize additional cost savings under the proposed changes to the disciplinary rules under § 37.206. Proposed § 37.206(b) would allow a SEF to administer its disciplinary program through not only one or more disciplinary panels as currently allowed, but also through its compliance staff. This proposed rule would provide SEFs with more flexibility to adopt a cost effective disciplinary structure that better suits their markets and market participants, while still effectuating the requirements and protections of Core Principle 2. The Commission anticipates that SEFs that choose to administer their disciplinary programs through their compliance staff would incur the greatest cost savings. These SEFs would not incur the cost associated with establishing or maintaining disciplinary panels.

Additionally, to the extent that a SEF chooses to administer its disciplinary programs through compliance staff, the SEF may no longer incur certain costs associated with conducting hearings or appeals, such as preparing materials and presentations for hearings before the disciplinary panel, or the time spent by SEF employees preparing written disciplinary decisions. A SEF also may benefit from increased efficiencies that they can leverage from compliance staff's knowledge about the SEF and its trading practices to adjudicate matters more quickly than under the traditional disciplinary structure.

(iv) Regulatory Service Provider

A SEF may realize cost savings from the proposed changes under § 37.204. Expanding the scope of entities that may provide regulatory services under proposed § 37.204(a) to include any non-registered entity approved by the Commission may result in an increase in competition among RSPs, and reduce the overall cost of securing an RSP. Under the proposed changes to § 37.204(b), a SEF and its RSP may also mutually agree on the method it will use to document substantive decisions, rather than documenting every instance where the SEF's actions differ from the RSP's recommendations, which may reduce the administrative costs associated with documentation created and maintained by a SEF and its RSP. Providing SEFs with the option under proposed § 37.204(b) to allow their RSPs to make substantive decisions, should better enable an RSP to promptly intervene and take action, as it deems necessary. Finally, eliminating the requirement under § 37.204(c) that a SEF document where its actions differ from the RSP's recommendations, deferring instead to the SEF and its RSP to mutually agree on the method it will use to document substantive decisions, may encourage better communication among SEFs and its RSP.

[1021] The Commission also notes that some of the new costs associated with the reconstruction program requirement in proposed § 37.205(c) are offset by to the statutory mandate in Core Principle 4 that already requires a SEF to have methods for conducting comprehensive and accurate trade reconstructions.

(3) Error Trade Policy

The Commission believes that the proposed changes to the error trade rule would reduce the costs and risks associated with error trades and promote swaps market integrity and efficiency. When counterparties execute a trade that is an error trade, the counterparties bear the costs and risks from being bound to terms to which they did not intend to assent. The proposed rule that requires error trades be resolved in a fair, transparent, and consistent manner would increase confidence that error trades would be corrected and that published swap data is an accurate indication of market supply and demand.

The proposed requirement that error trades be resolved in a timely manner would reduce the costs associated with error trades, including associated hedging costs. A counterparty may hedge an executed trade: (i) Before it learns that the trade may be erroneous, (ii) after it learns the trade may be erroneous, but before the SEF has determined whether the trade is an error trade, (iii) after an error has been identified but before it has been resolved, or (iv) after the SEF has resolved the error. The potential cost of each case likely depends on how quickly the SEF resolves the error because the longer a SEF takes to do so, then the greater the chance the market price of the trade and related hedge trade will move. For example, if a trader on a SEF enters into a hedge trade and the SEF determines that the initial trade is different from what the trader believed, then the trader may have to execute a new trade that hedges the correct trade and unwind the initial hedge trade. Doing so will be costly if the market has moved and the price of entering into the new hedge and unwinding the old hedge has increased. Similarly, a trader that waits to execute a hedge trade until after the SEF has resolved the error will likely face higher costs the longer the SEF takes to resolve the error. The proposed timeliness requirement should result in faster error resolution and lower the risk of costly market moves.

The proposed requirement that SEFs notify market participants that a swap transaction is under review pursuant to error trade rules and procedures, the determination that the trade under review is or is not an error trade, and the resolution of any error trade review should make markets more efficient. An error trade misinforms market participants when its price is different than the price would be if the trade had been executed non-erroneously. The notification requirement should allow market participants to make better informed decisions regarding supply and demand.

(4) Chief Compliance Officer

As discussed in the preamble, the Commission believes that some of the regulations implementing Core Principle 15 may be unnecessarily burdensome and inefficient. The proposed regulations are intended to address these issues.

The proposal to give the senior officer the same authority as the board of directors to oversee the CCO would provide SEFs with greater opportunity to structure the management and oversight of the CCO based on the SEF's particular corporate structure, size, and complexity. This could increase efficiency and reduce costs. Additionally, the quality of oversight of the CCO could improve if the senior officer is better positioned than the board of directors to provide day-to-day oversight of the CCO.

The proposal to permit the CCO to use any means to identify noncompliance issues is less prescriptive and should also increase efficiencies. The proposed amendment to § 37.1501(d) to refine the scope of the required information in a SEF's ACR should make the ACR process more efficient and reduce costs. For example, the proposed removal of § 37.1501(e)(2)(i) and certain specific content set forth under § 37.1501(e)(4) should reduce the amount of time that a CCO and his or her staff must spend preparing the ACR. Proposed § 37.1501(d)(4), which would require that SEFs focus on describing material non-compliance matters, rather than describing all compliance matters, should streamline the ACR requirement and provide more useful information to the Commission. Additionally, the proposed clarification under § 37.1501(e)(3) that the CCO must submit an amended ACR to the SEF's board of directors or, in the absence of a board of directors, the senior officer of the SEF, should reduce the need for extensive follow-up discussions.

Finally, the proposal to allow SEFs more time to submit their ACRs should reduce the time and resource burden on the CCO and compliance department. This additional time should allow SEFs to fully complete their ACRs and meet their other end-of-year reporting obligations, such as the fourth quarter financial report. However, the Commission understands that those SEFs that already may rely on Commission staff no-action relief for an extra 30 days to complete the ACR may have availed themselves of the benefits associated with the extended reporting deadline.

(5) Recordkeeping, Reporting, and Information-Sharing

(i) Equity Interest Transfer

The Commission notes that an indirect transfer of a SEF's equity interest raises similar concerns as a direct transfer, notification of which is currently required under the existing requirement. Therefore, the Commission believes that proposed § 37.5(c)(1) would benefit market participants because the Commission would have the ability to more broadly identify and assess situations where an indirect equity interest transfer of a SEF could potentially impact its operational ability to comply with the SEF core principles and the Commission's regulations.

(ii) Confirmation and Trade Evidence Record

The Commission believes that the proposed ''trade evidence record'' approach in proposed § 37.6(b) should benefit both SEFs and market participants by decreasing the administrative costs to execute an uncleared swap on a SEF. Not only would a SEF not be required to expend time and resources to gather and maintain all of the underlying relationship documentation between all possible counterparties on its facility, but market participants would also not be required to expend time and resources in gathering and submitting this information to the SEF, including any amendments or updates to that documentation. Consistent with the bilateral nature of the underlying relationship documentation and current market practice outside of SEFs, counterparties to the transaction would be better able to devise their own confirmation documents by supplementing the information provided in the trade evidence record with additional terms that they have previously negotiated. Therefore, SEFs and counterparties should benefit from a documentation requirement that better reflects the nature of uncleared swap transactions. Moreover, the Commission believes this trade evidence record may encourage more uncleared swaps trading on SEFs where these trades can benefit from SEF oversight, and ultimately would increase the financial integrity of the swaps market. The Commission notes that to the extent that SEFs and market participants have relied on the existing no-action relief provided by Commission staff to avoid these costs by incorporating those terms by reference in a confirmation

document, they have been availing themselves of the benefits from these reduced costs.

SEFs should also benefit from the proposed requirement that they transmit the confirmation document or the trade evidence record ''as soon as technologically'' practicable after execution of the transaction rather than at the same time as execution. In particular, this approach should provide an opportunity for a SEF to develop protocols for transmitting this documentation in a manner that is adaptive to the type of execution method that is utilized to execute a transaction. Given the flexible methods of execution that the Commission proposes to allow for all swaps, this practical approach to transmitting documentation should not impede the development of trading systems or platforms. For example, a SEF that offers non-automated execution methods would not be required to ensure that post-trade processing protocols simultaneously transmit the confirmation or trade evidence record at the time of execution.

Further, SEFs and market participants should benefit from allowing an intermediary to receive a confirmation document or trade evidence record on behalf of the counterparties to the transaction. This approach should be more consistent with current market practice, such that intermediaries maintain the connectivity in trading on the SEF. Given that intermediaries are connected with and participating on the SEFs, but are acting on behalf of the counterparties, a SEF is able to transmit the documentation related to a swap transaction to the intermediary, who would then transmit that information to the ultimate counterparties.

(iii) Information-Sharing

The Commission believes that the proposed amendment to information-sharing requirements would benefit SEFs by providing a better opportunity to utilize third-party entities to fulfill their self-regulatory and reporting responsibilities at a lower cost. The proposed rule should increase the number of RSPs and likely increase the competition between these providers, which should both lower costs and improve the level of services offered. The Commission anticipates that this benefit would be greater for smaller SEFs that otherwise would have difficulty operating economically due to the high fixed costs of some services.

(6) System Safeguards

The Commission has identified several potential benefits from the proposed changes to the system safeguards requirements. First, the proposed annual Technology Questionnaire filing requirement (in proposed Exhibit Q) should help the Commission maintain a current profile of the SEF's automated systems and be consistent with the provisions of existing § 37.1401(g)(4),[1022] which allows the Commission to request the results from a SEF's mandatory tests of its automated systems and business continuity-disaster recovery capabilities. The Commission believes that the proposed rule would reduce the need for additional information and document requests related to that existing requirement.[1023]

Second, the Commission believes an annually-updated Technology Questionnaire could expedite Systems Safeguards Examinations (''SSE''). For example, it could reduce a SEF's overall compliance-related burdens for SSEs by (i) reducing a SEF's effort to respond to SSE document requests by instead allowing a SEF to provide updated information and documents for sections of Exhibit Q that have changed since the last annual filing; and (ii) allowing SEFs to respond to an SSE document request by referencing Exhibit Q information and documents to the extent that they are still current, rather than resubmitting such information and documents. The Commission also notes that an annual update to Exhibit Q, which would be required concurrently with submission of the CCO annual compliance report, could provide information and documents potentially useful in preparing that annual report.

c. Costs

(1) SEF Trading Specialists

The Commission expects that SEFs and/or SEF trading specialists would incur additional costs to satisfy the fitness requirement in proposed § 37.201(c)(2). The Commission expects that SEFs would vet prospective SEF trading specialists to ensure that they are not subject to a statutory disqualification. Such vetting may include the completion by a prospective SEF trading specialist of a questionnaire regarding employment and criminal history. Additionally, SEFs may conduct criminal background checks through third-party service providers to ensure that SEF trading specialists are not subject to a statutory disqualification.

The costs of ensuring compliance with proposed § 37.201(c)(2)(i) may be mitigated where a SEF trading specialist is separately registered with the Commission in some other capacity (*e.g.,* as an associated person), in which case a SEF may reasonably rely on the person's registration status as evidence that the person is not subject to a statutory disqualification or that the person falls within the exception set forth in proposed § 37.201(c)(2)(ii)(A). In cases where a SEF relies on the exception in proposed § 37.201(c)(2)(ii)(B), the SEF (or the SEF trading specialist) would bear an additional cost of obtaining the required notice from an RFA.

The expected costs associated with the proficiency requirement in proposed § 37.201(c)(3)(i) would include the cost to a SEF of determining if a SEF trading specialist is sufficiently proficient (which can be accomplished by passing the examination, once it is available) and, if necessary, providing training to ensure that a SEF trading specialist possesses the requisite proficiency. In some cases, the cost of determining proficiency may be minimal; for example where the SEF trading specialist has an employment history that reflects the requisite knowledge and experience.

The expected costs associated with the proficiency examination requirement in proposed § 37.201(c)(3)(ii) would include a fee imposed by the RFA. This fee would likely be designed to, at a minimum, offset the costs of developing and administering the examination. Additional costs may include study, training, or other examination preparation, borne by a SEF trading specialist or by a SEF on behalf of the SEF trading specialist. As discussed above, once an examination for swaps proficiency is made available, compliance by a SEF with the examination requirement in proposed § 37.201(c)(3)(ii) would constitute compliance with the general proficiency requirement in proposed § 37.201(c)(3)(i). Thus, the cost associated with complying with proposed § 37.201(c)(3)(i) would be mitigated once an RFA-administered examination is made available.

As discussed in the proposed amendments to the guidance to Core

[1022] Existing § 37.1401(g) generally requires a SEF to provide all other books and records requested by Commission staff in connection with Commission oversight of system safeguards pursuant to the Act or Commission regulations, or in connection with Commission maintenance of a current profile of the SEF's automated systems. 17 CFR 37.1401(g).

[1023] The current profile of a SEF's automated systems is also supported by the provision of timely advance notice of all material planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems, and of planned changes to the SEF's program of risk analysis and oversight, as required by § 37.1401(f)(1)–(2). 17 CFR 37.1401(f)(1)–(2).

Principle 2 in Appendix B, each SEF would have broad discretion in developing and implementing its ethics training program under proposed § 37.201(c)(4). Given this discretion, the costs to SEFs to comply with the ethics training requirement may vary widely from SEF to SEF. Furthermore, the training needs of a SEF may vary according to the size, number of SEF trading specialists, and the level of their expertise and responsibilities within a SEF.

While the Commission believes that the requirements in proposed §§ 37.201(c)(5)–(6) would impose additional costs on SEFs, the Commission anticipates that the costs would vary from SEF to SEF. A SEF may utilize its existing compliance staff or may opt to add compliance staff in order to enforce its standards of conduct for SEF trading specialists and to meet the SEF's obligation to diligently supervise SEF trading specialists. Additional costs associated with these proposed requirements may include the costs of developing standards of conduct and policies and procedures designed to ensure that SEF trading specialists are diligently supervised.

(2) Rule Compliance and Enforcement

(i) Definition of ''Market Participant''

By effectively moving clients of asset managers out of the category of market participant, the proposal potentially reduces SEFs' ability to monitor the positions of these clients, although SEFs would still be able to monitor the trading of the asset managers.[1024] Hence, the cost of the proposed change may be a reduction in the ability of SEFs to detect abusive practices to the extent that clients of asset managers are able to engage in such practices. However, these swap users, who typically give up their trading discretion, appear to be the least likely to engage in manipulative practices. For example, when a client gives complete trading discretion to an asset manager, the specifics of the asset manager's trading typically occurs without particular knowledge of the client—that is, they do not know the investment, whether any swap traded is occurring on a SEF, or even the identity of the SEF. Importantly, the asset managers who conduct trading on the SEF for the client remain subject to the SEF's record retention and other requirements. Hence, to the extent that an asset manager for a client is engaging in abusive trading practices on a SEF, a SEF's ability to investigate and prevent those practices should not be diminished.

(ii) Audit Trail and Surveillance Program

Without conducting automated surveillance on orders entered by voice or certain other electronic communications, such as instant messaging and email, SEFs may have a reduced ability to identify potential misconduct involving voice orders. However, the Commission recognizes that since SEFs currently do not have a cost-effective solution for performing such automated surveillance, the proposed rules do not provide lesser protections to market participants and the public. Regarding the requirement to capture post-trade allocation information, the Commission understands that SEFs currently cannot capture this information. As a result of capturing less audit trail data under the proposal, there may be possible costs in the form of reduced protections to market participants and the public. However, the Commission does not believe that the proposed rule is likely to meaningfully reduce protections to market participants and the public as compared to the current rules.

The Commission proposes to replace the audit trail enforcement requirement with the requirement to perform audit trail reconstructions.[1025] Since SEFs are currently required to reconstruct a sample of orders and trades under the voice audit trail surveillance program, the Commission does not anticipate that any SEFs subject to this program will incur any additional costs associated with performing audit trail reconstructions under proposed § 37.205(c). For SEFs that electronically capture audit trail data and do not have a voice component, the incremental cost of reconstructing trades should not be material, as their automated trade surveillance systems should already be capable of such reconstructions under § 37.203(d).

(iii) Compliance and Disciplinary Programs

The Commission is mindful that the proposed elimination of the 12-month requirement for completing investigations under § 37.203(f)(2) could lead to delays in completing disciplinary actions. However, the Commission notes that SEFs remain responsible for completing investigations in a ''timely manner taking into account the facts and circumstances of the investigation.'' In addition, while many SEFs are likely to benefit from the proposed changes described above related to the disciplinary process, there may be accompanying costs. For example, a SEF's compliance staff may incur additional costs taking on the added responsibilities previously performed by a disciplinary panel.

The proposed changes to § 37.206 also permit SEFs to establish a disciplinary process that may provide respondents fewer procedural protections than are required under the current rules. However, the Commission notes that the guidance to Core Principle 2 in Appendix B states that a SEF's rules relating to disciplinary panel procedures should be fair, equitable, and publicly available. Competition and customer demand should ensure that SEFs maintain suitable disciplinary programs with sufficient protections.

(iv) Regulatory Service Provider

New RSPs may incur start-up costs associated with developing an automated trade surveillance system and establishing and maintaining sufficient compliance staff. However, the Commission would expect these costs to decrease once the RSP has established its program and as it gains experience providing regulatory services. RSPs may realize further reductions in these costs as they gain economies of scale by offering their services to multiple SEFs.

Eliminating the requirement that a SEF hold regular meetings and conduct periodic reviews of its RSP may lead to varying degrees of communication between a SEF and its RSP, but the Commission believes that most SEFs would seek to maintain regular communication with their RSPs, given that SEFs remain ultimately responsible for the performance of any regulatory services received, for compliance with their obligations under the Act and Commission regulations, and for the RSPs' performance on their behalf.

(3) Error Trade Policy

The Commission anticipates that SEFs would incur costs to establish and

[1024] The proposed definition of ''market participant'' includes any person who accesses a SEF through direct access provided by a SEF; through access or functionality provided by a third-party; or through directing an intermediary, such as an asset manager, that accesses a swap execution facility on behalf of such person to trade on its behalf. A person who does not access a SEF in any of these ways, such as a client who does not direct the asset manager to trade on its behalf, would not be a market participant under the proposed definition. *See* proposed § 37.2(b).

[1025] The Commission also notes that some of the new costs associated with the reconstruction program requirement under proposed § 37.205(c) are offset by the statutory mandate in Core Principle 4 that currently requires a SEF to have methods for conducting comprehensive and accurate trade reconstructions.

maintain rules and procedures that facilitate the resolution of error trades. As noted in the preamble, the proposed rule is intended to reflect error trade policies that generally exist among SEFs so many SEFs should have policies that are at least partially compliant with the proposed rule and would not have to incur the full costs discussed below. The Commission understands that SEFs implemented these policies as an appropriate means to address error trades or to satisfy a condition set forth in no-action relief provided by Commission staff.

Proposed § 37.203(e)(2) would require that some SEFs incur the costs associated with establishing and maintaining rules and procedures that facilitate resolution of purported errors in a fair, transparent, consistent, and timely manner. Existing § 37.203(e) requires only that a SEF have the authority to resolve errors when necessary to mitigate certain market disrupting events. SEFs that do not currently have error trade policies, or whose policies are not compliant with proposed § 37.203(e)(2), would incur one-time costs to develop a compliant policy and ongoing costs to implement such policy.

To comply with the proposed § 37.203(e)(3) requirement that SEFs notify market participants of (i) any swap transaction that is under review pursuant to the SEF's error trade rules and procedures; (ii) a determination that the trade under review is or is not an error trade; and (iii) the resolution of any error trade, including any trade term adjustment or cancellation, some SEFs would have to incur costs to establish a means of communicating such information to market participants. The Commission believes that many SEFs would send notifications electronically to their market participants. All SEFs have the ability to communicate electronically with market participants. However, some SEFs may not be able to send electronic notifications ''as soon as practicable'' and could have to obtain and implement software to do so. SEFs would also incur costs each time a notification is sent. The Commission believes that the ongoing cost would be minimal if the notification was sent electronically using a partially automated software system. However, some SEFs may send notifications to their market participants by other means.

The Commission does not believe the proposed error trade policy is likely to increase the risk that counterparties act carelessly and make more errors. As noted above, market participants may incur significant costs when they enter into error trades if they need to unwind hedge trades and execute new hedge trades. The Commission believes that these costs encourage market participants to implement best practices to avoid errors. The Commission also does not believe that the error trade policy is likely to increase the risk that counterparties attempt to use error trades to manipulate the market by entering into off-market transactions and then cancelling the trades after the market has moved. Since § 37.203(e) already requires that SEFs correct error trades, the proposed rule should not improve a market manipulation scheme's chances of success.

(4) Chief Compliance Officer

The proposed change to § 37.1501(b) to authorize the senior officer to oversee the CCO, could impair the independence of the CCO, and as a result the CCO's oversight of the SEF. However, the Commission believes that this risk is mitigated by the Commission's review of annual ACRs and examination programs.

The proposed amendments would eliminate requirements that the CCO identify noncompliance matters using only certain specified detection methods, design procedures that detect and resolve all possible noncompliance issues, and eliminate all potential conflicts of interest. These requirements would be replaced by more flexible standards, which could potentially allow for some impairment of a CCO's oversight of the SEF in some circumstances. However, the Commission believes that the resulting costs (in the form of potential adverse consequences) would not be material because the proposed changes would now focus on material aspects of the compliance program, *e.g.,* material breaches and material conflicts of interest. The Commission believes that the proposal acknowledges that the focus should be placed on material compliance issues rather than all compliance issues.

The proposed change to § 37.1501(e) to reduce the information required in an ACR could make it more difficult for the Commission to assess a SEF's compliance and self-regulatory programs. However, the Commission does not anticipate that these changes would materially impact the Commission's assessment as it already receives or has access to such information from other sources. For example, the Commission approves a SEF's compliance staffing and structure as part of the SEF's registration or rule submission, and annual updates provide minimal additional information, at best. In addition, SEFs report finalized disciplinary actions to the NFA,[1026] and the Commission could access this information through its oversight of the NFA.

Finally, the proposal to give SEFs more time to submit their ACRs could delay the Commission in recognizing and addressing a SEF compliance issue. However, the Commission anticipates that such risk is mitigated to the extent that SEFs provide ACRs on the timeline set forth in the proposed rules. The Commission's experience with these SEFs has not indicated that this delayed reporting has adversely impacted its ability to recognize and address compliance issues in a timely manner.

(5) Recordkeeping, Reporting, and Information-Sharing

(i) Equity Interest Transfer

The proposed additional requirement to notify the Commission of an indirect change in ownership would increase costs to a SEF, who would be required to provide notice in these instances. As part of that notification, a SEF may incur costs that are similar to those incurred when providing a notice of a direct change, including providing details of the proposed transaction and how the transaction would not adversely impact its ability to comply with the SEF core principles and the Commission's regulation, responding to any requests for supporting documentation from the Commission, and updating any ongoing changes to the transaction.[1027]

(ii) Confirmation and Trade Evidence Record

With respect to uncleared swaps, the proposed ''trade evidence record'' approach in proposed § 37.6(b) could reduce the financial integrity of transactions on SEFs compared to the current rule. There could be a greater risk of misunderstanding between the counterparties if they do not provide all the terms of a transaction at the time of execution. Even when parties reference agreements, confusion could arise from

[1026] *See* § 9.11 (stating that whenever an exchange decision pursuant to which a disciplinary action or access denial action is to be imposed has become final, the exchange must, within thirty days thereafter, provide written notice of such action to the person against whom the action was taken and notice to the National Futures Association). 17 CFR 9.11.

[1027] The Commission previously identified the types of information that a SEF should provide as part of its notification, including (i) relevant agreement(s); (ii) associated changes to relevant corporate documents; (iii) a chart outlining any new ownership or corporate or organization structure, if available; and (iv) a brief description of the purpose and any impact of the equity interest transfer. SEF Core Principles Final Rule at 33490.

issues such as multiple versions of the agreement with the same labeling or missing sections. However, the Commission does not expect that this risk will materially reduce the integrity of the swaps market. The Commission notes that these agreements are usually relationship terms between counterparties that govern all trading in uncleared swaps and do not concern the terms of specific transactions. The Commission expects that, since it should generally be less extensive, the change should result in no increased costs.

The Commission also notes that to the extent that a SEF elects to not issue a confirmation document that includes or incorporates all of the terms of an uncleared swap transaction (including the trade evidence record), the counterparties to the swap may be subject to other Commission regulations that impose those burdens, and therefore, increased costs. For example, where one of the counterparties to an uncleared swap transaction is a swap dealer or major swap participant, § 23.501 requires that the swap dealer or major swap participant issue a confirmation for the transaction as soon as technologically practicable.[1028] The Commission, however, believes that such costs are likely to be mitigated by the reduced cost burdens § 37.6(b) otherwise currently imposes upon counterparties to an uncleared swap.

(iii) Information-Sharing

The Commission recognizes that permitting SEFs to share information with any third party to fulfill its self-regulatory obligations under proposed § 37.504 may increase the risk that the SEF's market participant information is misappropriated. These third party entities are not necessarily registered with the Commission and may lack the document security and compliance knowledge, to adequately protect market participant information. However, the Commission notes that a SEF would remain responsible for maintaining the security of this information, and would oversee their service providers to ensure compliance, to the extent feasible. Furthermore, the Commission intends to continue to review SEFs' operations to ensure ongoing compliance (including the compliance of third-party service providers).

(6) System Safeguards

SEFs are currently required to file a Technology Questionnaire under existing Exhibit V to Form SEF for registration as a SEF. SEFs are likely to incur additional costs associated with annually updating this Questionnaire in proposed Exhibit Q under proposed § 37.1401(g). The Commission believes, however, that this cost may be minimal, as the Technology Questionnaire pertains to the SEF's operations and is information that a SEF should know for purposes of its compliance with Core Principle 14 and the Commission regulations. Further, the Commission believes that maintaining an annually updated Exhibit Q would limit SSE document requests and the effort required to respond to these requests and ad-hoc Commission system safeguards-related requests under proposed § 37.1401(h).

d. Section 15(a) Factors

(1) Protection of Market Participants and the Public

The Commission believes that the proposed amendments to the existing SEF requirements related to compliance and self-regulatory responsibilities are likely to increase professionalism in the swaps market, further promote an orderly trading environment and market integrity, and better enable the Commission to protect market participants and the public.

First, several of the requirements should help the Commission to determine whether a SEF's operations are compliant with the Act and the Commission's regulations. For example, requiring a SEF to additionally provide notice of any transaction resulting in the transfer of indirect ownership of fifty percent or more of the SEF's equity interest under § 37.5(c)(1) would broaden the Commission's ability to review changes in ownership that may affect the SEF's operations. Accordingly, the Commission should be better able to assess whether such changes would adversely impact the SEF's operations or its ability to comply with the core principles or Commission's regulations, which are intended in part to protect market participants.

The Commission's proposed amendments to the ACR requirements under proposed § 37.1501(d) should also better enable the Commission to assess the effectiveness of a SEF's compliance or self-regulatory programs. The proposed amendments, among other things, would remove some of the existing content requirements that are duplicative and unnecessary, but require the ACR to include a description and self-assessment of the SEF's written policies. Removing information requirements, *e.g.,* requirements to review all Commission regulations applicable to a SEF and to identify the written policies and procedures enacted to foster compliance, may reduce the amount of information available to the Commission in an ACR to assess a SEF's compliance. However, the Commission has considered that, based on its experience with the existing requirements, this information may not enhance the usefulness of the ACR. Therefore, the Commission does not believe that the proposed amendments would negatively impact its ability to assess the SEF, which is intended, in part, to protect market participants.

The proposed requirement that a SEF annually update its response to the Questionnaire should facilitate the Commission's oversight of a SEF's systems safeguard program, and in turn, benefit the swaps markets by promoting more robust automated systems and enhanced cybersecurity. This should decrease the likelihood of disruptions and market-wide closures, systems compliance issues, and systems intrusions. The receipt of an annually-updated response to Exhibit Q should further the protection of market participants and the public by helping to ensure that automated systems are available, reliable and secure; adequate in scalable capacity; and effectively overseen.

Second, the proposed requirements under § 37.201(c) should protect market participants and the public by mandating that SEF trading specialists meet fitness and proficiency standards, undergo periodic ethics training, and be subject to standards of conduct and diligent supervision by SEFs. The Commission expects that the proposed requirements should reduce abusive and fraudulent conduct and increase the professionalism of, and fair dealing by, SEF trading specialists who facilitate trading between SEF market participants. Furthermore, the proposed requirements should promote compliance with legal and regulatory obligations and SEF rules that are aimed at protecting market participants. These improvements may be attenuated if the costs of meeting the new standards reduce the number of SEF trading specialists.

Third, in addition to promoting the Commission's ability to assess a SEF's compliance with the Act and Commission regulations, some of the requirements should protect market participants and the public by improving a SEF's ability to detect potential rule violations. For example, the proposed amendments to § 37.203(f)(2) and § 37.206(b) would permit a SEF to determine the timeframe within which to complete an investigation and how to administer its

[1028] 17 CFR 23.501(a).

disciplinary program, respectively. A SEF would be better able to prioritize its completion of investigations and disciplinary cases that have a greater impact on the SEF's markets, its market participants, and the public. These benefits may be reduced if SEFs excessively delay investigations or do not prioritize appropriately. Furthermore, proposed § 37.204(b) should permit a SEF's RSP to make substantive decisions, which would allow an RSP to take action more promptly to protect the SEF's markets, market participants, and the public against misconduct, with a reduced risk of delay that could be incurred if the SEF was required to take action. There may be a risk of erroneous decisions or inappropriate delays by the RSP, however. By shifting existing § 37.205(c)'s focus from audit trail enforcement to audit trail reconstruction, proposed § 37.205(c) should enable a SEF to better detect inaccurate or incomplete audit trail data that could potentially impair the SEF's ability to conduct effective surveillance. As a whole, the Commission believes that the requirements as amended should continue to allow a SEF to better protect its markets, market participants, and the public by providing it with greater discretion to carry out these self-regulatory responsibilities.

The proposed changes to the existing audit trail requirements may reduce the scope of information that would be captured in a SEF's audit trail, but the Commission believes that these changes are not likely to materially affect the protection of market participants and the public. For example, the Commission proposes to eliminate the requirement that a SEF capture post-execution allocation information. The Commission notes that this information has generally not been captured because SEFs have operated under no-action relief, which was provided by Commission staff due to the general inability of SEFs to access this information. Thus, elimination of the requirement should not have a material effect.

The Commission believes that certain proposed amendments to current requirements reflect existing market realities, which preclude SEFs from complying with some of these requirements. In particular, the proposal would (i) move the requirement that audit trail data be sufficient to reconstruct indications of interest, requests for quotes, orders and trades, to the guidance to Core Principle 2 in Appendix B; and (ii) eliminate the requirement under existing § 37.205(b)(2) that a SEF's electronic history database include all indications of interest, requests for quotes, orders, and trades entered into a SEF's trading system or platform. Further, the proposed regulations would no longer require a SEF that offers a voice-based trading system or platform to maintain regular voice audit trail surveillance programs to reconstruct and review voice trades for possible trading violations. Notwithstanding the regulatory requirements in this area, the Commission emphasizes that SEF Core Principle 2 and its requirements remain and a SEF must still capture all audit trail data related to each of its offered execution methods that is necessary to reconstruct all trading on its facility, detect and investigate customer and market abuses, and take disciplinary action.

Fourth, the proposed requirements should protect market participants by promoting the integrity of the transactions executed on the SEF. For example, proposed § 37.203(e)—which would require a SEF to adopt policies to address and resolve error trades on its facility—should help to ensure that SEFs promptly address error trades to facilitate fair and equitable treatment between market participants on the SEF. To the extent that market participants better understand how a SEF addresses error trades and its approach for resolving such errors, these market participants should have more confidence in transacting on the SEF. Furthermore, the proposal should lead to SEFs adopting more consistent approaches to addressing trading errors, which should better protect market participants from basing their trading on erroneous information provided in market data feeds. Additionally, the proposal should lead to market participants receiving more effective notice of potential and resolved errors, which should minimize the market harm from price misinformation, which can lead to price distortion and inefficiency in the market, and indirectly impact the public. The extent of these improvements may depend on the quality of error trade policies adopted by SEFs and the effectiveness of their implementation.

Fifth, the proposed requirements should continue to promote the legal certainty of transactions executed on the SEF. Proposed § 37.6(b)(1)(ii), which would require a SEF to provide the counterparties to an uncleared swap transaction with a ''trade evidence record'' that memorializes the terms of the swap transaction agreed upon between the counterparties on the SEF, specifies that such documentation must be legally binding and memorialize the terms of the transaction. The Commission notes that this approach differs from the existing no-action relief provided by Commission staff, under which SEFs have incorporated terms by reference in a confirmation for an uncleared swap that have been previously established via privately-negotiated underlying agreements. While the proposed requirement would limit the scope of terms and conditions that must be included in SEF-issued documentation for uncleared swaps, the Commission believes that this approach is not likely to diminish the protection of market participants. The trade evidence record would continue to serve as evidence of a legally-binding swap transaction between the counterparties, who would still have the ability to supplement the record with additional terms that they had already previously agreed upon.

The protection of market participants and the public may be adversely affected to the extent that risks noted in the discussion of the costs of the proposed amendments occur. For example, increased flexibility in the implementation of compliance programs may lead to a reduction of their effectiveness in some circumstances.

(2) Efficiency, Competitiveness, and Financial Integrity of Markets

The Commission believes that the proposed amendments to the SEF requirements listed above should further promote efficiency, competitiveness, and financial integrity of the swaps markets.

Requiring a SEF to adopt error trade policies under proposed § 37.203(e) should also promote efficiency and financial integrity on a SEF's markets. Although many SEFs currently maintain error trade policies as noted, the proposed rule should help to establish a more consistent and transparent approach to addressing and resolving error trades that should benefit market participants, including those that may rely on trading data derived from the SEF's trading activity. Accordingly, requiring SEFs to provide notification of potential errors and a pending review should mitigate the potential for subsequent trading based on an erroneous transaction that could create market distortions interfering with efficient and competitive markets. The requirement should encourage efficiency by minimizing the risk that the SEF's pricing information does not reflect existing market conditions, thereby increasing market participants' confidence to participate on the SEF's facility. The extent of these improvements may depend on the

quality of error trade policies adopted by SEFs, and the effectiveness of their implementation.

The proposed amendments under Core Principle 2 would generally allow a SEF greater discretion to tailor its compliance program to identify and address rule violations among its markets and market participants. The Commission believes that proposed § 37.203(f) and § 37.206 may improve a SEF's operational efficiency, and thereby the efficiency and integrity of its markets, by allowing a SEF to determine how to complete an investigation and take disciplinary action to address misconduct more efficiently. Further, proposed § 37.204(b), which would allow a SEF's RSP more leeway to make substantive decisions related to a SEF's compliance program, should also improve the efficiency and integrity of a SEF's operations by allowing the RSP to take action with less delay once it identifies misconduct among market participants. These efficiency gains may be reduced by inappropriate decisions made by RSPs. Additionally, the Commission believes that the audit trail reconstruction requirement under proposed § 37.205(c) should improve a SEF's ability to detect potential rule violations, and may thereby enhance the overall integrity of its markets.

The requirements in proposed §§ 37.201(c)(2)–(3) should enhance efficiency, competitiveness, and financial integrity of swap markets by helping to ensure that SEF trading specialists, who are responsible for facilitating orderly, efficient, and fair trading on SEFs, have better fitness and proficiency to do so. The requirements pertaining to ethics training and SEF standards of conduct in proposed §§ 37.201(c)(4)–(5) should better ensure that SEF trading specialists are more aware of applicable regulatory obligations and SEF rules aimed at maintaining efficiency, competiveness, and market integrity. These gains may not be as extensive if the costs of meeting these standards reduce the number of SEF trading specialists. The proposed supervision requirement under § 37.201(c)(6) should increase compliance by SEF trading specialists with its obligations.

The Commission believes that related amendments proposed under Core Principle 15 should also promote efficiency and integrity of a SEF's market by allowing a more streamlined compliance approach that does not require the board of directors to assume primary oversight responsibility for the CCO. This proposed approach should in many circumstances permit the CCO to more efficiently make changes to the regulatory program in response to potential trading violations, which should aid in protecting the financial integrity of the market. Furthermore, the proposal's focus of the CCO's duties on reasonably designed procedures to address noncompliance issues and material conflicts of interest should improve the CCO's efficiency by specifying that this is the appropriate standard. This increased efficiency should permit CCOs to better allocate resources to focus on detecting and deterring material rule violations, which otherwise may harm the market's efficiency, competitiveness, and integrity.

(3) Price Discovery

The Commission believes that the proposed amendments related to compliance and self-regulatory responsibilities should protect the price discovery functions provided by a SEF's trading system or platform. For example, the proposed amendments under Core Principle 2, which the Commission believes would allow a SEF to develop the most efficient approach to identify and address rule violations based on its markets and market participants, should help to facilitate orderly trading and promote integrity in the market. Price discovery may be impaired, however, if SEFs are less successful in addressing rule violations or have difficulty in maintaining orderly trading under the framework of the proposed rules. By promoting market integrity and orderly trading—particularly through identifying and resolving abusive trading practices in an efficient manner—the Commission believes that a SEF's trading system or platform should be able to serve as a more robust mechanism for price discovery.

To the extent that SEF trading specialists facilitate the trading of swaps transactions, they may be active participants in the price discovery process. The proposed fitness, proficiency, and ethics rules would help ensure that SEF trading specialists perform these tasks ethically and competently, which should contribute to the smooth functioning of the price discovery process.

The Commission believes that requiring SEFs to adopt and maintain a formal error trade policy under proposed § 37.203(e) should similarly promote the SEF's ability to facilitate price discovery. The error trade policy should protect the price discovery process on the SEF's facility, and promote confidence in the prices market participants use to hedge risk. This may depend on the quality of the policy and the effectiveness of its implementation. If a SEF does not promptly address an error trade, market participants may mistakenly rely on inaccurate pricing information.

(4) Sound Risk Management Practices

The Commission believes that the proposed amendments related to compliance and self-regulatory responsibilities should promote sound risk management practices. The gains in this regard may depend on the quality and effective implementation of the policies and practices that SEFs would adopt under the proposed amendments.

The Commission notes that proposed § 37.203(e) is intended to encourage SEFs to implement and maintain error trade policies that reduce operational risks for market participants, and are therefore sound risk management policies. This proposed rule should reduce the harm to a market participant when it enters into an error trade, and reduce harm to the market generally by decreasing the risk of reliance on pricing information from an error trade.

(5) Other Public Interest Considerations

The Commission has not identified any effects of the proposed rules identified above on other public interest considerations.

Request for Comment

The Commission requests comment on all aspects of the consideration of the costs and benefits of the provisions related to Compliance and SRO Responsibilities.

6. Design and Monitoring of Swaps

a. Overview

(1) Swaps Not Readily Susceptible to Manipulation

The Commission proposes to revise the guidance relating to how a SEF should demonstrate that a new swap contract is not readily susceptible to manipulation under § 37.301. The Commission proposes to adopt rules that would create an Appendix C to part 37 (and update the cross reference under § 37.301) and make conforming changes to the guidance found in Appendix B. The proposed revision to the guidance to Core Principle 3 in Appendix B would eliminate the explanatory guidance, which the Commission is proposing to address in the proposed guidance to Appendix C to part 37 and replace the existing Appendix B guidance's cross reference to sections of Appendix C to part 38 with a general reference to Appendix C to part 37. The guidance in Appendix C to part 38 partly focuses on futures

products, which is not applicable in part 37. The proposed guidance is intended to clarify a SEF's obligations pursuant to Core Principle 3, and specifically addresses only swap contracts.

(2) Monitoring of Trading and Trade Processing

The proposed changes to the regulations implementing Core Principle 4 are intended to establish more practical trade monitoring requirements. First, the Commission proposes to amend existing § 37.401(c) [1029] to require that a SEF conduct real-time market monitoring of ''trading activity'' only on its own facility and in order to identify disorderly trading, any market or system anomalies, and instances or threats of manipulation, price distortion, and disruption. Second, the Commission proposes to amend existing § 37.401(a) [1030] to specify that a SEF has discretion to determine when (in place of the current requirement that it do so on an ''ongoing basis'') to collect and evaluate market participant's trading activity beyond its market, *i.e.,* as necessary to detect and prevent manipulation, price distortion, and, where possible, disruptions of the physical-delivery or cash-settlement processes. Third, the Commission proposes to eliminate the § 37.403(a) requirement that SEFs monitor the ''pricing'' of the reference price used to determine cash flows or settlement. Fourth, with regards to the § 37.404(b) requirement that a SEF require its market participants to keep records of their trading, the Commission proposes to eliminate the current information maintenance and collection exemption that permits SEFs to limit the application of the requirement for market participants to keep and provide records of their activity to only those market participants that conduct ''substantial'' trading on the SEF as set forth in the guidance to Core Principle 4 in Appendix B. Fifth, the Commission proposes to amend § 37.405 to state that a SEF must have risk control mechanisms to prevent and reduce market disruptions as well as price distortions only on its own facility, rather than on and off facility.

In addition to these substantive changes, the Commission proposes a number of clarifying and streamlining changes that would not result in any new costs or benefits and are not discussed below. The Commission proposes to partially incorporate existing § 37.203(e), which requires that a SEF conduct real-time market monitoring, into § 37.401(a),[1031] and to consolidate the trade reconstruction requirements under § 37.401(d) and § 37.406 into proposed § 37.401(d). The Commission proposes clarifying amendments to § 37.402 and § 37.403, regarding SEF monitoring obligations with respect to physical-delivery and cash-settled swaps, which would not impose new obligations.

b. Benefits

(1) Swaps Not Readily Susceptible to Manipulation

The Commission believes that SEFs should benefit from the swap focused discussion in proposed Appendix C to part 37. Similar to Appendix C to part 38, the guidance outlined in proposed Appendix C to part 37 would set forth information that should be provided to the Commission for new products and rule amendments under § 37.301, based on best practices developed over the past three decades by the Commission and other regulators. This guidance should provide greater efficiency for SEFs so that they do not have to try to apply to swaps products the futures-related provisions in Appendix C to part 38. The guidance would also likely reduce the time and costs that SEFs would incur in providing the appropriate information and should mitigate the need for extensive follow-up discussions with the Commission. In addition, it should reduce the amount of time it takes Commission staff to analyze whether a new product or rule amendment is in compliance with the CEA.

Furthermore, the proposed Appendix C to part 37 should not diminish the current benefits from the implementing regulations for Core Principle 3. The proposed Appendix C to part 37 should continue to aid SEFs to list contracts that are not readily susceptible to manipulation and should contribute to integrity and stability of the marketplace by giving traders more confidence that the prices associated with swaps reflect the true supply of and demand for the underlying commodities or financial instruments.

(2) Monitoring of Trading and Trade Processing

The Commission acknowledges that trading abuses may take place across trading platforms and markets. However, the Commission understands that the requirement that a SEF monitor the trading activity of its market participants, whether or not the activity occurs on the SEF's own platform, has in practice been highly costly and burdensome, and in some instances these costs and burdens effectively preclude compliance. Moreover, requiring every SEF to monitor trading on every other regulated trading facility is redundant and therefore provides little incremental benefit.

The Commission believes that the proposed regulations should substantially reduce these very high monitoring costs for SEFs with relatively little impact on the benefits of the regulation, as discussed above. Under the proposed regulations, a SEF would not have to monitor trading activity in real-time beyond its facility or the pricing of reference prices for cash-settled swaps, and would not have to collect and evaluate its market participants trading activity on an ongoing basis—only as needed to detect and prevent abusive trading practices. Accordingly, this should save SEF resources.

Proposed § 37.401(a) and, for cash-settled swaps, the removal of existing § 37.403(a),[1032] would limit certain monitoring obligations to a SEF's facility, and should significantly reduce the hours that a SEF's employees and officers must spend reviewing both the SEF's market participants' trading activity off of its facility and also market data (including the pricing information as required under § 37.403(a)) from other exchanges, index providers, and over-the-counter (''OTC'') trading. SEFs would not have to pay third party exchanges and providers for this market data and trading information because a SEF would no longer have to monitor trading beyond its facility (although it would still have to collect and evaluate market participant's trading data as needed per § 37.401(b)). As a practical matter, SEFs would also not have to establish and implement protocols to reformat third party data for import and use with the SEF's internal systems. While existing SEFs have already incurred cost to establish protocols to import third party data, there would be

[1029] This requirement is in proposed § 37.401(a).

[1030] This requirement is in proposed § 37.401(b).

[1031] The Commission notes that existing § 37.203(e) specifies that a SEF must conduct real-time market monitoring of all trading activity on its system(s) or platform(s) to identify ''disorderly trading and any market or system anomalies.'' As discussed above, the Commission is proposing to eliminate this provision and establish these requirements under § 37.401(a) to streamline the existing regulations.

[1032] The Commission notes that the proposed elimination of § 37.403(a) only creates a cost savings for a SEF's monitoring of cash-settled swap products.

some savings for new SEFs because they would not have to develop protocols.

Furthermore, SEFs generally would no longer have to implement or maintain these protocols to import third party data. Consistent with these changes, proposed § 37.405 would require a SEF to maintain risk control mechanisms to prevent and reduce the potential risk of price distortions and market disruptions on its facility. A SEF would no longer have to incur costs to monitor other trading facilities and OTC trading for purposes of its risk controls. As noted above, since these other trading facilities also have risk control mechanisms, the benefits of requiring SEFs to monitor other trading facilities may be incremental.

Additionally, under proposed § 37.401(b), a SEF would only be required to collect and evaluate data on its market participant's activity that occurs away from the SEF to the extent that doing so is necessary to detect and prevent abusive trading practices. The cost for SEFs to collect market data should decrease because SEFs would no longer collect information on an ongoing basis. To the extent that SEFs were requesting that market participants provide trading data, market participants should also incur fewer costs. Furthermore, SEFs would no longer have to obtain trading data from third parties since all market participants would be required to provide trading data upon request under § 37.404(b), including those market participants that a SEF currently may not require to provide trading activity information to the SEF.[1033] These market participants that currently do not collect or provide trading data would incur some additional costs to provide such information. Overall, SEFs should be required to spend less money importing and analyzing its market participants' off-SEF trading, and market participants should incur less cost in exporting this data.

Consistent with these changes, proposed § 37.405 would require a SEF to maintain risk control mechanisms to prevent and reduce the potential risk of price distortions and market disruptions only on its facility. A SEF would no longer have to monitor or coordinate its risk controls with other SEFs and activity on the OTC market.

Notwithstanding these potential savings due to proposed §§ 37.401(a)–(b), § 37.405, and removal of existing § 37.403(a), the Commission understands that most SEFs have (in light of the infeasibility of compliance as discussed above) interpreted the existing regulations to be less demanding than as described in the preamble to the part 37 SEF final rule, and, in practice, have implemented monitoring programs and risk controls that primarily focus on their respective facility. These SEFs may not realize a meaningful reduction in costs because they already have implemented many of these more limited monitoring programs and risk controls.

c. Costs

(1) Swaps Not Readily Susceptible to Manipulation

Compliance with the guidance in proposed Appendix C to part 37 should not impose any additional costs on SEFs or the market generally. SEFs submitting products for the Commission's certification under § 37.301 could incur some costs applying the guidance if the proposed Appendix C to part 37 prompted a SEF to increase the information that it provided when submitting a new swap product. However, the requested information set forth in proposed Appendix C to part 37 is intended to reflect the Commission's prior expectations. For example, the proposed Appendix C to part 37 includes a specific section for options on swap contracts that Appendix C to part 38 does not address. This newly created section is intended to be consistent with previous Commission expectations regarding contract design and transparency of option contract terms. The Commission currently requires that a SEF's product submission specify in an objective manner the following material option-specific terms of a swap (in addition to appropriately designing and sufficiently specifying the underlying swap's terms): (i) Exercise method; (ii) exercise procedure; (iii) strike price provisions; (iv) automatic exercise provisions; (v) contract size; (vi) option expiration and last trading day; and (vii) option type and trading convention. SEFs have provided these option-specific terms in their submissions for options on swap contracts. The Commission does not expect SEFs to incur any additional costs because of the guidance.

(2) Monitoring of Trading and Trade Processing

The proposed changes to the implementing regulations under Core Principle 4 could increase the chance that a SEF does not promptly identify abusive trading practices that occur away from its facility, but this risk is mitigated because every transaction occurring on a regulated platform such as a SEF or DCM would still be subject to monitoring. The narrowing of a SEF's monitoring obligations under § 37.401(a) may potentially cause the SEF to not identify an abusive trading practice occurring on another exchange or OTC market, possibly in coordination with trading on the SEF's facility.

As a mitigating factor, the Commission believes that a SEF should benefit from its monitoring staff focusing more on trading activity on its facilities and the SEF's obligation to collect and evaluate its market participants' trading activity off of the SEF. This refocusing of the monitoring staff's attention should better enable a SEF to more quickly identify and address abusive trading practices on its facility.

The removal of SEFs' monitoring obligations under § 37.403(a) may potentially cause a SEF to not identify an abusive trading practice occurring on a cash-settled swap's underlier, possibly in coordination with trading of the cash-settled swap on the SEF's facility. In practice, the Commission believes that the additional risk of a SEF failing to promptly identify abusive trading due to this proposed regulation is minimal because SEFs typically cannot access third parties' price-forming information, and SEFs would be challenged to analyze this third party information for abusive activities. Consequently, the Commission does not anticipate that removing this requirement will materially impact SEFs current monitoring practices or effectiveness.[1034]

The reduction in trading information that SEFs have to analyze under proposed § 37.401(b) could limit a SEF's ability to identify an abusive trading practice occurring on another SEF or a DCM or OTC, possibly in coordination with trading on the SEF's facility. However, the Commission believes that under the proposed regulation, SEFs would still have the means to collect market participants' trading information and, in unusual situations when a SEF would benefit from additional information to identify abusive trading practices, the SEF would be able to request this information. Moreover, the

[1033] Section 37.404(b) and the associated guidance to Core Principle 4 in Appendix B permits a SEF to limit the application of the requirement for market participants to keep and provide records of their activity in the index or instrument used as a reference price, the underlying commodity, and related derivatives markets, to only those market participants that conduct substantial trading on its facility. 17 CFR part 37 app. B.

[1034] The Commission notes that SEFs would continue to be obligated to monitor the continued appropriateness of the index or instrument and take appropriate actions where there is a threat of manipulation, price distortion, or market disruption pursuant to proposed § 37.403(b).

other SEFs and DCMs would be required to monitor for abusive practices on their own facilities. Thus, requiring SEFs to monitor trading on other regulated trading facilities is redundant. The Commission believes that SEFs would be more efficient and effective if they were required only to ask for this information when needed.

The proposed changes to the risk control mechanisms under § 37.405 could increase the chance that abusive trading practices go unchecked. A SEF would no longer have to monitor or coordinate its risk controls with other SEFs and OTC trading, and a market participant may be able to attempt to engage in an abusive trading practice across exchanges and OTC due to this lack of coordination. The Commission believes that this risk is largely mitigated because every SEF and DCM would be required to have these mechanisms on their own facilities, and therefore the incremental detriment from removing this requirement should be minimal. The Commission believes that potential costs resulting from removing the requirement that SEFs monitor or have risk controls related to the OTC market are unlikely to be significant, since such monitoring and risk controls are not practicable. The OTC market is not required by the CEA or the Commission's regulations to have risk controls and it is not clear that risk controls in the OTC market are feasible. The Commission notes that in light of the Commission's proposed interpretation of the trade execution requirement, more swaps are likely to be traded on-SEF and thus subject to monitoring and risk controls. Moreover, SEFs would continue to have the ability to investigate and address abusive trading practices that are implemented across multiple trading facilities, and to request information on a market participant's trading activity.

d. Section 15(a) Factors

(1) Protection of Market Participants and the Public

The proposed guidance in Appendix C to part 37 and the monitoring requirements in proposed §§ 37.401–403 should not materially diminish a SEF's ability to protect market participants and the public. The proposed guidance in Appendix C to part 37 and the proposed amendments to §§ 37.402–403 are intended to provide additional clarity for SEFs to help ensure that a contract is not readily susceptible to manipulation, and to help ensure that SEFs are able to adequately collect information on market activity, including special considerations for physical-delivery contracts and cash-settled contracts. Proposed §§ 37.402–403 would require SEFs to take specific actions to address threats of manipulation, price distortion, or market disruption, and proposed § 37.405 would continue to require risk controls to prevent and reduce the potential risk of price distortions and market disruptions on the SEF.

The Commission does not believe that narrowing a SEF's monitoring obligation under proposed § 37.401(a) to trading activity on its facility, requiring a SEF to collect market participants' off facility trading information only when necessary to detect abusive trading activity per proposed § 37.401(b), eliminating the SEF's monitoring of the price formation information for underlying indexes currently set forth under § 37.403(a), or altering the risk control mechanisms under § 37.405 would meaningfully increase the risk that abusive trading practices go undetected. While there is a risk that abusive trading can lead to market disruptions and create distorted prices or systemic risks that could harm the economy and the public, the SEF's requirement to monitor its facility per § 37.401(a) and to collect additional trading information from market participants as necessary per § 37.401(b) should mitigate this risk. As a group, these rules should continue to protect market participants by helping to prevent price manipulation and trading abuses, as the proposed rules are designed to protect the public by creating an environment that fosters prices that reflect actual market conditions.

(2) Efficiency, Competitiveness, and Financial Integrity of the Markets

The proposed guidance in Appendix C to part 37 is intended to provide more tailored guidance, based on best practices for swaps, regarding what a SEF should consider when developing a swap or amending the terms and conditions of an existing swap. This tailored guidance should help the contracts listed by SEFs, as a whole, to be more reflective of the underlying cash market, thus providing for more efficient hedging of commercial risk.

Furthermore, proposed §§ 37.401–403 should require SEFs to continue to detect and promptly address violations and market anomalies, and ensure that prohibited activities do not distort the swap market's prices. Therefore, the proposed modifications to SEF monitoring requirements should not materially diminish market confidence or reduce the market's ability to operate efficiently. Additionally, proposed § 37.405 should continue to deter rule violations by establishing conditions under which trading is paused or halted.

(3) Price Discovery

The Commission does not believe that the proposed rules would materially diminish a SEF's ability to implement an effective monitoring system of its facility to detect rule violations. Manipulation or other market disruptions interfere with the price discovery process by artificially distorting prices and preventing those prices from properly reflecting the fundamental forces of supply and demand. Although there is some risk, as discussed above, that modifications to the SEF's monitoring obligations may cause a SEF to not identify price manipulation, the Commission believes this risk is not material. These rules would continue to require that SEFs detect, and where possible prevent, such market mispricing, and detect disconnects between swaps and their related market prices, *e.g.,* between cash market prices and the prices of related futures and swaps. These rules should continue to promote confidence in the SEF's price discovery process and market participants' use of swaps to hedge risk.

(4) Sound Risk Management Practices

By following the best practices outlined in the proposed guidance in Appendix C to part 37 and the requirements of proposed §§ 37.402–403, a SEF should be able to minimize the susceptibility of a swap to manipulation or price distortion at the time it is developing the contract's terms and conditions. Performing this work early on should enable a SEF to minimize risks to its clearinghouse and to market participants. Sound risk management practices rely upon execution of hedge strategies at market prices that are free of manipulation or other disruptions. These rules are designed to facilitate hedging at prices free of distortions that may be preventable by adequate controls.

Furthermore, proposed §§ 37.401–403 should continue to aid SEFs in deterring, detecting, and addressing operational risks posed by abusive trading practices or trading activities. These proposed rules are designed to limit the potential losses and costs to SEFs and market participants and promote sound risk management practices.

(5) Other Public Interest Considerations

The Commission has not identified any effects that these rules will have on

other public interest considerations other than those enumerated above.

Request for Comment

The Commission requests comment on all aspects of the consideration of the costs and benefits of the provisions related to the Design and Monitoring of Swaps.

7. Financial Integrity of Transactions

a. Overview

In order to promote financial integrity of transactions, the Commission is proposing changes with respect to certain straight-through processing obligations under Core Principle 7 for SEFs and its implementing regulations and under § 39.12(b)(7) for derivatives clearing organizations (''DCO''). The Commission will discuss these changes together in this section since these provisions interact to form the basis of the Commission's straight-through processing obligations for SEFs and DCOs.[1035]

Proposed § 37.701 would require a SEF to have an independent clearing agreement with each registered DCO or exempt DCO to which the SEF routes swaps for clearing, including in those instances where a SEF, pursuant to a service agreement with a third-party service provider, routes swaps through the SEF's third-party service provider to a DCO that maintains its own agreement with the third-party service provider, but not with the SEF.

Proposed § 37.702(b)(1) would require SEFs to coordinate with registered DCOs to develop rules and procedures that facilitate the ''prompt, efficient, and accurate'' processing and routing of swap transactions in accordance with § 39.12(b)(7)(i)(A).[1036] The Commission proposes to explicitly interpret the ''prompt, efficient, and accurate'' standard to establish a qualitative approach for swaps subject to manual post-execution affirmation to be routed to and received by the relevant DCO via a third-party affirmation hub that would account for existing market practices and technology, as well as current market conditions at the time of execution. The Commission notes that this proposed interpretation is in contrast to the Divisions' view discussed in the 2013 Staff STP Guidance, in which the Divisions interpreted the ''prompt and efficient'' standard in existing § 37.702(b)(2) to mean that swaps subject to manual post-execution affirmation via a third-party affirmation hub should be routed to and received by the relevant DCO in no more than ten minutes after execution.[1037]

Proposed §§ 37.702(b)(2)–(3), respectively, would mandate that SEFs (i) require their market participants to identify a clearing member in advance for each counterparty on an order-by-order basis and (ii) facilitate pre-execution screening by each clearing FCM in accordance with the requirements of § 1.73 on an order-by-order basis. The Commission notes that this is consistent with the Divisions' view in the 2013 Staff STP Guidance that such requirements are corollary to a SEF's obligation to facilitate ''prompt and efficient'' transaction processing.[1038] Further, the Commission notes that pre-execution credit screening has become a fundamental component of the swaps clearing infrastructure as SEFs that list Required Transactions [1039] for trading or offer clearing for Permitted Transactions [1040] generally have already established these functionalities, at least in part, to comply with the Commission's regulations, to be consistent with the Divisions' views expressed in the 2013 Staff STP Guidance, or to adhere to existing industry practices.[1041]

The Commission proposes to streamline the applicable straight-through processing provisions for registered DCOs by consolidating the existing requirements under §§ 39.12(b)(7)(ii)–(iii) into proposed § 39.12(b)(7)(ii) and would delete existing § 39.12(b)(7)(iii). Specifically, proposed § 39.12(b)(7)(ii) would establish a single AQATP standard that applies to all ''*agreements,* contracts, *and transactions*'' (emphasis added) regardless of whether a trade is (1) executed competitively or noncompetitively; (2) executed on, off, or pursuant to the rules of a DCM; [1042] or (3) a swap, futures contract, or option on a futures contract; and (4) would apply after *submission* to the DCO (*i.e.,* once the transaction is received by the DCO) rather than after *execution* in all circumstances.

In contrast, existing §§ 39.12(b)(7)(ii)–(iii) establish different standards that apply based on a transaction's characteristics. Existing § 39.12(b)(7)(ii) applies to (i) any contract, including futures, options on futures, and swaps, that is (ii) executed competitively, (iii) on or subject to the rules of a SEF or DCM, and (iv) the AQATP period applies after the trade's *execution* on the SEF or DCM (emphasis added). Existing § 39.12(b)(7)(iii) applies to any (i) swap (but not other products) that either is (ii) executed noncompetitively on or subject to the rules of a SEF or DCM or (iii) not executed on or subject to the rules of a SEF or DCM, and (iv) the AQATP period applies after *submission* to the DCO (emphasis added). Moreover, consistent with the views expressed by the Divisions in the 2013 Staff STP Guidance, the Commission proposes that registered DCOs must continue to accept or reject trades within ten seconds after submission under proposed § 39.12(b)(7)(ii)'s AQATP standard.

The Commission would also make several non-substantive amendments. First, to conform the changes throughout the part 37 proposal, all references under §§ 37.702–703 to

[1035] For example, the Commission promulgated § 37.702(b) and § 39.12(b)(7) along with other Commission regulations related to straight-through processing in the same Commission rulemaking. *See* Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management, 77 FR 21278 (Apr. 9, 2012) (''Timing of Acceptance for Clearing Final Rule'').

[1036] *See* Section XII.B.—§ 37.702—General Financial Integrity. The proposal would renumber § 37.702(b)(2) to § 37.702(b)(1), delete existing § 37.702(b)(1), and amend the ''prompt and efficient'' standard to ''prompt, efficient, *and accurate*'' (emphasis added).

[1037] The Commission understands that several aspects of straight-through processing requirements are rendered through the 2013 Staff STP Guidance and the 2015 Staff Supplementary Letter. The Commission also understands that certain aspects of the guidance may be unclear when read in conjunction with existing regulations. Therefore, the Commission seeks to provide greater clarity and certainty under the proposed framework with respect to the straight-through processing requirements for SEFs and DCOs through the proposed clarifications and amendments described herein.

[1038] *See* 2013 Staff STP Guidance at 3. The Commission further notes that it stated in the Timing of Acceptance for Clearing Final Rule, that the ''parties would need to have clearing arrangement in place with clearing members in advance of execution'' and that ''[i]n cases where more than once DCO offered clearing services, the parties also would need to specify in advance where the trade should be sent for clearing.'' Timing of Acceptance for Clearing Final Rule at 21284.

[1039] 17 CFR 37.9(a)(1) (defining a Required Transaction as any transaction involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the Act).

[1040] 17 CFR 37.9(c) (defining a Permitted Transaction as any transaction not involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the Act).

[1041] In the 2013 Staff STP Guidance, the Divisions believed that pre-trade credit checks would make rejection from clearing for credit reasons a rare event. *See* 2013 Staff STP Guidance at 5. The Commission notes that the proposed amendments to § 37.702(b) are generally consistent with the Divisions' views articulated in the 2013 Staff STP Guidance.

[1042] The Commission notes that it is proposing to eliminate the ''pursuant to the rules'' language, given the change to the block trade definition. *See supra* Section XXII.A.—§ 43.2—Definition—Block Trade; § 37.203(a)—Elimination of Block Trade Exception to Pre-Arranged Trading.

''member'' would be changed to ''market participant.''

Second, existing § 37.702(b)(2) requires SEFs to develop rules and procedures to facilitate the ''prompt and efficient transaction processing'' of swap transactions to the applicable DCO. To conform this requirement to existing § 39.12(b)(7)(i)(A), which requires each registered DCO to coordinate with a SEF or DCM to facilitate the ''prompt, efficient, and accurate'' processing of swaps for clearing, the Commission proposes to add the term ''accurate'' to the existing ''prompt and efficient'' standard for SEFs under § 37.702(b)(2).[1043] Proposed § 37.702(b)(1) would also apply to the ''routing'' of swap transactions; while the Commission believes that ''processing'' as used in existing § 37.702(b)(2) also encompasses the routing of swaps from a SEF to a DCO, the Commission proposes to explicitly include ''routing'' in the regulatory text for avoidance of doubt.[1044] As a result, existing § 37.702(b)(1), which required a SEF to have the ''capacity to route transactions'' to a DCO, would be deleted as unnecessary due to new proposed § 37.702(b)(1). As a conforming change to proposed § 37.702(b)(1), the Commission also proposes to add the term ''routing'' to § 39.12(b)(7)(i)(A). The Commission also proposes to specify under § 37.702(b)(1) that a SEF's obligation to coordinate with DCOs should be in accordance with DCOs' obligations under existing § 39.12(b)(7)(i)(A).[1045]

Third, proposed § 37.702 would clarify that a SEF's obligations under § 37.702 apply only to registered DCOs, as opposed to exempt DCOs.

Fourth, proposed § 37.702(b) would specify that its requirements apply only to those transactions routed through a SEF to a registered DCO for clearing. The Commission believes that this change is helpful to clarify that § 37.702(b)'s requirements do not apply to those SEFs that do not facilitate the clearing of swaps executed on the SEF.

Fifth, proposed § 39.12(b)(7) would apply to all ''agreements, contracts, and transactions,'' rather than ''transactions'' as currently provided, in order to conform with the statutory definition of ''DCO'' in section 1a(15) of the Act and general scope of product eligibility under § 39.12(b)(1) and would make conforming changes in proposed §§ 39.12(b)(7)(i)–(ii).

b. Benefits

Proposed § 37.701 is intended to interact with the other proposed changes in Core Principle 7 and § 39.12(b)(7) to strengthen the straight-through processing and routing of swaps from SEFs to DCOs, and increase market integrity. The Commission believes proposed § 37.701(b)'s requirement that a SEF have a direct clearing agreement with each DCO to which the SEF submits swaps for clearing would improve a SEF's ability to establish rules and procedures that better coordinate with a DCO's clearance and settlement processes to foster greater financial integrity of swaps sent to the DCO for clearing. Such an agreement also would instill more confidence in the ability of swap clearing through the SEF, as under the proposal the SEF should have the appropriate processes to facilitate swaps clearing. Further, the terms established in a direct clearing agreement between the SEF and DCO should help the SEF and DCO resolve any problems that arise at the DCO that could diminish the SEF's ability to submit transactions for clearing.

The Commission believes that adopting proposed §§ 37.702(b)(2)–(3) would strengthen the straight-through processing and routing of swaps from SEFs to DCOs, and increase financial integrity of transactions by ensuring a consistent and timely clearing process. Specifically, proposed §§ 37.702(b)(2)–(3) should benefit transaction processing, routing, and clearing by codifying the straight-through processing requirement that SEFs must ensure that trades are efficiently routed to DCOs, reducing the time between execution and clearing. However, to the extent counterparties already comply with proposed §§ 37.702(b)(2)–(3) as a result of standard industry practices or as a result of adopting the Divisions' view discussed in the 2013 Staff STP Guidance, these benefits may already have been realized.[1046]

The Commission believes that its proposed qualitative interpretation of the ''prompt, efficient, and accurate'' standard in proposed § 37.702(b)(1), rather than a static bright-line standard such as the ten-minute standard discussed by the Divisions in the 2015 Supplementary Staff Letter, would benefit the marketplace by establishing a standard that is conducive to the broader array of swaps that would be subject to the expanded trade execution requirement, as well as the additional executed methods that would be permitted under the Commission's proposal.

The Commission's proposed qualitative interpretation of the ''prompt, efficient, and accurate'' standard should also help ensure that SEFs have time to use third-party affirmation hubs for all swap trades instead of merely those trades that can be routed through the affirmation hub for submission to the DCO within the prescribed time limit. The Commission believes that permitting the use of affirmation hubs benefits the marketplace in certain situations by providing an opportunity for counterparties to identify and correct potential error trades prior to routing these trades to a DCO for clearing, thereby reducing the number of error trades.

The Commission believes that streamlining and creating a single AQATP standard would benefit DCOs, SEFs, and clearing FCMs. The current bifurcation of the AQATP standard requires a DCO to ascertain the characteristics of a trade to determine whether the DCO's obligation to accept or reject a trade subject to AQATP begins after (1) the trade's execution for a trade that is executed competitively on a SEF or DCM (and therefore subject to § 39.12(b)(7)(ii)), or (2) the trade's submission to the DCO for a trade that was either executed non-competitively or on or subject to the rules of a SEF or DCM or executed bilaterally (and therefore subject to § 39.12(b)(7)(iii)). The Commission's proposal to streamline the AQATP standard should simplify the AQATP standard for DCOs, which in turn may lead to even more efficient trade processing, routing, and clearing since these extra steps are being removed from the straight-through processing requirements.

c. Costs

Proposed § 37.701 would require those SEFs that do not currently have a direct clearing agreement with a DCO to

[1043] The Commission proposes to renumber § 37.702(b)(2) to § 37.702(b)(1).

[1044] Existing § 37.702(b)(1) requires SEFs to have the capacity to route transactions to the DCO in a manner acceptable to the DCO for purposes of clearing. Since proposed § 37.702(b)(3) would specify that SEFs must also work with DCOs to route transactions, existing § 37.702(b)(1) would become superfluous and would be deleted.

[1045] Existing § 37.702(b)(2) requires SEFs to work with each DCO in accordance with the requirements of § 39.12(b)(7). The Commission's proposal would more specifically reference § 39.12(b)(7)(i)(A) (emphasis added), which establishes a corresponding obligation on DCOs to work with SEFs to develop rules to facilitate the ''prompt, efficient, and accurate processing'' of transactions in order to avoid any confusion with the application of the AQATP standard under existing §§ 39.12(b)(7)(ii)–(iii).

[1046] As discussed above, in the 2013 Staff STP Guidance, the Divisions previously discussed their view that the straight-through processing requirements under § 37.702(b) require SEFs to have pre-execution credit screening in certain instances. *Id.* at 3.

clear swaps executed on the SEF to enter into such an agreement with an applicable DCO. This requirement could add a marginal cost related to reviewing and entering into such an agreement with the SEF's DCO.

With respect to the Commission's proposed qualitative interpretation of the ''prompt, efficient, and accurate'' standard in proposed § 37.702(b)(1), the Commission believes that the proposed qualitative standard for swaps routed via third-party affirmation hubs could reduce the financial integrity of the trades facilitated by the SEF as compared to the alternative of establishing a bright-line static deadline, such as the ten-minute timeframe discussed by the Divisions in the 2015 Supplementary Staff Letter. As a result, a SEF could argue that it complies with the Commission's qualitative interpretation of the ''prompt, efficient, and accurate'' standard even though the swap could have been processed and routed more quickly if the Commission would have established a bright-line standard, *e.g.,* the ten-minute timeframe articulated in the 2015 Supplementary Staff Letter.

However, the Commission believes this potential cost would be mitigated if, as the Commission expects will occur, market and technological developments enable processing and routing through third-party affirmation hubs to occur at increasingly shorter time intervals. The Commission also believes that there is an inherent incentive to confirm all trades in a timely manner, as a counterparty to the trade that has entered a trade in its front office system and is trading on that information needs to ensure that trade is accurate, otherwise, it may be managing its portfolio with inaccurate information. Further, the Commission has set forth its expectation that under its proposed qualitative standard, transactions that can be reasonably affirmed on a fully automatic basis after execution should be affirmed in that manner.[1047] In such cases, the Commission believes that ''prompt, efficient, and accurate'' processing and routing would occur in a much shorter time frame, *e.g.,* less than the ten-minute time frame discussed in the 2015 Supplementary Staff Letter. Accordingly, the Commission would continue to monitor the post-trade affirmation timeframe and industry developments with respect to swap processing and routing to require that SEFs and DCOs comply with their applicable straight-through processing requirements.

Proposed § 37.702(b)(2) would require each market participant to identify a clearing FCM in advance of each trade for each counterparty. The Commission notes that market participants must already identify a clearing FCM, and so does not believe that the proposed requirement will impose a material cost since it would specify only that a market participant must identify its clearing FCM before the trade rather than after. Similarly, proposed § 37.702(b)(3) would require SEFs to provide pre-execution credit screening, which could impose a cost on some SEFs to establish a means of communicating with an FCM. While proposed §§ 37.702(b)(2)–(3) could impose costs by requiring SEFs to update their systems to facilitate these requirements, the Commission believes that SEFs generally already have established these functionalities as established market practices. Moreover, existing § 1.73 requires a clearing FCM to implement pre-execution risk controls. Consequently, the Commission believes that most SEFs already comply with proposed § 37.702(b)(3) since clearing FCMs otherwise would unlikely be able to comply with their § 1.73 obligations. Accordingly, costs imposed by proposed §§ 37.702(b)(2)–(3) likely have already been realized.[1048]

The Commission believes that the proposed consolidation of the AQATP standard would not impose any new cost on DCOs since the Commission is merely clarifying an AQATP standard in existing § 39.12(b)(7)(ii) to more accurately reflect when a DCO's AQATP obligation begins. The proposed ten-second AQATP standard could impose new costs by requiring DCOs to establish the ability to accept or reject trades for clearing within ten seconds. However, the Commission does not believe that the proposed interpretation of the AQATP standard would impose any material costs because it conforms to the industry standard and 99 percent of all trades are accepted or rejected from clearing within ten seconds or less.[1049] The proposed ten-second interpretation of the AQATP standard could dis-incentivize the development of an even quicker industry AQATP standard, resulting in the opportunity cost of the development of more efficient and faster straight-through processing. On the other hand, the ten-second standard could be too prescriptive, compared to the qualitative approach the Commission is taking with respect to the ''prompt, efficient, and accurate'' standard in the context of manual affirmation hubs, and certain execution methods such as voice execution, that may have a relatively higher error rate compared to other execution methods such as electronic trading, could reasonably require more than ten seconds under the AQATP standard. This issue could be exacerbated by new or innovative execution methods along with potentially new and complex swaps that the Commission anticipates may become more common on SEFs and DCMs under its proposed framework and that otherwise could benefit from more than ten seconds under the AQATP standard.

d. Section 15(a) Factors

(1) Protection of Market Participants and the Public

The Commission's proposal on the financial integrity of transactions and straight-through processing obligations should benefit market participants and the public by helping to ensure greater transparency and consistency of straight-through processing, which the Commission expects would result in market participants and the public having a better understanding of the relevant market structure. In turn, this could enable market participants and the public to make more informed choices and more readily identify and understand possible risks. The proposal would adopt and codify certain straight-through processing standards—rather than relying on industry practice or staff guidance—related to the processing and routing of swaps by SEFs, *i.e.,* the ''prompt, efficient, and accurate'' standard and the continued use of manual affirmation hubs and the clearing or rejection of trades by registered DCOs, *i.e.,* the ten-second AQATP standard. These requirements should help market participants and the public obtain greater transparency of market structure and potential risks related to timely trade processing and clearing. Similarly, although the Commission believes that its proposal is consistent with existing industry practices, by adopting and codifying these straight-through processing standards, the proposal should better protect market participants and the public by helping to ensure that FCMs, SEFs, DCMs, and DCOs adhere to the applicable straight-through processing

[1047] The Commission notes that this statement is consistent with the views of the Divisions in the 2015 Supplementary Staff Letter. *Id.* at 3.

[1048] The Divisions' view in the 2013 Staff STP Guidance already stipulated that SEFs should adopt the practices that the Commission has proposed under §§ 37.702(b)(2)–(3). As a result, to the extent that SEFs have followed the Divisions' interpretation in the 2013 Staff STP Guidance, such costs already have been realized.

[1049] *See* 2015 Supplementary Staff Letter at 5.

standards. As a result, the proposal would help ensure that market participants and the public continue to receive the related straight-through processing benefits.

(2) Efficiency, Competitiveness, and Financial Integrity of Markets

The AQATP standard reflects the Commission's belief that acceptance or rejection for clearing in close to real time is crucial for the efficient operation of trading venues, and the Commission's proposal is intended to reinforce SEFs' and DCOs' mutual obligation to work with one another to ensure the prompt, efficient, and accurate processing and routing of swaps from SEFs to DCOs. In turn, this should promote market efficiency and the financial integrity of transactions by requiring these market participants to work together to process, route, and ultimately clear swap transactions as appropriate.

In recognizing that some trading venues may not be fully automated or may offer execution methods that either are not fully automated or that have a relatively higher error rate, such as voice execution, the Commission's proposal would explicitly permit the use of third-party affirmation hubs pursuant to proposed § 37.702(b) to assist counterparties in identifying and fixing any errors before routing to a DCO. Identifying errors before trades are cleared should enhance the financial integrity of markets by helping to ensure that cleared transactions reflect counterparties' expectations and thereby avoid costs associated with fixing any cleared error trades. However, the absence of a prescribed timeframe to confirm transactions may result in delayed resolution of trade errors.

Clarifying that a DCO must accept or reject a trade after submission to the DCO, *i.e.,* when the DCO receives the transaction, subject to the ten-second AQATP standard should facilitate a regulatory framework in which DCOs have access to reasonably available technology to provide their clearing customers with competitive and efficient timeframes to accurately accept or reject trades for clearing. The Commission's AQATP standard for DCOs' compliance will allow—and require—the timeframe for straight-through processing to continue to adapt with technological advancements and other cleared product developments.

Proposed § 37.702(b) and the Commission's related interpretation should promote efficiency by incorporating the use of third-party affirmation platforms, which provide an opportunity to identify error trades prior to clearing, pursuant to the ''prompt, efficient, and accurate'' standards. Similarly, proposed § 37.702(b) should promote financial integrity by reducing instances in which a DCO inadvertently clears an error trade, which may also possibly be reported to an SDR that would publish such trades to the public pursuant to the real-time reporting requirements under part 43 of the Commission's regulations. However, the Commission also recognizes that to the extent that market participants have adopted these practices, such as pre-execution screening by FCMs, these benefits may already have been realized.

(3) Price Discovery

The Commission does not believe the proposed changes will have a significant effect on price discovery. To the extent that the Commission's proposal is conducive to permitting new execution methods (*i.e.,* by establishing a qualitative standard for third-party manual affirmation hubs), the Commission believes that these changes could improve price discovery. On the other hand, the absence of a prescribed timeframe to process and route transactions to a DCO may result in trades taking longer to clear than they otherwise would have with a prescribed timeframe, which may affect price discovery. However, as noted above, the Commission believes that the proposed standard is consistent with industry practice.

(4) Sound Risk Management Practices

The AQATP standard reflects the Commission's belief that acceptance or rejection for clearing in close to real time is crucial for effective risk management. The Commission believes that prudent risk management dictates that once a trade has been submitted to a clearing FCM or a DCO, the clearing FCM or DCO must accept or reject it as quickly as possible. The Commission's proposal would promote sound risk management practices by ensuring that all intended-to-be-cleared swaps are subject to straight-through processing on a SEF and that all trades submitted to a DCO are subject to a consistent AQATP standard.

(5) Other Public Interest Considerations

The Commission has not identified any other public interest considerations relevant to the proposal on financial integrity and straight-through processing obligations.

Request for Comment

The Commission requests comment on all aspects of the consideration of the costs and benefits of the proposal related to the financial integrity of transactions and straight-through processing obligations.

8. Financial Resources

a. Overview

The proposal would generally adopt Commission staff ''Financial Resources Guidance,'' [1050] with certain changes, as part of the proposed acceptable practices to Core Principle 13 in Appendix B to part 37 to provide additional guidance for SEFs when determining their financial obligations under proposed § 37.1301 and § 37.1303, including what costs a SEF may or may not include in its projected operating cost calculations.

Proposed § 37.1301(a) would require a SEF to maintain financial resources in an amount adequate to cover only those projected operating costs necessary to enable the SEF to comply with its core principle obligations under section 5h of the Act and any applicable Commission regulation for a one-year period, calculated on an ongoing basis. In contrast, existing § 37.1301(a) requires a SEF to maintain sufficient financial resources to cover all of its operations for a one-year period, calculated on an ongoing basis, regardless of whether such operating costs are necessary for the SEF to comply with its core principle or other applicable Commission regulations. The Commission would consolidate § 37.1301(c) with § 37.1301(a) and accordingly delete § 37.1301(c). Proposed § 37.1301(b) would permit a SEF to file a consolidated financial report if the SEF also operates as a DCO.

Pursuant to existing § 37.1303, a SEF currently has reasonable discretion to determine its financial obligations under § 37.1301.[1051] The Commission would adopt Acceptable Practices to further clarify the costs that a SEF may or may not exclude in its reasonable discretion when determining its projected operating costs under § 37.1301(a). The proposed Acceptable Practices would generally be based

[1050] CFTC Letter No. 17–25 Division of Market Oversight Guidance on Calculating Projected Operating Costs by Designated Contract Markets and Swap Execution Facilities (Apr. 28, 2017).

[1051] Section 37.1303 provides that a SEF has reasonable discretion in determining the methodology used to compute its projected operating costs in order to determine the amount needed to meet its requirements under § 37.1301. Because the liquidity requirement in existing § 37.1305 is based upon a SEF's financial requirement under § 37.1301, the SEF's application of its reasonable discretion also implicitly determines its liquidity obligation under § 37.1305. The Commission proposes to renumber § 37.1303 to § 37.1304. Other than renumbering the provision and other conforming changes, such as including a reference to wind-down costs, the Commission is not proposing substantive changes to the provision.

upon the Financial Resources Guidance in which staff discussed the scope of a SEF's reasonable discretion for determining its obligations under § 37.1301 and § 37.1303. Specifically, the Financial Resources Guidance provides that a SEF may reasonably exclude from its projected operating costs certain expenses, including (1) costs attributable solely to sales, marketing, business development, or recruitment;[1052] (2) compensation and related taxes and benefits for SEF employees whose functions are not necessary to meet the SEF's regulatory responsibilities;[1053] (3) costs for acquiring and defending patents and trademarks for SEF products and related intellectual property; (4) magazine, newspaper, and online periodical subscription fees; (5) tax preparation and audit fees; (6) to the extent not covered by item (2) above, the variable commissions that a voice-based SEF may pay to its employee-brokers, calculated as a percentage of transaction revenue generated by the voice-based SEF; and (7) any non-cash costs, including depreciation and amortization. The Commission similarly would incorporate this list with certain conforming changes into the proposed Acceptable Practices as costs that the Commission believes may be reasonable for a SEF to exclude from its projected operating cost calculations.[1054] In addition to these enumerated items, the proposed Acceptable Practices additionally would provide that as long as a SEF offers more than one *bona fide* execution method, it may be a reasonable use of a SEF's discretion under proposed § 37.1304 to include the costs of only one of its *bona fide* execution methods in its projected operating costs calculations, while excluding the costs associated with its other execution methods.[1055]

Further, based on the Financial Resources Guidance, the proposed Acceptable Practices would clarify that in order to determine its obligations under proposed § 37.1301(a), a SEF may pro-rate, but not exclude, certain expenses in calculating projected operating costs.[1056] In pro-rating any of these expenses, however, a SEF would need to document, identify, and justify is decision to pro-rate such expenses.

Proposed § 37.1303 would require a SEF to maintain liquid assets in an amount equal to the greater of (i) three-months' projected operating costs necessary to enable the SEF to comply with its core principle and applicable Commission regulations and (ii) the SEF's projected wind-down costs. In contrast, a SEF currently must maintain sufficient liquid assets to cover six-months' projected operating costs.[1057] As discussed above, the Commission proposes to adopt the Acceptable Practices to further clarify the costs that a SEF, based on its reasonable discretion, may or may not exclude from its projected operating costs when determining its financial obligations under proposed § 37.1303.

Since SEFs currently are not required to provide GAAP-compliant financial submissions, proposed § 37.1306(a) would require a SEF's quarterly financial submissions to conform to GAAP, or in the case of a non-U.S. domiciled SEF that is not otherwise required to prepare GAAP-compliant statements, to prepare its statements in accordance with either the International Financial Reporting Standards issued by the International Accounting Standards Board, or a comparable international standard that the Commission may accept in its discretion. Proposed § 37.1306(c) would provide that a SEF's quarterly financial statements must explicitly (i) identify all the SEF's expenses without any exclusions, (ii) identify all expenses and corresponding amounts that the SEF excluded or pro-rated when it determined its projected operating costs, (iii) explain why the SEF excluded or pro-rated any expenses, and (iv) identify and explain all costs necessary to wind down the SEF's operations. Section 37.1306(c)(1) currently requires SEFs to provide ''[s]ufficient documentation'' explaining how the SEF determined its financial resources obligations, and the Commission believes that the items specified in proposed § 37.1306(c) constitute such sufficient documentation and are already being provided by compliant SEFs. Proposed § 37.1306(d) would extend the deadline for a SEF's fourth quarter financial statement from sixty to ninety days after the end of such fiscal quarter to conform to the extended deadline for a SEF's annual compliance report. Proposed § 37.1306(e) would require a SEF to provide notice no later than forty-eight hours after it knows or reasonably should know it no longer meets its financial resources obligations.

b. Benefits

Proposed § 37.1301(a) is expected to reduce the total financial assets that most SEFs must maintain since a SEF would be required to maintain sufficient resources to cover only its operations necessary to comply with its core principle obligations and applicable Commission regulations rather than all of its operating costs as currently provided in existing § 37.1301(a). With respect to proposed § 37.1301(a), the proposed Acceptable Practices would provide further guidance regarding the scope of a SEF's reasonable discretion when determining the SEF's financial requirements under § 37.1301(a) to exclude certain expenses from its projected operating cost calculations, thereby reducing the amount of total financial assets that a SEF must maintain under proposed § 37.1301(a). To the extent that the proposed Acceptable Practices generally adopt the staff's existing Financial Resources Guidance, SEFs may also already have realized the benefits associated with reduced financial resources

[1052] The costs listed in this item (1) also include costs for travel, entertainment, events and conferences to the extent that such costs are not necessary.

[1053] For example, if a SEF requires a certain number of voice brokers to run its voice/hybrid platform but hires additional voice brokers to provide superior customer service, the SEF would only need to include the minimum number of voice brokers to run its voice-based or voice-assisted platform based on its current business volume, and taking into account any projected increase or decrease in business volume, in its projected operating cost calculations.

[1054] In order to conform to the Commission's proposed change to § 37.1301(a), the Commission proposes to slightly alter the wording of item (2) to provide that a SEF may exclude the costs of a SEF's employees are not necessary to *comply with* the core principles set forth in § 5h of the Act and any applicable Commission regulations. (emphasis added). Similarly, the Financial Resources Guidance provides that a reasonable calculation of projected operating expenses must include all expenses necessary for a SEF to discharge its responsibilities as a SEF in compliance with the CEA, the Commission's regulations, and the SEF's rulebooks, which is consistent with existing § 37.1301(a). However, in order to conform with proposed § 37.1301(a), the proposed acceptable practices would instead provide that a SEF must include all expenses necessary for the SEF ''to comply'' with the core principles and any applicable Commission regulations.

[1055] For example, if a SEF offers both an Order Book and RFQ System, the SEF would be permitted to include the costs related to only one of the execution methods it offers (*e.g.,* if a SEF includes in its projected operating costs the costs associated with its Order Book, it may exclude the costs related to its RFQ System, or vice-versa). A *bona fide* method would refer to a method actually used by SEF participants and not established by a SEF on a *pro forma* basis for the purpose of complying with—or evading—the financial resources requirement. In contrast, under the current Financial Resources Guidance and Commission regulations, a SEF's projected operating costs generally must include all offered execution methods.

[1056] For example, a SEF would be permitted to pro-rate expenses that are shared with affiliates, *e.g.,* the costs of administrative staff or seconded employees that a SEF shares with affiliates. Further, a SEF would also be permitted to pro-rate expenses that are attributable in part to activities that are not required to comply with the SEF core principles, *e.g.,* costs of a SEF's office space to the extent it also houses personnel whose costs may be excludable under items (1) or (2).

[1057] The proposal would renumber § 37.1305 to § 37.1303.

requirements. However, in addition to the expenses enumerated in the Financial Resources Guidance, the proposed Acceptable Practices also would clarify that when determining its financial obligations under § 37.1301(a), as long as a SEF includes the costs of one *bona fide* execution method, a SEF could reasonably exclude from its projected operating costs the expenses associated with its other execution methods.[1058] As a result, the Commission anticipates that a SEF's projected operating costs related to a SEF's execution platforms would generally not be significantly more than the least costly *bona fide* execution method offered by the SEF, which the Commission notes could be in the millions of dollars for certain SEFs.[1059]

Proposed § 37.1301(b) could result in a marginal cost reduction since an entity would no longer be required to submit a separate financial submission for its affiliated SEF and DCO. However, the Commission believes that this would be a *de minimis* reduction.

Proposed § 37.1303's liquidity requirement would significantly reduce the amount of liquid financial assets that must be maintained by most SEFs. Currently, a SEF must maintain liquid financial assets equal to six-months' projected operating costs, while proposed § 37.1303 would require most SEFs to hold three-months' projected operating costs. As a result, proposed § 37.1303 generally would reduce the liquidity requirement for most SEFs by 50 percent.[1060] Similar to the discussion above under proposed § 37.1301(a), the proposed Acceptable Practices would broaden the reasonable discretion that a SEF has under proposed § 37.1304 for computing its projected operating costs to exclude certain expenses from its projected three-months' operating cost calculations, thereby reducing the amount of total financial assets that a SEF must maintain under proposed § 37.1303.[1061] In addition, a SEF currently must maintain liquid assets equal to six-months' operating costs even if the SEF's actual wind-down costs are greater. For certain SEFs with wind-down costs that exceed six-months' operating costs, proposed § 37.1303 would augment market integrity for such SEFs by requiring them to maintain additional liquid assets to cover their wind-down costs, even if the SEF's wind-down would exceed six-months, but in no event would a SEF be permitted to maintain less than three-months' operating costs.

The Commission believes that the proposal provides a SEF with greater flexibility in terms of establishing its financial resources. This, in turn, may lead to greater efficiencies in terms of financing and capital allocation and investment. However, the Commission acknowledges, as discussed below, this flexibility may increase the level of financial risk at the SEF.

Proposed §§ 37.1306(a) and (c) would benefit transparency and augment the Commission's oversight by requiring SEFs to provide standardized, GAAP-compliant financial submissions that explicitly identify any cost a SEF has excluded or pro-rated in determining its projected operating costs. In its experience conducting ongoing SEF oversight, Commission staff has devoted additional effort to obtain appropriate clarity and sufficient documentation from SEFs. Therefore, the Commission believes that clarifying the minimum documentation that a SEF must provide would mitigate the time and resources required both by staff in conducting its oversight and by SEFs in responding to staff's requests for additional information. Proposed § 37.1306(e) would benefit market integrity by ensuring that the Commission is aware of any non-compliance forty-eight hours after the SEF knows or reasonably should know that it fails to satisfy its financial resources obligations rather than when the SEF submits its quarterly financial statement under § 37.1306(a), increasing the Commission's ability to promptly respond.

c. Costs

Proposed § 37.1301(a) would reduce the amount of financial resources that a SEF must maintain to an amount that would enable the SEF to comply with its core principle obligations and applicable Commission regulations for a one-year period, calculated on an ongoing basis, rather than in an amount necessary to cover all of the SEF's operations as required under existing § 37.1301(a). The proposed Acceptable Practices further would clarify the costs that a SEF may exclude when determining its obligations under proposed § 37.1301(a). As a result, proposed § 37.1301(a) as contemplated in the proposed Acceptable Practices likely would induce SEFs to reduce the current level of total financial resources that they maintain under § 37.1301. In turn, this could decrease market participants' confidence and could harm a SEF's stability during adverse market conditions because the SEF may not have adequate financial resources to cover its costs. However, the Commission believes that the potential harm to a SEF's financial stability and to the market is minimal since proposed § 37.1301(a) addresses only the amount of a SEF's total financial assets, which includes illiquid assets, rather than focusing only on a SEF's liquid assets. The Commission notes that illiquid assets are less important compared to the amount of liquid financial assets that a SEF must maintain under proposed § 37.1303 since it is more difficult for a SEF to timely liquidate its illiquid assets to cover its operating costs, especially during periods of market instability. Accordingly, the Commission believes a SEF's liquid financial assets, which the Commission addresses in proposed § 37.1303 below, is more important for sustaining a SEF's financial health and continuing operations.

Proposed § 37.1303 could require some SEFs to maintain additional liquid financial assets, compared to the current liquidity requirement, where a SEF's wind-down costs exceed six-months' operating costs. However, as explained above under the discussion of benefits, the Commission believes that most SEFs would not have wind-down costs that exceed six-months' operating costs. Accordingly, proposed § 37.1303 should not increase the liquidity requirement for most SEFs.

Proposed § 37.1304 would require a SEF to incur an additional marginal cost to calculate its wind-down costs, in addition to its projected operating costs as currently required, in order to determine its financial resources

[1058] For example, if a SEF offers both an Order Book and RFQ System, the SEF would be permitted to include the costs related to only one of the execution methods it offers (*e.g.,* if a SEF includes in its projected operating costs the costs associated with its Order Book, it may exclude the costs related to its RFQ System, or vice-versa). A *bona fide* method would refer to a method actually used by SEF participants and not established by a SEF on a *pro forma* basis for the purpose of complying with—or evading—the financial resources requirement.

[1059] The Commission anticipates that SEFs that offer execution methods that are more costly for a SEF to maintain, such as voice-based or voice-assisted execution methods, are likely to see the greatest relative reduction in projected operating costs.

[1060] The Commission notes that the current liquidity requirement in existing § 37.1305 as well as proposed § 37.1303 permits a SEF to acquire a ''committed line of credit'' to satisfy the liquidity requirement. However, the Commission notes that most SEFs satisfy this requirement through maintaining liquid assets rather than obtaining a line of credit. Accordingly, as a practical matter, the Commission expects proposed § 37.1303 to reduce the amount of liquid assets that a SEF must maintain. Moreover, the Commission notes that there would be additional associated costs if a SEF were to obtain a committed line of credit.

[1061] This assumes that a SEF's projected wind-down costs are less than the SEF's three-months' projected operating costs; otherwise, proposed § 37.1303 would require the SEF to maintain liquid financial resources in an amount equal to its wind-down costs.

obligations under § 37.1301 and § 37.1303. The Commission estimates that this proposed change would impose an initial, minimal, one-time cost for each SEF related to determining the length of time and associated costs associated with an orderly wind down.

Proposed § 37.1306 would impose greater costs on a SEF. Specifically, proposed § 37.1306(a) would require a SEF to submit GAAP-compliant quarterly reports. Because GAAP-compliant financial statements generally require additional effort compared to non-GAAP compliance financial statements, the Commission estimates that the proposed change would increase annual costs for each SEF to create GAAP-compliance financial report. However, the Commission does not believe that proposed § 37.1306(c) would increase costs. Under existing § 37.1306(c), a SEF must provide sufficient documentation explaining the methodology it used to compute its financial resources requirements; accordingly, proposed § 37.1306(c) is merely clarifying the type of information that is already required.[1062] Similarly, the Commission does not believe that proposed § 37.1306(e) would increase costs since a SEF currently is required to maintain continuous compliance with its financial resources obligations. By requiring a SEF to notify the Commission within 48 hours of non-compliance, rather than informing the Commission through a SEF's quarterly financial submission, proposed § 37.1306(e) could impose a *de minimis* cost to prepare a notice from a non-compliant SEF.

d. Section 15(a) Factors

(1) Protection of Market Participants and the Public

The Commission previously noted that the financial resources requirements protect market participants and the public by establishing uniform standards and a system of Commission oversight that ensures that trading occurs on a financially stable facility, which in turn, mitigates the risk of market disruptions, financial losses, and system problems that could arise from a SEF's failure to maintain adequate financial resources.[1063] In the event that a SEF must wind down its operations, proposed § 37.1303 would explicitly require a SEF to maintain sufficient liquid financial resources to conduct an orderly wind-down of its operations, or three-months' operating costs if greater than the SEF's wind-down costs.[1064] The Commission believes that the proposed SEF financial requirements are better calibrated to the inherent risks of a SEF, which should not diminish the financial integrity of the SEF, but should result in greater efficiencies.

Moreover, a SEF would be required to provide notice under proposed § 37.1306(e) no later than forty-eight hours after it knows or reasonably should have known that it no longer satisfies its financial resources obligations, ensuring that the Commission can take prompt action to protect market participants and the public. In contrast, the Commission currently is notified of non-compliance in a SEF's quarterly financial statements. Lastly, a SEF would be required to submit GAAP-compliant quarterly financial submissions under proposed § 37.1306(c) that explicitly identify the costs a SEF has excluded or pro-rated in determining its projected operating costs. As a result, the Commission would more easily be able to compare SEFs' financial health and take pro-active steps to protect market participants and the public if the Commission identifies a SEF with weak financial health or the development of negative financial trends among SEFs that could endanger the market participants or the public.

(2) Efficiency, Competitiveness, and Financial Integrity of the Markets

Proposed § 37.1301(a) and § 37.1303, as further clarified through the proposed Acceptable Practices, together should benefit market efficiency by reducing capital costs since SEFs would no longer be required to maintain an excessive amount of financial resources. Accordingly, a SEF should be able to more efficiently allocate its financial resources, which in turn should encourage market growth and innovation. For example, as noted above, in the case of proposed § 37.1303, the Commission expects that most SEFs would need to hold approximately 50 percent less liquid financial assets as reserve capital to cover operating costs. The current financial resources requirements dis-incentivize a SEF by imposing higher capital requirements if the SEF wishes to offer new or experimental technology, execution methods, or related products and services—especially if such business lines, products, or services are not expected to be immediately profitable or would have low margins.

The existing regulations may discourage a SEF from offering more capital intensive activities, such as execution methods that involve human brokers compared to fully electronic trading that are less capital intensive. Accordingly, the Commission believes that the proposed capital resources requirements would be more neutral with respect to a SEF's chosen technology and business model, and therefore should encourage a greater variety of execution methods and related services and products in the market place.

Reducing capital costs would promote the entry of new entrants into the market by reducing start-up costs and initial capital requirements, thereby further encouraging competition and innovation. The increase in competition and innovation could depend on the extent to which potential new entrants respond to this encouragement.

Proposed § 37.1306(e) should improve the financial integrity of markets by requiring a SEF to notify the Commission within 48 hours after it knows or reasonably should have known that it no longer satisfies its financial resources obligations, ensuring that the Commission can take prompt action to protect market integrity. Lastly, proposed § 37.1306(c) would improve SEF financial submissions by requiring GAAP-compliant statements as well as clarifying that a SEF must explicitly identify any costs that it has exclude or pro-rated in determining its projected operating costs. These changes should improve the Commission's ability to conduct its oversight responsibilities to protect market integrity.

(3) Price Discovery

The Commission has not identified any effects of the proposed rules identified above on price discovery.

(4) Sound Risk Management Practices

By establishing specific standards with respect to how SEFs should assess and monitor the adequacy of their financial resources, the financial resources rules should promote sound risk management practices by SEFs. As noted above, proposed § 37.1303 would require a SEF to identify its wind-down costs and associated timing and ensure that it has sufficient liquid assets to maintain an orderly wind down. Similarly, proposed § 37.1306(c) would require a SEF to explain the basis of its determination for its estimate of its

[1062] *See* § 37.1306(c).

[1063] *See* Core Principles Final Rule at 33580.

[1064] As the Commission previously noted, a SEF that has sufficient amounts of liquid financial resources would be better positioned to close out trading in a manner not disruptive to market participants or to members of the public who rely on SEF prices. *See* Core Principles Final Rule at 33580.

wind-down costs and timing. Proposed § 37.1307(e) would require a SEF to notify the Commission no later than 48 hours after it knows or reasonably should have known that it no longer satisfies its financial resources obligations. As a result, a SEF would be required to ensure that it maintains the necessary procedures to identify, and to notify the Commission of, any non-compliance.

(5) Other Public Interest Considerations

The Commission has not identified any effects that these rules will have on other public interest considerations other than those enumerated above.

Request for Comment

The Commission requests comment on all aspects of the consideration of the costs and benefits of the provisions related to SEF financial resources.

D. Antitrust Considerations

CEA section 15(b) requires the Commission to ''take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of this Act, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of this Act.'' [1065]

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requests comment on whether the proposal implicates any other specific public interest to be protected by the antitrust laws.

The Commission has considered the proposal to determine whether it is anticompetitive and does not anticipate that the proposal, viewed in its entirety, will have material anticompetitive effects or result in anticompetitive behavior. As described in detail in the preamble above, the proposal is expected to generally provide greater flexibility and competition in connection with swap trading on SEFs largely as a result of the proposed approach that would permit SEFs to offer a variety of innovative execution methods rather than being limited to specific, mandated execution methods. The Commission believes that such innovation is expected to promote greater competition between SEFs in order to attract additional trading and market participation.

The Commission also believes that achieving the SEF statutory goals of promoting trading on SEFs and pre-trade price transparency requires both (i) increasing the number of swaps that are subject to the trade execution requirement; and (ii) concurrently providing flexibility of execution methods. The Commission believes that requiring market participants to conduct a larger portion of their swaps trading on SEFs would, among other things, foster additional competition among a more concentrated number of market participants resulting in increased market efficiency and decreased transaction costs.

The Commission also notes that the proposal would enhance the available third party regulatory service providers that a SEF could hire to perform a variety of regulatory functions required of SEFs under the Act and Commission regulations. Specifically, as noted in the preamble, the Commission has proposed to expand the scope of entities that may provide regulatory services under § 37.204(a) to include any non-registered entity approved by the Commission. This proposed change is expected to potentially increase competition among existing and potential regulatory service providers and, thereby, reduce operating costs for SEFs, and mitigate barriers to entry for new SEFs.

Although the Commission does not anticipate that the proposal, viewed in its entirety, will have material anticompetitive effects or result in anticompetitive behavior, the Commission encourages comments on any aspect of the proposal that may be inconsistent with the antitrust laws or anticompetitive in nature. For example, the impartial access requirements proposed under § 37.202(a) would not require an all-to-all market as envisioned by the current SEF rules, and therefore may inhibit the ability of certain market participants to access certain trading markets and liquidity pools. The Commission notes, however, that the current SEF market structure and participation patterns already have generally developed along these traditional lines, absent the proposed access criteria. The Commission underscores that its proposed changes to the impartial access requirements would require a SEF to allow access to prospective participants who are able to meet the SEF's participation criteria. As discussed in this proposal, although the Commission believes that this approach should prevent potential anticompetitive harms, it may still provide potential barriers to access.[1066] The Commission requests comment on whether and in what circumstances adopting the proposed rule could be anticompetitive.

Further, the Commission has preliminarily determined that the proposal serves the regulatory goals set forth in CEA section 5h(e) to promote trading on SEFs and pre-trade transparency in the swaps market. In addition, the Commission also preliminary believes that the proposal serves the general regulatory purpose in CEA section 3(b) to ''promote responsible innovation and fair competition among boards of trade, other markets and market participants.'' [1067]

Although the Commission has not identified any less anticompetitive means to effectuate the purposes of CEA sections 5h(e) and 3(b) in connection with the SEF regulatory framework, nonetheless, the Commission requests comment on whether there are other less anticompetitive means of achieving the relevant purposes of the Act. The Commission notes that it is not required to follow the least anticompetitive course of action.

List of Subjects

17 CFR Part 9

Administrative practice and procedure, Commodity exchanges, Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 36

Designated contract markets, Registered entities, Swap execution facilities, Swaps, Trade execution requirement.

17 CFR Part 37

Commodity futures, Registered entities, Registration application, Reporting and recordkeeping requirements, Swap execution facilities, Swaps.

17 CFR Part 38

Commodity futures, Designated contract markets, Registered entities, Reporting and recordkeeping

[1065] 7 U.S.C. 19(b).

[1066] The Commission previously applied the impartial access requirement to ISVs on the basis that such types of vendors would provide various benefits to the market and market participants. SEF Core Principles Final Rule at 33,508 n.423. However, based on the Commission's experience and notwithstanding the existing impartial access requirement, ISVs have not established a significant level of participation on SEFs, nor have they achieved a broad level of adoption among market participants, absent the proposed access criteria. *See supra* VII.A.1.a.—§ 37.202(a)(1)—Impartial Access Criteria.

requirements, Swaps, Trade execution requirement.

17 CFR Part 39

Consumer protection, Derivatives clearing organizations, Reporting and recordkeeping requirements, Risk management, Straight-through processing, Swaps.

17 CFR Part 43

Block trades, Consumer protection, Reporting and recordkeeping requirements, Swaps.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR chapter I as follows:

PART 9—RULES RELATING TO REVIEW OF EXCHANGE DISCIPLINARY, ACCESS DENIAL OR OTHER ADVERSE ACTIONS

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6b–1, 6c, 7, 7a–2, 7b–3, 8, 9, 9a, 12, 12a, 12c, 13b, 16a, 18, 19, and 21.

■ 2. Amend § 9.1 by:
■ a. Redesignating paragraph (c) as paragraph (d);
■ b. Redesignating paragraph (b)(4) as paragraph (c);
■ c. Revising paragraphs (b)(2), (b)(3), and newly redesignated paragraph (c).

The revisions read as follows:

§ 9.1 Scope of rules.

* * * * *

(b) * * *

(2) Except as provided in §§ 9.11(a), (b)(3)(i) through (v), (c), 9.12(a), and 9.13 (concerning the notice, effective date and publication of a disciplinary or access denial action), any summary action permitted under the rules of the swap execution facility imposing a minor penalty for the violation of rules relating to recordkeeping or reporting, or permitted under Core Principle 13, paragraph (a)(6) in appendix B to part 38 of this chapter imposing a minor penalty for the violation of exchange rules relating to decorum or attire, or relating to the timely submission of accurate records required for clearing or verifying each day's transactions or other similar activities; and

(3) Any exchange action arising from a claim, grievance, or dispute involving cash market transactions which are not a part of, or directly connected with, any transaction for the purchase, sale, delivery or exercise of a commodity for future delivery, a commodity option, or a swap.

(c) The Commission will, upon its own motion or upon motion filed pursuant to § 9.21(b), promptly notify the appellant and the exchange that it will not accept the notice of appeal or petition for stay of matters specified in paragraph (b) of this section. The determination to decline to accept a notice of appeal will be without prejudice to the appellant's right to seek alternate forms of relief that may be available in any other forum.

■ 3. In § 9.2, revise paragraph (k) to read as follows:

§ 9.2 Definitions.

* * * * *

(k) *Summary action* means a disciplinary action resulting in the imposition of a penalty on a person for violation of rules of the exchange permitted under the rules of the swap execution facility for impeding the progress of a hearing; Core Principle 13, paragraph (a)(4) in appendix B to part 38 of this chapter (penalty for impeding progress of hearing); Core Principle 2, paragraph (a)(8) in appendix B to part 37 of this chapter (emergency disciplinary actions); Core Principle 13, paragraph (a)(7) in appendix B to part 38 of this chapter (emergency disciplinary actions); the rules of the swap execution facility for summary fines for violations of rules regarding recordkeeping or reporting; or Core Principle 13, paragraph (a)(6) in appendix B to part 38 of this chapter (summary fines for violations of rules regarding timely submission of records, decorum, or other similar activities).

■ 4. In § 9.11, revise paragraph (b)(2) to read as follows:

§ 9.11 Form, contents and delivery of notice of disciplinary or access denial action.

* * * * *

(b) * * *

(2) The written notice of a disciplinary action or access denial action provided to the person against whom the action was taken by a swap execution facility must be a copy of a written decision which includes the items listed in paragraphs (b)(3)(i) through (vi) of this section.

* * * * *

■ 5. In § 9.12, revise paragraphs (a)(1) through (3) to read as follows:

§ 9.12 Effective date of disciplinary or access denial action.

(a) * * *

(1) As permitted by Core Principle 2, paragraph (a)(8) in appendix B to part 37 of this chapter (emergency disciplinary actions) or Core Principle 13, paragraph (a)(7) in appendix B to part 38 of this chapter (emergency disciplinary actions), the exchange reasonably believes, and so states in its written decision, that immediate action is necessary to protect the best interests of the marketplace;

(2) As permitted by the rules of the swap execution facility or Core Principle 13, paragraph (a)(4) in appendix B to part 38 of this chapter (hearings), the exchange determines, and so states in its written decision, that the actions of a person who is within the exchange's jurisdiction has impeded the progress of a disciplinary hearing;

(3) As permitted by the rules of the swap execution facility for recordkeeping or reporting violations or Core Principle 13, paragraph (a)(6) in appendix B to part 38 of this chapter (summary fines for violations of rules regarding timely submission of records, decorum, or other similar activities), the exchange determines that a person has violated exchange rules relating to decorum or attire, or timely submission of accurate records required for clearing or verifying each day's transactions or other similar activities; or

* * * * *

■ 6. In § 9.24, revise paragraph (a)(2) to read as follows:

§ 9.24 Petition for stay pending review.

(a) * * *

(2) Within ten days after a notice of summary action has been delivered in accordance with § 9.12(b) to a person who is the subject of a summary action permitted by Core Principle 2, paragraph (a)(8) in appendix B to part 37 of this chapter (emergency disciplinary actions) or Core Principle 13, paragraph (a)(7) in appendix B to part 38 of this chapter (emergency disciplinary actions), that person may petition the Commission to stay the effectiveness of the summary action pending completion of the exchange proceeding.

* * * * *

■ 7. Add part 36 to read as follows:

PART 36—TRADE EXECUTION REQUIREMENT

Sec.

Authority: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a–2, 7b–3, 2a2, and 21, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

§ 36.1 Trade execution requirement.

(a) Except as provided in this section, counterparties shall execute a transaction involving a swap subject to the clearing requirement of section 2(h)(1) of the Act on a designated contract market, a swap execution facility, or a swap execution facility that is exempt from registration under section 5h(g) of the Act, that lists the swap for trading.

(b) Paragraph (a) of this section does not apply to a swap transaction that is listed only by a swap execution facility that is exempt from registration under section 5h(g) of the Act.

(c) Paragraph (a) of this section does not apply to a swap transaction for which the clearing exception under section 2(h)(7) of the Act or the exceptions or exemptions under part 50 of this chapter have been elected, and the associated requirements met.

(d) Paragraph (a) of this section does not apply to a swap transaction that is executed as a component of a package transaction that includes a component transaction that is the issuance of a bond in a primary market.

(1) For purposes of this paragraph (d), a *package transaction* consists of two or more component transactions executed between two or more counterparties where:

(i) Execution of each component transaction is contingent upon the execution of all other components transactions; and

(ii) The component transactions are priced or quoted together as one economic transaction with simultaneous or near simultaneous execution of all components.

(2) [Reserved]

(e) Paragraph (a) of this section does not apply to a swap transaction that is executed between counterparties that have eligible affiliate counterparty status pursuant to § 50.52(a) of this chapter even if the eligible affiliate counterparties clear the swap transaction.

§ 36.2 Registry of registered entities listing swaps subject to the trade execution requirement.

(a) *Registry.* The Commission shall publish and maintain on its website a list that specifies the swaps that are subject to the trade execution requirement under section 2(h)(8) of the Act as set forth in § 36.1 and the designated contract markets and swap execution facilities where such swaps are listed for trading.

(b) *Required filing.* A designated contract market or swap execution facility shall file electronically to the Commission a complete Form TER set forth in appendix A to this part for each swap, or any group, category, type or class of swaps that it lists for trading and is subject to or becomes subject to the clearing requirement of section 2(h)(1) of the Act, as follows:

(1) For any swap, or any group, category, type or class of swaps subject to the clearing requirement of section 2(h)(1) of the Act, to be listed for trading, a designated contract market or a swap execution facility shall submit a complete Form TER or amend its Form TER concurrently with the submission of a product listing pursuant to § 40.2 or § 40.3 of this chapter;

(2) For any swap, or any group, category, type or class of swaps currently listed for trading and subject to the clearing requirement of section 2(h)(1) of the Act, a designated contract market or a swap execution facility shall submit a complete Form TER ten business days prior to the effective date of this rule in the **Federal Register**; or

(3) For any swap, or any group, category, type or class of swaps that a designated contract market or a swap execution facility lists for trading that subsequent to listing is determined to become subject to the clearing requirement of section 2(h)(1) of the Act, the designated contract market or the swap execution facility shall submit a complete Form TER or amend its Form TER ten business days prior to the effective date of the same swap, or same group, category, type or class of swaps becoming subject to the clearing requirement.

(c) *Required posting.* A designated contract market and a swap execution facility shall publicly post the most recent version of its Form TER on its website pursuant to the timeline in paragraph (b) of this section. If any information reported on Form TER, or in any amendment thereto, is or becomes inaccurate for any reason, the designated contract market or the swap execution facility shall promptly file an amendment on Form TER updating such information.

§ 36.3 Trade execution requirement compliance schedule.

(a) *Definitions.* For the purposes of this section:

Category 1 entity means a swap dealer; a security-based swap dealer; a major swap participant; or a major security-based swap participant.

Category 2 entity means a commodity pool; a private fund as defined in section 202(a) of the Investment Advisers Act of 1940; or a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature as defined in section 4(k) of the Bank Holding Company Act of 1956.

(b) For swaps subject to the requirements of section 2(h)(8) of the Act prior to the effective date of this rule, counterparties must continue to comply with the requirements of section 2(h)(8) of the Act.

(c) *Schedule for compliance.* Upon the effective date of this rule, the following schedule for compliance with the trade execution requirement under section 2(h)(8) of the Act as set forth in § 36.1 shall apply with respect to swaps that on the effective date of this rule in the **Federal Register** become subject to the requirements of section 2(h)(8) of the Act:

(1) *Category 1 entities.* A Category 1 entity must comply with the requirements of section 2(h)(8) of the Act as set forth in § 36.1 no later than ninety (90) days from the effective date of this rule in the **Federal Register** when it executes a swap transaction with another Category 1 entity or a non-Category 1 entity that voluntarily seeks to execute the swap on a swap execution facility, designated contract market, or swap execution facility that is exempt from registration under section 5h(g) of the Act.

(2) *Category 2 entities.* A Category 2 entity must comply with the requirements of section 2(h)(8) of the Act as set forth in § 36.1 no later than one hundred and eighty (180) days from the effective date of this rule in the **Federal Register** when it executes a swap transaction with another Category 2 entity, a Category 1 entity, or other counterparties that voluntarily seek to execute the swap on a swap execution facility, designated contract market, or swap execution facility that is exempt from registration under section 5h(g) of the Act.

(3) *Other counterparties.* All other counterparties must comply with the requirements of section 2(h)(8) of the Act as set forth in § 36.1 no later than two hundred and seventy (270) days from the effective date of this rule in the **Federal Register**.

(d) Nothing in this rule shall be construed to prohibit any person from voluntarily complying with the requirements of section 2(h)(8) of the Act as set forth in § 36.1 sooner than required under the implementation schedule provided under paragraph (c) of this section.

(e) *Future compliance schedules.* After the effective date of this rule and upon the issuance of additional clearing requirement determinations under section 2(h)(2) of the Act that a swap, or any group, category, type or class of swaps is required to be cleared, the

Commission shall determine the appropriate schedule for compliance with the trade execution requirement under section 2(h)(8) of the Act as set forth in § 36.1 for that swap, group, category, type or class of swap.

Appendix A to Part 36—Form TER

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

FORM TER

LISTED SWAPS SUBJECT TO THE TRADE EXECUTION REQUIREMENT

INSTRUCTIONS

Intentional misstatements or omissions of material fact may constitute federal criminal violations (7 U.S.C. 13 and 18 U.S.C. 1001).

DEFINITIONS

Unless the context requires otherwise, all terms used in this Form TER have the same meaning as in the Commodity Exchange Act, as amended ("CEA" or "Act"), and in the General Rules and Regulations of the Commodity Futures Trading Commission ("Commission") thereunder (17 CFR chapter I).

GENERAL INSTRUCTIONS

1. This Form TER, which includes instructions, is to be filed with the Commission by a designated contract market ("DCM") or swap execution facility ("SEF") for a swap or a group, category, type, or class of swaps, that is subject to or that becomes subject to the clearing requirement of section 2(h)(1) of the Act that the DCM or SEF lists for trading.

2. Individuals' names, except the executing signature, shall be given in full (Last Name, First Name, Middle Name).

3. Signatures on all copies of the Form TER filed with the Commission can be executed electronically. If this Form TER is filed by a corporation, it shall be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, it shall be signed in the name of the limited liability company by a manager or member duly authorized to sign on the limited liability company's behalf; if filed by a partnership, it shall be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it shall be signed in the name of such organization or association by the managing agent, *i.e.*, a duly authorized person who directs or manages or who participates in the directing or managing of its affairs.

4. If any item is inapplicable, indicate by "none," "not applicable," or "N/A," as appropriate.

5. The Commission may determine that additional information is required from the DCM or SEF in order to process its filing. **A Form TER that is not prepared and executed in compliance with applicable requirements and instructions**

may be returned as not acceptable for filing. Acceptance of this Form TER, however, shall not constitute a finding that the Form TER has been filed as required or that the information submitted is true, current, or complete.

6. The information submitted on this Form TER will be published and maintained on the Commission's website and be available for inspection by any interested person.

AMENDMENTS

1. When filing this Form TER for purposes of amending a prior filing pursuant to § 36.2 of the Commission's regulations (17 CFR 36.2), a DCM or SEF must file a complete form that is marked to show changes as applicable.

2. Amendments shall be signed on behalf of the DCM or SEF by a duly authorized representative.

WHERE TO FILE

This Form TER must be filed electronically with the Secretary of the Commission in the manner specified by the Commission.

COMMODITY FUTURES TRADING COMMISSION

FORM TER

LISTED SWAPS SUBJECT TO THE TRADE EXECUTION REQUIREMENT

Registered Entity Identifier Code *(optional)*:

_____

Organization:

_____

Filing as a: ___ DCM ___ SEF

☐ If this is an **INITIAL** filing of Form TER, complete in full and check here.

☐ If this is an **AMENDMENT** to a previously filed Form TER, complete in full, list all items that are amended and check here.

SIGNATURES

The DCM or SEF has duly caused this Form TER or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this ____ day of _____, 20___. The undersigned represents hereby that all information contained herein is true, current, and complete. It is understood that all required items are considered integral parts of this Form TER and that the submission of any amendment represents that all unamended items remain true, current, and complete as previously filed.

_____

Name of DCM or SEF

_____

Signature of Duly Authorized Person

_____

Print Name and Title of Signatory

GENERAL INFORMATION – EXHIBIT INSTRUCTIONS

1. The following Exhibit(s) must be filed with the Commission for each swap, or any group, category, type, or class of swaps that the DCM or SEF lists for trading that is subject to the clearing requirement under section 2(h)(1) of the Act as set forth in § 50.4 of the Commission's regulations (17 CFR 50.4).

2. An Exhibit must be labeled and include the information as specified in this Form TER. The following tables are the required template and must be reproduced for each contract listing, as appropriate.

EXHIBIT A-1 – INTEREST RATES

1. Attach as **Exhibit A-1**, the interest rate contracts the DCM or SEF lists for trading that are subject to the clearing requirement.

Product Class/Specification	
Currency	
Floating Rate Index	
Stated Termination Date Range	
Optionality	
Dual Currencies	
Conditional Notional Amounts	

EXHIBIT A-2 – CREDIT

2. Attach as **Exhibit A-2**, the credit contracts the DCM or SEF lists for trading that are subject to the clearing requirement.

Product Class/Specification	
Reference Entities	
Region	
Indices	
Tenor	
Applicable Series	
Tranched	

BILLING CODE 6351–01–C

■ 8. Revise part 37 to read as follows:

PART 37—SWAP EXECUTION FACILITIES

Authority: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a–2, 7b–3 and 12a, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

Subpart A—General Provisions

§ 37.1 Scope.

The provisions of this part shall apply to every swap execution facility that is registered or is applying to become registered as a swap execution facility under section 5h of the Commodity Exchange Act (''the Act'').

§ 37.2 Applicable provisions and definitions.

(a) *Applicable provisions.* A swap execution facility shall comply with the requirements of this part and all other applicable Commission regulations, including § 1.60 of this chapter and any related definitions and cross-referenced sections.

(b) *Definitions.* For the purposes of this part, *market participant* means any person who accesses a swap execution facility in the following manner:

(1) Through direct access provided by a swap execution facility;

(2) Through access or functionality provided by a third-party; or

(3) Through directing an intermediary that accesses a swap execution facility on behalf of such person to trade on its behalf.

§ 37.3 Requirements and procedures for registration.

(a) *Requirements for registration.* Any person operating a facility that offers a trading system or platform in which more than one market participant has the ability to execute or trade any swap, regardless of whether such swap is subject to the trade execution requirement under section 2(h)(8) of the Act as set forth in § 36.1 of this chapter, with more than one other market participant on the system or platform shall register the facility as a swap execution facility under this part or as a designated contract market under part 38 of this chapter.

(b) *Procedures for registration*—(1) *Application for registration.* An applicant requesting registration as a swap execution facility shall:

(i) File electronically a complete Form SEF as set forth in appendix A to this part, or any successor forms, and all information and documentation described in such forms with the Secretary of the Commission in the form and manner specified by the Commission;

(ii) Provide to the Commission, upon the Commission's request, any additional information and documentation necessary to review an application; and

(iii) Obtain a legal entity identifier code for the purpose of identifying the swap execution facility pursuant to part 45 of this chapter.

(2) *Request for confidential treatment.* (i) An applicant requesting registration as a swap execution facility shall identify with particularity any information in the application that will be subject to a request for confidential

treatment pursuant to § 145.9 of this chapter.

(ii) Section 40.8 of this chapter sets forth those sections of the application that will be made publicly available, notwithstanding a request for confidential treatment pursuant to § 145.9 of this chapter.

(3) *Amendment of application for registration.* An applicant amending a pending application for registration as a swap execution facility shall file an amended Form SEF electronically with the Secretary of the Commission in the manner specified by the Commission.

(4) *Effect of incomplete application.* If an application is incomplete pursuant to paragraph (b)(1) of this section, the Commission shall notify the applicant that its application will not be deemed to have been submitted for purposes of the Commission's review.

(5) *Commission review period.* The Commission shall review an application for registration as a swap execution facility pursuant to the 180-day timeframe and procedures specified in section 6(a) of the Act.

(6) *Commission determination.* (i) The Commission shall issue an order granting registration upon a Commission determination, in its own discretion, that the applicant has demonstrated compliance with the Act and the Commission's regulations applicable to swap execution facilities. If deemed appropriate, the Commission may issue an order granting registration subject to conditions.

(ii) The Commission may issue an order denying registration upon a Commission determination, in its own discretion, that the applicant has not demonstrated compliance with the Act and the Commission's regulations applicable to swap execution facilities.

(c) *Amendment of an order of registration.* (1) A swap execution facility requesting an amendment to an order of registration shall electronically file such request with the Secretary of the Commission in the form and manner specified by the Commission.

(2) A swap execution facility shall provide to the Commission, upon the Commission's request, any additional information and documentation necessary to review a request to amend an order of registration.

(3) The Commission shall issue an amended order of registration upon a Commission determination, in its own discretion, that the swap execution facility would maintain compliance with the Act and the Commission's regulations upon amendment to the order. If deemed appropriate, the Commission may issue an amended order of registration subject to conditions.

(4) The Commission may decline to issue an amended order based upon a Commission determination, in its own discretion, that the SEF would not continue to maintain compliance with the Act and the Commission's regulations upon amendment to the order.

(d) *Reinstatement of dormant registration.* A dormant swap execution facility as defined in § 40.1 of this chapter may reinstate its registration under the procedures of paragraph (b) of this section. The applicant may rely upon previously submitted materials if such materials accurately describe the dormant swap execution facility's conditions at the time that it applies for reinstatement of its registration.

(e) *Request for transfer of registration.* (1) A swap execution facility seeking to transfer its registration from its current legal entity to a new legal entity as a result of a corporate change shall file a request for approval to transfer such registration with the Secretary of the Commission in the form and manner specified by the Commission.

(2) *Timeline for filing a request for transfer of registration.* A swap execution facility shall file a request for transfer of registration as soon as practicable prior to the anticipated corporate change.

(3) *Required information.* The request for transfer of registration shall include the following:

(i) The underlying documentation that governs the corporate change;

(ii) A description of the corporate change, including the reason for the change and its impact on the swap execution facility, including its governance and operations, and its impact on the rights and obligations of market participants;

(iii) A discussion of the transferee's ability to comply with the Act, including the core principles applicable to swap execution facilities, and the Commission's regulations thereunder;

(iv) The governing documents adopted by the transferee, including a copy of any constitution, articles or certificate of incorporation, organization, formation, or association with all amendments thereto, partnership or limited liability agreements, and any existing bylaws, operating agreement, or rules or instruments corresponding thereto;

(v) The transferee's rules marked to show changes from the current rules of the swap execution facility;

(vi) A representation by the transferee that it:

(A) Will be the surviving entity and successor-in-interest to the transferor swap execution facility and will retain and assume the assets and liabilities of the transferor, except if otherwise indicated in the request;

(B) Will assume responsibility for complying with all applicable provisions of the Act and the Commission's regulations promulgated thereunder, including all self-regulatory responsibilities except if otherwise indicated in the request; and

(C) Will notify market participants of all changes to the transferor's rulebook prior to the transfer, including those changes that may affect the rights and obligations of market participants, and will further notify market participants of the concurrent transfer of the registration to the transferee upon Commission approval and issuance of an order permitting this transfer.

(4) *Commission determination.* Upon review of a request for transfer of registration, the Commission, as soon as practicable, shall issue an order either approving or denying the request.

(f) *Request for withdrawal of application for registration.* An applicant for registration as a swap execution facility may withdraw its application submitted pursuant to paragraph (b) of this section by filing a withdrawal request electronically with the Secretary of the Commission. Withdrawal of an application for registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the application was pending with the Commission.

(g) *Request for vacation of registration.* A swap execution facility may request that its registration be vacated under section 7 of the Act by filing a vacation request electronically with the Secretary of the Commission. Vacation of registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the swap execution facility was registered by the Commission.

(h) *Delegation of authority.* The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, upon consultation with the General Counsel or the General Counsel's delegate, authority to notify an applicant seeking registration that its application is incomplete and that it will not be deemed to have been submitted for purposes of the Commission's review, and to notify an

applicant seeking registration under section 6(a) of the Act that its application is materially incomplete and the running of the 180-day period is stayed. The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

§ 37.4 Procedures for implementing rules.

(a) Any rule, except for swap product terms and conditions, submitted as part of a swap execution facility's application for registration shall be considered for approval by the Commission at the time the Commission issues the swap execution facility's order of registration.

(b) Any rule, except for swap product terms and conditions, submitted as part of an application to reinstate the registration of a dormant swap execution facility, as defined in § 40.1 of this chapter, shall be considered for approval by the Commission at the time the Commission approves the dormant swap execution facility's reinstatement of registration.

§ 37.5 Provision of information relating to a swap execution facility.

(a) *Request for information.* Upon the Commission's request, a swap execution facility shall file with the Commission information related to its business as a swap execution facility in the form and manner and within the time period as the Commission specifies in its request.

(b) *Demonstration of compliance.* Upon the Commission's request, a swap execution facility shall file with the Commission a written demonstration, containing supporting data, information, and documents that it is in compliance with its obligations under the Act and the Commission's regulations as the Commission specifies in its request. The swap execution facility shall file such written demonstration in the form and manner and within the time period as the Commission specifies in its request.

(c) *Equity interest transfer*—(1) *Equity interest transfer notification.* A swap execution facility shall file with the Commission a notification of each transaction involving the direct or indirect transfer of fifty percent or more of the equity interest in the swap execution facility. The Commission may, upon receiving such notification, request that the swap execution facility provide supporting documentation of the transaction.

(2) *Timing of notification.* The equity interest transfer notice described in paragraph (c)(1) of this section shall be filed electronically with the Secretary of the Commission at its Washington, DC headquarters at *submissions@cftc.gov* and the Division of Market Oversight at *DMOSubmissions@cftc.gov,* at the earliest possible time but in no event later than the open of business ten business days following the date upon which a firm obligation is made to transfer, directly or indirectly, fifty percent or more of the equity interest in the swap execution facility.

(3) *Certification.* Upon a transfer, whether directly or indirectly, of an equity interest of fifty percent or more in a swap execution facility, the swap execution facility shall file electronically with the Secretary of the Commission at its Washington, DC headquarters at *submissions@cftc.gov* and the Division of Market Oversight at *DMOSubmissions@cftc.gov,* a certification that the swap execution facility meets all of the requirements of section 5h of the Act and the Commission regulations adopted thereunder, no later than two business days following the date on which the equity interest of fifty percent or more was acquired.

(d) *Delegation of authority.* The Commission hereby delegates, until it orders otherwise, the authority set forth in this section to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time. The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

§ 37.6 Enforceability.

(a) *Enforceability of transactions.* A swap transaction executed on a swap execution facility shall not be void, voidable, subject to rescission, otherwise invalidated, or rendered unenforceable as a result of:

(1) A violation by the swap execution facility of the provisions of section 5h of the Act or this part;

(2) Any Commission proceeding to alter or supplement a rule, term, or condition under section 8a(7) of the Act or to declare an emergency under section 8a(9) of the Act; or

(3) Any other proceeding the effect of which is to:

(i) Alter or supplement a specific term or condition or trading rule or procedure; or

(ii) Require a swap execution facility to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action.

(b) *Swap documentation*—(1) *Legally binding documentation*—(i) *Cleared swaps.* (A) A swap execution facility shall provide a confirmation document to each counterparty to a cleared swap transaction that is executed on the swap execution facility.

(B) *Confirmation document* means a legally binding written documentation (electronic or otherwise) that memorializes the agreement to all terms of a swap transaction and legally supersedes any previous agreement (electronic or otherwise) that relates to the swap transaction between the counterparties.

(ii) *Uncleared swaps.* (A) A swap execution facility shall provide a trade evidence record to each counterparty to an uncleared swap transaction that is executed on the swap execution facility.

(B) *Trade evidence record* means a legally binding written documentation (electronic or otherwise) that memorializes the terms of a swap transaction agreed upon by the counterparties and legally supersedes any conflicting term in any previous agreement (electronic or otherwise) that relates to the swap transaction between the counterparties.

(2) *Requirements for swap documentation.* (i) A swap execution facility shall issue the confirmation document or trade evidence record to the counterparties as soon as technologically practicable after the execution of the swap transaction on the swap execution facility.

(ii) Specific customer identifiers for accounts included in bunched orders involving swap transactions need not be included in a confirmation document or a trade evidence record provided by a swap execution facility if the applicable requirements of § 1.35(b)(5) of this chapter are met.

(iii) The swap execution facility may issue the confirmation document or trade evidence record to the person acting as an intermediary on behalf of the counterparty to the swap transaction. The swap execution facility shall establish and enforce rules that require such intermediary to send the confirmation document or trade evidence record to the respective counterparty as soon as technologically practicable upon receipt of the confirmation document or trade evidence record from the swap execution facility.

§ 37.7 Boards of trade operating both a designated contract market and a swap execution facility.

(a) An entity that intends to operate both a designated contract market and a swap execution facility shall separately

register the two entities pursuant to the designated contract market designation procedures set forth in part 38 of this chapter and the swap execution facility registration procedures set forth in this part.

(b) A board of trade, as defined in section 1a(6) of the Act, that operates both a designated contract market and a swap execution facility and that uses the same electronic trade execution system for executing and trading swaps on the designated contract market and on the swap execution facility shall clearly identify to market participants for each swap whether the execution or trading of such swaps is taking place on the designated contract market or on the swap execution facility.

Subpart B—Compliance With Core Principles

§ 37.100 Core Principle 1—Compliance with core principles.

(a) *In general.* To be registered, and maintain registration, as a swap execution facility, the swap execution facility shall comply with—

(1) The core principles described in section 5h of the Act; and

(2) Any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the Act.

(b) *Reasonable discretion of a swap execution facility.* Unless otherwise determined by the Commission by rule or regulation, a swap execution facility described in paragraph (a) of this section shall have reasonable discretion in establishing the manner in which the swap execution facility complies with the core principles described in section 5h of the Act.

§ 37.101 [Reserved]

Subpart C—Compliance With Rules

§ 37.200 Core Principle 2—Compliance with rules.

A swap execution facility shall:

(a) Establish and enforce compliance with any rule of the swap execution facility, including the terms and conditions of the swaps traded or processed on or through the swap execution facility and any limitation on access to the swap execution facility;

(b) Establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means to provide market participants with impartial access to the market and to capture information that may be used in establishing whether rule violations have occurred;

(c) Establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades; and

(d) Provide by its rules that when a swap dealer or major swap participant enters into or facilitates a swap that is subject to the mandatory clearing requirement of section 2(h) of the Act, the swap dealer or major swap participant shall be responsible for compliance with the mandatory trading requirement under section 2(h)(8) of the Act.

§ 37.201 Requirements for swap execution facility execution methods.

(a) *Required swap execution facility rules.* A swap execution facility shall establish rules governing the operation of the swap execution facility that specify:

(1) The protocols and procedures for trading and execution, including entering, amending, cancelling, or executing orders for each execution method;

(2) The manner or circumstances in which the swap execution facility may exercise discretion in facilitating trading and execution for each execution method; and

(3) The sources and methodology for generating any market pricing information provided to facilitate trading and execution for each execution method.

(b) *Pre-execution communications.* A swap execution facility shall establish rules governing the operation of the swap execution facility that specify a prohibition on engaging in any communications away from the swap execution facility regarding any swap subject to the trade execution requirement of section 2(h)(8) of the Act as set forth in § 36.1 of this chapter.

(1) Counterparties to a swap that is subject to the trade execution requirement of section 2(h)(8) of the Act as set forth in § 36.1 of this chapter may engage in communications away from the swap execution facility if the swap is executed as a component of a package transaction that includes a component transaction that is not subject to section 2(h)(8) of the Act as set forth in § 36.1 of this chapter. For purposes of this paragraph (b)(1), a package transaction consists of two or more component transactions executed between two or more counterparties where:

(i) Execution of each component transaction is contingent upon the execution of all other components transactions; and

(ii) The component transactions are each priced or quoted together as part of one economic transaction with simultaneous or near simultaneous execution of all components.

(2) [Reserved]

(c) *SEF trading specialist*—(1) *Definition.* For purposes of this part, the term *SEF trading specialist* means any natural person who, acting as an employee (or in a similar capacity) of a swap execution facility, facilitates the trading or execution of swaps transactions (other than in a ministerial or clerical capacity), or who is responsible for direct supervision of such persons.

(2) *Fitness.* (i) No swap execution facility shall permit a person who is subject to a statutory disqualification under sections 8a(2) or 8a(3) of the Act to serve as a SEF trading specialist if the swap execution facility knows, or in the exercise of reasonable care should know, of the statutory disqualification.

(ii) The prohibition set forth in paragraph (c)(2)(i) of this section shall not apply to:

(A) Any person listed as a principal or registered with the Commission as an associated person of a futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant, or any person registered as a floor broker or floor trader, notwithstanding that such person is subject to a disqualification from registration under sections 8a(2) or 8a(3) of the Act; or

(B) Any person otherwise subject to a disqualification from registration under sections 8a(2) or 8a(3) of the Act for whom a registered futures association provides a notice stating that, if the person applied for registration with the Commission as an associated person, the registered futures association would not deny the application on the basis of the statutory disqualification.

(3) *Proficiency requirements.* (i) A swap execution facility shall establish and enforce standards and procedures to ensure that its SEF trading specialists have the proficiency and knowledge necessary to:

(A) Fulfill their responsibilities to the swap execution facility as SEF trading specialists; and

(B) Comply with applicable provisions of the Act, the Commission's regulations, and the rules of the swap execution facility.

(ii) *Qualification testing.* A swap execution facility shall require any person serving as a SEF trading specialist to demonstrate that:

(A) Such person has taken and passed any examination for swaps proficiency developed and administered by a registered futures association; and

(B) There is no continuous two-year period subsequent to such person passing a swaps proficiency examination during which the person has not served as a SEF trading specialist.

(iii) Compliance with the qualification testing requirements under paragraph (c)(3)(ii) of this section shall constitute compliance with the proficiency requirements under paragraph (c)(3)(i) of this section.

(4) *Ethics training.* A swap execution facility shall establish and enforce policies and procedures to ensure that its SEF trading specialists receive ethics training on a periodic basis.

(5) *Standards of conduct.* A swap execution facility shall establish and enforce policies and procedures that require its SEF trading specialists in dealing with market participants and fulfilling their responsibilities to the swap execution facility to satisfy standards of conduct as established by the swap execution facility.

(6) *Duty to supervise.* A swap execution facility shall diligently supervise the activities of its SEF trading specialists in the facilitation of trading and execution on the swap execution facility.

(7) *Additional sources for compliance.* A swap execution facility may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.201.

§ 37.202 Access requirements.

(a) *Impartial access to markets, market services, and execution methods.* (1) A swap execution facility shall establish rules specifying impartial access criteria for its markets, market services, and execution methods, including any indicative quote screens or any similar pricing data displays. Such impartial access criteria shall be transparent, fair, and non-discriminatory and applied to all or similarly situated market participants.

(2) A swap execution facility shall establish fee structures and fee practices that are fair and non-discriminatory to market participants.

(b) *Limitations on access.* A swap execution facility shall establish and impartially enforce rules governing any decision to deny, suspend, permanently bar, or otherwise limit market participants' access to the swap execution facility, including when such decisions are made as part of a disciplinary or emergency action taken by the swap execution facility. The swap execution facility shall maintain documentation of any decision to deny, suspend, permanently bar, or otherwise limit access of a market participant to the swap execution facility.

(c) *Eligibility.* A swap execution facility shall require its market participants to provide the swap execution facility with written confirmation (electronic or otherwise) of their status as eligible contract participants, as defined by the Act and Commission regulations, prior to obtaining access.

(d) *Jurisdiction.* Prior to granting any market participant access to its facilities, a swap execution facility shall require that the market participant consent to its jurisdiction.

§ 37.203 Rule enforcement program.

(a) *Abusive trading practices prohibited.* A swap execution facility shall prohibit abusive trading practices on its markets by market participants. Swap execution facilities that permit intermediation shall prohibit customer-related abuses including, but not limited to, trading ahead of customer orders, trading against customer orders, accommodation trading, and improper cross trading. Specific trading practices that shall be prohibited include front-running, wash trading, pre-arranged trading, fraudulent trading, money passes, and any other trading practices that a swap execution facility deems to be abusive. A swap execution facility shall also prohibit any other manipulative or disruptive trading practices prohibited by the Act or by the Commission pursuant to Commission regulation.

(b) *Authority to collect information.* A swap execution facility shall have the authority to collect information required to be kept by persons subject to the swap execution facility's recordkeeping rules.

(c) *Compliance staff and resources.* A swap execution facility shall establish and maintain sufficient compliance staff and resources to ensure that it can fulfill its self-regulatory obligations under the Act and Commission regulations.

(d) *Automated trade surveillance system.* A swap execution facility shall maintain an automated trade surveillance system capable of detecting and reconstructing potential trade practice violations. Any trade executed by voice or by entry into a swap execution facility's electronic trading system or platform and any order entered into an electronic trading system or platform shall be loaded and processed into the automated trade surveillance system no later than 24 hours after the completion of the trading day on which such trade was executed or such order was entered.

(e) *Error trade policy*—(1) *Definition.* As used in this paragraph (e), the term *error trade* means any swap transaction executed on a swap execution facility that contains an error in any term of the swap transaction, including price, size, or direction.

(2) A swap execution facility shall establish and maintain rules and procedures that facilitate the resolution of error trades in a fair, transparent, consistent, and timely manner. Such rules and procedures shall:

(i) Provide the swap execution facility with the authority to adjust trade terms or cancel trades; and

(ii) Specify the rules and procedures for market participants to notify the swap execution facility of an error trade, including any time limits for notification.

(3) A swap execution facility shall, as soon as practicable, provide notice to all market participants of:

(i) Any swap transaction that is under review by the swap execution facility pursuant to error trade rules and procedures;

(ii) Any determination by the swap execution facility that a swap transaction under review is or is not an error trade; and

(iii) The resolution of any error trade, including any trade term adjustment or trade cancellation.

(4) The requirements of paragraph (e) of this section shall not preclude the swap execution facility from establishing non-reviewable ranges.

(f) *Investigations*—(1) *Procedures.* A swap execution facility shall establish and maintain procedures that require its compliance staff to conduct investigations, including the commencement of an investigation upon the receipt of a request from Commission staff or upon the discovery or receipt of information by the swap execution facility that indicates a reasonable basis for finding that a violation may have occurred or will occur.

(2) *Timeliness.* Each investigation shall be completed in a timely manner, taking into account the facts and circumstances of the investigation.

(3) *Investigation reports.* Compliance staff shall prepare a written investigation report to document the conclusion of each investigation. The investigation report shall include the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; compliance staff's analysis and conclusions; and a

recommendation as to whether disciplinary action should be pursued.

(g) *Additional sources for compliance.* A swap execution facility may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.203.

§ 37.204 Regulatory services provided by a third party.

(a) *Use of regulatory service provider permitted.* A swap execution facility may choose to contract with a registered futures association or another registered entity, as such terms are defined under the Act, or any non-registered entity (collectively, ''regulatory service providers''), for the provision of services to assist in complying with the Act and Commission regulations thereunder, as approved by the Commission. Any swap execution facility that chooses to contract with a regulatory service provider shall ensure that such provider has the capabilities and resources necessary to provide timely and effective regulatory services, including adequate staff and automated surveillance systems. A swap execution facility shall at all times remain responsible for the performance of any regulatory services received, for compliance with the swap execution facility's obligations under the Act and Commission regulations, and for the regulatory service provider's performance on its behalf.

(b) *Duty to supervise regulatory service provider.* A swap execution facility that elects to use the service of a regulatory service provider shall retain sufficient compliance staff and resources to supervise the quality and effectiveness of the regulatory services provided on its behalf. A swap execution facility shall determine the necessary processes for a swap execution facility to supervise such provider. Such processes shall include, at a minimum, the swap execution facility's involvement in all substantive decisions, such as decisions involving:

(1) The adjustment or cancellation of trades;

(2) Whether or not to issue disciplinary charges; and

(3) Denials of access to the swap execution facility for disciplinary reasons. Such decisions shall be documented as agreed upon by the swap execution facility and its regulatory service provider.

(c) *Delegation of authority.* The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority to approve any regulatory service provider chosen by a swap execution facility for the provision of regulatory services. The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

§ 37.205 Audit trail.

(a) *Audit trail required.* A swap execution facility shall capture and retain all audit trail data necessary to reconstruct all trading on its facility, detect and investigate customer and market abuses, and take appropriate disciplinary action. An acceptable audit trail shall also permit the swap execution facility to track a customer order from the time of receipt through execution on the swap execution facility.

(b) *Elements of an acceptable audit trail program*—(1) *Original source documents.* A swap execution facility's audit trail shall include original source documents. Original source documents include unalterable, sequentially-identified records on which trade execution information is originally recorded, whether recorded manually or electronically.

(2) *Transaction history database.* A swap execution facility's audit trail program shall include an electronic transaction history database. An adequate transaction history database includes a history of any trade executed by voice or by entry into a swap execution facility's electronic trading system or platform and any order entered into its electronic trading system or platform, including any order modification and cancellation.

(3) *Electronic analysis capability.* A swap execution facility's audit trail program shall include electronic analysis capability with respect to all audit trail data in the transaction history database. Such electronic analysis capability shall ensure that the swap execution facility has the ability to reconstruct any trade executed by voice or by entry into a swap execution facility's electronic trading system or platform and any order entered into its electronic trading system or platform, and identify possible trading violations with respect to both customer and market abuse.

(c) *Audit trail reconstruction.* A swap execution facility shall establish a program to verify its ability to comprehensively and accurately reconstruct all trading on its facility in a timely manner.

§ 37.206 Disciplinary procedures and sanctions.

(a) *Enforcement staff.* A swap execution facility shall establish and maintain sufficient enforcement staff and resources to effectively and promptly enforce possible rule violations within the disciplinary jurisdiction of the swap execution facility.

(b) *Disciplinary program.* A swap execution facility shall establish a disciplinary program to enforce its rules. A swap execution facility shall administer its disciplinary program through one or more disciplinary panels or its compliance staff. Notwithstanding the requirements of § 37.2, if a swap execution facility elects to administer its disciplinary program through its compliance staff, the requirements of § 1.64(c)(4) of this chapter shall not apply to such compliance staff. Any disciplinary panel or appellate panel established by a swap execution facility shall meet the composition requirements of applicable Commission regulations, and shall not include any member of the swap execution facility's compliance staff or any person involved in adjudicating any other stage of the same proceeding.

(c) *Warning letters and sanctions.* (1) All warning letters and sanctions imposed by a swap execution facility or its disciplinary panels shall be commensurate with the violations committed and shall be clearly sufficient to deter recidivism or similar violations by other market participants. All such warning letters and sanctions (including summary fines and sanctions imposed pursuant to an accepted settlement offer) shall take into account the respondent's disciplinary history. In the event of demonstrated customer harm, any sanction shall also include full customer restitution, except where the amount of restitution or to whom it should be provided cannot be reasonably determined.

(2) A swap execution facility's compliance staff or disciplinary panel may not issue more than one warning letter to the same individual found to have committed the same rule violation within a rolling twelve-month period, except for rule violations related to minor recordkeeping or reporting infractions.

(d) *Additional sources for compliance.* A swap execution facility may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the

Commission compliance with the requirements of § 37.206.

Subpart D—Swaps Not Readily Susceptible to Manipulation

§ 37.300 Core Principle 3—Swaps not readily susceptible to manipulation.

The swap execution facility shall permit trading only in swaps that are not readily susceptible to manipulation.

§ 37.301 General requirements.

To demonstrate to the Commission compliance with the requirements of § 37.300, a swap execution facility shall, at the time it submits a new swap contract in advance to the Commission pursuant to part 40 of this chapter, provide the applicable information as set forth in appendix C to this part, Demonstration of Compliance that a Swap Contract is Not Readily Susceptible to Manipulation.

Subpart E—Monitoring of Trading and Trade Processing

§ 37.400 Core Principle 4—Monitoring of trading and trade processing.

The swap execution facility shall:

(a) Establish and enforce rules or terms and conditions defining, or specifications detailing:

(1) Trading procedures to be used in entering and executing orders traded on or through the facilities of the swap execution facility; and

(2) Procedures for trade processing of swaps on or through the facilities of the swap execution facility; and

(b) Monitor trading in swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

§ 37.401 General requirements.

A swap execution facility shall:

(a) Conduct real-time market monitoring of all trading activity on the swap execution facility to identify disorderly trading, any market or system anomalies, and instances or threats of manipulation, price distortion, and disruption;

(b) Collect and evaluate data on its market participants' trading activity away from its facility, including trading in the index or instrument used as a reference price, the underlying commodity for its listed swaps, or in related derivatives markets, as necessary to detect and prevent manipulation, price distortion, and, where possible, disruptions of the physical-delivery or cash-settlement processes;

(c) Monitor and evaluate general market data as necessary to detect and prevent manipulative activity that would result in the failure of the market price to reflect the normal forces of supply and demand; and

(d) Have the ability to comprehensively and accurately reconstruct all trading activity on its facility for the purpose of detecting instances or threats of manipulation, price distortion, and disruptions.

§ 37.402 Additional requirements for physical-delivery swaps.

For a physical-delivery swap listed on the swap execution facility, the swap execution facility shall:

(a) Monitor the swap's terms and conditions as it relates to the underlying commodity market by reviewing the convergence between the swap's price and the price of the underlying commodity and make a good-faith effort to resolve conditions that are interfering with convergence or notify the Commission of such conditions; and

(b) Monitor the availability of the supply of the commodity specified by the delivery requirements of the swap and make a good-faith effort to resolve conditions that threaten the adequacy of supplies or the delivery process or notify the Commission of such conditions.

§ 37.403 Additional requirements for cash-settled swaps.

(a) For cash-settled swaps listed on the swap execution facility where the reference price is formulated and computed by the swap execution facility, the swap execution facility shall monitor the continued appropriateness of its methodology for deriving that price and take appropriate action, including amending the methodology, where there is a threat of manipulation, price distortion, or market disruption.

(b) For cash-settled swaps listed on the swap execution facility where the reference price relies on a third-party index or instrument, the swap execution facility shall monitor the continued appropriateness of the index or instrument and take appropriate action, including selecting an alternate index or instrument for deriving the reference price, where there is a threat of manipulation, price distortion, or market disruption.

§ 37.404 Ability to obtain information.

(a) A swap execution facility shall maintain access to sufficient information to assess whether trading in swaps that it lists, in the index or instrument used as a reference price, or in the underlying commodity for its listed swaps is being used to affect prices on its market.

(b) A swap execution facility shall have rules that require its market participants to keep records of their trading, including records of their activity in the index or instrument used as a reference price, the underlying commodity, and related derivatives markets, and make such records available, upon request, to the swap execution facility or, if applicable, to its regulatory service provider, and the Commission.

§ 37.405 Risk controls for trading.

The swap execution facility shall establish and maintain risk control mechanisms to prevent and reduce the potential risk of price distortions and market disruptions on its facility, including, but not limited to, market restrictions that pause or halt trading under market conditions prescribed by the swap execution facility.

§ 37.406 Regulatory service provider.

A swap execution facility shall comply with the regulations in this subpart through a dedicated regulatory department or by contracting with a regulatory service provider pursuant to § 37.204.

§ 37.407 Additional sources for compliance.

A swap execution facility may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.400.

Subpart F—Ability To Obtain Information

§ 37.500 Core Principle 5—Ability to obtain information.

The swap execution facility shall:

(a) Establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in section 5h of the Act;

(b) Provide the information to the Commission on request; and

(c) Have the capacity to carry out such international information-sharing agreements as the Commission may require.

§ 37.501 Establish and enforce rules.

A swap execution facility shall establish and enforce rules that will allow the swap execution facility to have the ability and authority to obtain sufficient information to allow it to fully perform its operational, risk management, governance, and

regulatory functions and any requirements under this part.

§ 37.502 Provide information to the Commission.

A swap execution facility shall provide information in its possession to the Commission upon request, in a form and manner that the Commission approves.

§ 37.503 Information-sharing.

A swap execution facility shall share information as required by the Commission or as appropriate to fulfill its self-regulatory and reporting responsibilities. Appropriate information-sharing agreements can be established or the Commission can act in conjunction with the swap execution facility to carry out such information sharing.

§ 37.504 Prohibited use of data collected for regulatory purposes.

A swap execution facility shall not use for business or marketing purposes, nor permit such use of, any proprietary data or personal information it collects or receives, from or on behalf of any person, for the purpose of fulfilling its regulatory obligations; *provided, however,* that a swap execution facility may use or permit the use of such data or information for business or marketing purposes if the person from whom it collects or receives such data or information clearly consents to the use of such data or information in such manner. A swap execution facility shall not condition access to its markets or market services on a person's consent to the swap execution facility's use of proprietary data or personal information for business or marketing purposes.

Subpart G—Position Limits or Accountability

§ 37.600 Core Principle 6—Position limits or accountability.

(a) *In general.* To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, a swap execution facility that is a trading facility shall adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators.

(b) *Position limits.* For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a) of the Act, the swap execution facility shall:

(1) Set its position limitation at a level no higher than the Commission limitation; and

(2) Monitor positions established on or through the swap execution facility for compliance with the limit set by the Commission and the limit, if any, set by the swap execution facility.

§ 37.601 [Reserved]

Subpart H—Financial Integrity of Transactions

§ 37.700 Core Principle 7—Financial integrity of transactions.

The swap execution facility shall establish and enforce rules and procedures for ensuring the financial integrity of swaps entered on or through the facilities of the swap execution facility, including the clearance and settlement of the swaps pursuant to section 2(h)(1) of the Act.

§ 37.701 Required clearing.

(a) Transactions executed on the swap execution facility that are required to be cleared under section 2(h)(1)(A) of the Act or are voluntarily cleared by the counterparties shall be cleared through a Commission-registered derivatives clearing organization, or a derivatives clearing organization that the Commission has determined is exempt from registration.

(b) A swap execution facility shall have an independent clearing agreement with each Commission-registered derivatives clearing organization, or derivatives clearing organization that the Commission has determined is exempt from registration, to which the swap execution facility submits a swap for clearing.

§ 37.702 General financial integrity.

A swap execution facility shall provide for the financial integrity of its transactions:

(a) By establishing minimum financial standards for its market participants, which shall, at a minimum, require that each market participant qualifies as an eligible contract participant as defined in section 1a(18) of the Act;

(b) For transactions routed through a swap execution facility to a registered derivatives clearing organization for clearing:

(1) By coordinating with each registered derivatives clearing organization to which the swap execution facility submits transactions for clearing, in the development of rules and procedures to facilitate prompt, efficient, and accurate processing and routing of transactions to registered derivatives clearing organizations in accordance with the requirements of § 39.12(b)(7)(i)(A) of this chapter;

(2) By requiring that each market participant identify a clearing member in advance for each counterparty on an order-by-order basis; and

(3) By facilitating pre-execution screening by each clearing futures commission merchant in accordance with the requirements of § 1.73 of this chapter on an order-by-order basis.

§ 37.703 Monitoring for financial soundness.

A swap execution facility shall monitor its market participants to ensure that they continue to qualify as eligible contract participants as defined in section 1a(18) of the Act.

Subpart I—Emergency Authority

§ 37.800 Core Principle 8—Emergency authority.

The swap execution facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any swap or to suspend or curtail trading in a swap.

§ 37.801 Additional sources for compliance.

A swap execution facility may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.800.

Subpart J—Timely Publication of Trading Information

§ 37.900 Core Principle 9—Timely publication of trading information.

(a) *In general.* The swap execution facility shall make public timely information on price, trading volume, and other trading data on swaps to the extent prescribed by the Commission.

(b) *Capacity of swap execution facility.* The swap execution facility shall be required to have the capacity to electronically capture and transmit trade information with respect to transactions executed on the facility.

§ 37.901 General requirements.

With respect to swaps traded on or through a swap execution facility, each swap execution facility shall:

(a) Report specified swap data as provided under parts 43 and 45 of this chapter; and

(b) Meet the requirements of part 16 of this chapter.

Subpart K—Recordkeeping and Reporting

§ 37.1000 Core Principle 10—Recordkeeping and reporting.

(a) *In general.* A swap execution facility shall:

(1) Maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of five years;

(2) Report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the Act; and

(3) Keep any such records relating to swaps defined in section 1a(47)(A)(v) of the Act open to inspection and examination by the Securities and Exchange Commission.

(b) *Requirements.* The Commission shall adopt data collection and reporting requirements for swap execution facilities that are comparable to corresponding requirements for derivatives clearing organizations and swap data repositories.

§ 37.1001 Recordkeeping.

A swap execution facility shall maintain records of all activities relating to the business of the facility, in a form and manner acceptable to the Commission, for a period of at least five years. A swap execution facility shall maintain such records, including a complete audit trail for all swaps executed on the swap execution facility, investigatory files, and disciplinary files, in accordance with the requirements of § 1.31 and part 45 of this chapter.

Subpart L—Antitrust Considerations

§ 37.1100 Core Principle 11—Antitrust considerations.

Unless necessary or appropriate to achieve the purposes of the Act, the swap execution facility shall not:

(a) Adopt any rules or take any actions that result in any unreasonable restraint of trade; or

(b) Impose any material anticompetitive burden on trading or clearing.

§ 37.1101 Additional sources for compliance.

A swap execution facility may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.1100.

Subpart M—Conflicts of Interest

§ 37.1200 Core Principle 12—Conflicts of interest.

The swap execution facility shall:

(a) Establish and enforce rules to minimize conflicts of interest in its decision-making process; and

(b) Establish a process for resolving the conflicts of interest.

§ 37.1201 [Reserved]

Subpart N—Financial Resources

§ 37.1300 Core Principle 13—Financial resources.

(a) *In general.* The swap execution facility shall have adequate financial, operational, and managerial resources to discharge each responsibility of the swap execution facility.

(b) *Determination of resource adequacy.* The financial resources of a swap execution facility shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the swap execution facility to cover the operating costs of the swap execution facility for a one-year period, as calculated on a rolling basis.

§ 37.1301 General requirements.

(a) A swap execution facility shall maintain financial resources on an ongoing basis that are adequate to enable it to comply with the core principles set forth in section 5h of the Act and any applicable Commission regulations. Financial resources shall be considered adequate if their value exceeds the total amount that would enable the swap execution facility to cover its projected operating costs necessary for the swap execution facility to comply with section 5h of the Act and applicable Commission regulations for a one-year period, as calculated on a rolling basis pursuant to § 37.1304.

(b) An entity that operates as both a swap execution facility and a derivatives clearing organization shall also comply with the financial resource requirements of § 39.11 of this chapter. In lieu of filing separate reports under § 37.1306(a) and § 39.11(f) of this chapter, such an entity may file a single report in accordance with § 39.11 of this chapter.

§ 37.1302 Types of financial resources.

Financial resources available to satisfy the requirements of § 37.1301 may include:

(a) The swap execution facility's own capital, meaning its assets minus its liabilities calculated in accordance with generally accepted accounting principles in the United States; and

(b) Any other financial resource deemed acceptable by the Commission.

§ 37.1303 Liquidity of financial resources.

The financial resources allocated by the swap execution facility to meet the ongoing requirements of § 37.1301 shall include unencumbered, liquid financial assets (*i.e.,* cash and/or highly liquid securities) equal to at least the greater of three months of projected operating costs, as calculated on a rolling basis, or the projected costs needed to wind down the swap execution facility's operations, in each case as determined under § 37.1304. If a swap execution facility lacks sufficient unencumbered, liquid financial assets to satisfy its obligations under this section, the swap execution facility may satisfy this requirement by obtaining a committed line of credit or similar facility in an amount at least equal to such deficiency.

§ 37.1304 Computation of costs to meet financial resources requirement.

A swap execution facility shall each fiscal quarter, make a reasonable calculation of its projected operating costs and wind-down costs in order to determine its applicable obligations under § 37.1301 and § 37.1303. The swap execution facility shall have reasonable discretion in determining the methodologies used to compute such amounts. The Commission may review the methodologies and require changes as appropriate.

§ 37.1305 Valuation of financial resources.

No less than each fiscal quarter, a swap execution facility shall compute the current market value of each financial resource used to meet its obligations under § 37.1301 and § 37.1303. Reductions in value to reflect market and credit risk (''haircuts'') shall be applied as appropriate.

§ 37.1306 Reporting to the Commission.

(a) Each fiscal quarter, or at any time upon Commission request, a swap execution facility shall provide a report to the Commission that includes:

(1) The amount of financial resources necessary to meet the requirements of § 37.1301 and § 37.1303, computed in accordance with the requirements of § 37.1304, and the market value of each available financial resource, computed in accordance with the requirements of § 37.1305; and

(2) Financial statements, including the balance sheet, income statement, and statement of cash flows of the swap execution facility.

(i) The financial statements shall be prepared in accordance with generally accepted accounting principles in the United States, prepared in English, and denominated in U.S. dollars.

(ii) The financial statements of a swap execution facility that is not domiciled in the United States, and is not otherwise required to prepare financial statements in accordance with generally

accepted accounting principles in the United States, may satisfy the requirement in paragraph (a)(2)(i) of this section if such financial statements are prepared in accordance with either International Financial Reporting Standards issued by the International Accounting Standards Board, or a comparable international standard as the Commission may otherwise accept in its discretion.

(b) The calculations required by paragraph (a) of this section shall be made as of the last business day of the swap execution facility's applicable fiscal quarter.

(c) With each report required under paragraph (a) of this section, the swap execution facility shall also provide the Commission with sufficient documentation explaining the methodology used to compute its financial requirements under § 37.1301 and § 37.1303. Such documentation shall:

(1) Allow the Commission to reliably determine, without additional requests for information, that the swap execution facility has made reasonable calculations pursuant to § 37.1304; and

(2) Include, at a minimum:

(i) A total list of all expenses, without any exclusion;

(ii) All expenses and the corresponding amounts, if any, that the swap execution facility excluded or pro-rated when determining its operating costs, calculated on a rolling basis, required under § 37.1301 and § 37.1303, and the basis for any determination to exclude or pro-rate any such expenses;

(iii) Documentation demonstrating the existence of any committed line of credit or similar facility relied upon for the purpose of meeting the requirements of § 37.1303 (*e.g.,* copies of agreements establishing or amending a credit facility or similar facility); and

(iv) All costs that a swap execution facility would incur to wind down the swap execution facility's operations, the projected amount of time for any such wind-down period, and the basis of its determination for the estimation of its costs and timing.

(d) The reports and supporting documentation required by this section shall be filed not later than 40 calendar days after the end of the swap execution facility's first three fiscal quarters, and not later than 90 calendar days after the end of the swap execution facility's fourth fiscal quarter, or at such later time as the Commission may permit, in its discretion, upon request by the swap execution facility.

(e) A swap execution facility shall provide notice to the Commission no later than 48 hours after it knows or reasonably should have known that it no longer meets its obligations under § 37.1301 or § 37.1303.

§ 37.1307 Delegation of authority.

(a) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, authority to:

(1) Determine whether a particular financial resource under § 37.1302 may be used to satisfy the requirements of § 37.1301;

(2) Review and make changes to the methodology used to compute projected operating costs and wind-down costs under § 37.1304 and the valuation of financial resources under § 37.1305;

(3) Request reports, in addition to those required in § 37.1306, or additional documentation or information under § 37.1306(a), (c), and (e); and

(4) Grant an extension of time to file fiscal quarter reports under § 37.1306(d).

(b) The Director may submit to the Commission for its consideration any matter that has been delegated in this section. Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

Subpart O—System Safeguards

§ 37.1400 Core Principle 14—System safeguards.

The swap execution facility shall:

(a) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and automated systems, that:

(1) Are reliable and secure; and

(2) Have adequate scalable capacity;

(b) Establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for:

(1) The timely recovery and resumption of operations; and

(2) The fulfillment of the responsibilities and obligations of the swap execution facility; and

(c) Periodically conduct tests to verify that the backup resources of the swap execution facility are sufficient to ensure continued:

(1) Order processing and trade matching;

(2) Price reporting;

(3) Market surveillance; and

(4) Maintenance of a comprehensive and accurate audit trail.

§ 37.1401 Requirements.

(a) A swap execution facility's program of risk analysis and oversight with respect to its operations and automated systems shall address each of the following categories of risk analysis and oversight:

(1) *Enterprise risk management and governance.* This category includes, but is not limited to: Assessment, mitigation, and monitoring of security and technology risk; security and technology capital planning and investment; board of directors and management oversight of technology and security; information technology audit and controls assessments; remediation of deficiencies; and any other elements of enterprise risk management and governance included in generally accepted best practices;

(2) *Information security.* This category includes, but is not limited to, controls relating to: Access to systems and data (including least privilege, separation of duties, account monitoring and control); user and device identification and authentication; security awareness training; audit log maintenance, monitoring, and analysis; media protection; personnel security and screening; automated system and communications protection (including network port control, boundary defenses, encryption); system and information integrity (including malware defenses, software integrity monitoring); vulnerability management; penetration testing; security incident response and management; and any other elements of information security included in generally accepted best practices;

(3) *Business continuity-disaster recovery planning and resources.* This category includes, but is not limited to: Regular, periodic testing and review of business continuity-disaster recovery capabilities, the controls and capabilities described in paragraphs (c), (d), and (k) of this section; and any other elements of business continuity-disaster recovery planning and resources included in generally accepted best practices;

(4) *Capacity and performance planning.* This category includes, but is not limited to: Controls for monitoring the swap execution facility's systems to ensure adequate scalable capacity (including testing, monitoring, and analysis of current and projected future capacity and performance, and of possible capacity degradation due to planned automated system changes); and any other elements of capacity and performance planning included in generally accepted best practices;

(5) *Systems operations.* This category includes, but is not limited to: System maintenance; configuration management (including baseline

configuration, configuration change and patch management, least functionality, inventory of authorized and unauthorized devices and software); event and problem response and management; and any other elements of system operations included in generally accepted best practices;

(6) *Systems development and quality assurance.* This category includes, but is not limited to: Requirements development; pre-production and regression testing; change management procedures and approvals; outsourcing and vendor management; training in secure coding practices; and any other elements of systems development and quality assurance included in generally accepted best practices; and

(7) *Physical security and environmental controls.* This category includes, but is not limited to: Physical access and monitoring; power, telecommunication, and environmental controls; fire protection; and any other elements of physical security and environmental controls included in generally accepted best practices.

(b) In addressing the categories of risk analysis and oversight required under paragraph (a) of this section, a swap execution facility shall follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(c) A swap execution facility shall maintain a business continuity-disaster recovery plan and business continuity-disaster recovery resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a swap execution facility following any disruption of its operations. Such responsibilities and obligations include, without limitation: Order processing and trade matching; transmission of matched orders to a derivatives clearing organization for clearing, where appropriate; price reporting; market surveillance; and maintenance of a comprehensive audit trail protected from alteration, accidental erasure, or other loss. A swap execution facility's business continuity-disaster recovery plan and resources generally should enable resumption of trading and clearing of swaps executed on the swap execution facility during the next business day following the disruption. A swap execution facility shall update its business continuity-disaster recovery plan and emergency procedures at a frequency determined by an appropriate risk analysis, but at a minimum no less frequently than annually.

(d) A swap execution facility satisfies the requirement to be able to resume its operations and resume its ongoing fulfillment of its responsibilities and obligations during the next business day following any disruption of its operations by maintaining either:

(1) Infrastructure and personnel resources of its own that are sufficient to ensure timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a swap execution facility following any disruption of its operations; or

(2) Contractual arrangements with other swap execution facilities or disaster recovery service providers, as appropriate, that are sufficient to ensure continued trading and clearing of swaps executed on the swap execution facility, and ongoing fulfillment of all of the swap execution facility's responsibilities and obligations with respect to such swaps, in the event that a disruption renders the swap execution facility temporarily or permanently unable to satisfy this requirement on its own behalf.

(e) A swap execution facility shall notify Commission staff promptly of all:

(1) Electronic trading halts and material system malfunctions;

(2) Cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and

(3) Activations of the swap execution facility's business continuity-disaster recovery plan.

(f) A swap execution facility shall provide Commission staff timely advance notice of all material:

(1) Planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and

(2) Planned changes to the swap execution facility's program of risk analysis and oversight.

(g) A swap execution facility shall annually prepare and submit to the Commission an up-to-date Exhibit Q to Form SEF—Program of Risk Analysis and Oversight Technology Questionnaire—in appendix A to this part. The annual filing shall be submitted electronically to the Commission not later than 90 calendar days after the end of the swap execution facility's fiscal year. The swap execution facility shall file Exhibit Q with the annual financial report and the annual compliance report pursuant to § 37.1306(d) and § 37.1501(e)(2), respectively.

(h) As part of a swap execution facility's obligation to produce books and records in accordance with § 1.31 of this chapter, Core Principle 10 (Recordkeeping and Reporting), and § 37.1000 and § 37.1001, a swap execution facility shall provide to the Commission the following system safeguards-related books and records, promptly upon the request of any Commission representative:

(1) Current copies of its business continuity-disaster recovery plans and other emergency procedures;

(2) All assessments of its operational risks or system safeguards-related controls;

(3) All reports concerning system safeguards testing and assessment required by this chapter, whether performed by independent contractors or by employees of the swap execution facility; and

(4) All other books and records requested by Commission staff in connection with Commission oversight of system safeguards pursuant to the Act or Commission regulations, or in connection with Commission maintenance of a current profile of the swap execution facility's automated systems.

(5) Nothing in this paragraph (h) shall be interpreted as reducing or limiting in any way a swap execution facility's obligation to comply with § 1.31 of this chapter, Core Principle 10 (Recordkeeping and Reporting), or § 37.1000 or § 37.1001.

(i) A swap execution facility shall conduct regular, periodic, objective testing and review of its automated systems to ensure that they are reliable, secure, and have adequate scalable capacity. It shall also conduct regular, periodic testing and review of its business continuity-disaster recovery capabilities. Such testing and review shall include, without limitation, all of the types of testing set forth in this paragraph (i).

(1) *Definitions.* As used in paragraph (i):

Controls means the safeguards or countermeasures employed by the swap execution facility in order to protect the reliability, security, or capacity of its automated systems or the confidentiality, integrity, and availability of its data and information, and in order to enable the swap execution facility to fulfill its statutory and regulatory responsibilities.

Controls testing means assessment of the swap execution facility's controls to determine whether such controls are implemented correctly, are operating as intended, and are enabling the swap execution facility to meet the requirements established by this section.

Enterprise technology risk assessment means a written assessment that includes, but is not limited to, an analysis of threats and vulnerabilities in the context of mitigating controls. An enterprise technology risk assessment identifies, estimates, and prioritizes risks to swap execution facility operations or assets, or to market participants, individuals, or other entities, resulting from impairment of the confidentiality, integrity, and availability of data and information or the reliability, security, or capacity of automated systems.

External penetration testing means attempts to penetrate the swap execution facility's automated systems from outside the systems' boundaries to identify and exploit vulnerabilities. Methods of conducting external penetration testing include, but are not limited to, methods for circumventing the security features of an automated system.

Internal penetration testing means attempts to penetrate the swap execution facility's automated systems from inside the systems' boundaries, to identify and exploit vulnerabilities. Methods of conducting internal penetration testing include, but are not limited to, methods for circumventing the security features of an automated system.

Key controls means those controls that an appropriate risk analysis determines are either critically important for effective system safeguards or intended to address risks that evolve or change more frequently and therefore require more frequent review to ensure their continuing effectiveness in addressing such risks.

Security incident means a cyber security or physical security event that actually jeopardizes or has a significant likelihood of jeopardizing automated system operation, reliability, security, or capacity, or the availability, confidentiality or integrity of data.

Security incident response plan means a written plan documenting the swap execution facility's policies, controls, procedures, and resources for identifying, responding to, mitigating, and recovering from security incidents, and the roles and responsibilities of its management, staff and independent contractors in responding to security incidents. A security incident response plan may be a separate document or a business continuity-disaster recovery plan section or appendix dedicated to security incident response.

Security incident response plan testing means testing of a swap execution facility's security incident response plan to determine the plan's effectiveness, identify its potential weaknesses or deficiencies, enable regular plan updating and improvement, and maintain organizational preparedness and resiliency with respect to security incidents. Methods of conducting security incident response plan testing may include, but are not limited to, checklist completion, walk-through or table-top exercises, simulations, and comprehensive exercises.

Vulnerability testing means testing of a swap execution facility's automated systems to determine what information may be discoverable through a reconnaissance analysis of those systems and what vulnerabilities may be present on those systems.

(2) *Vulnerability testing.* A swap execution facility shall conduct vulnerability testing of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A swap execution facility shall conduct such vulnerability testing at a frequency determined by an appropriate risk analysis.

(ii) Such vulnerability testing shall include automated vulnerability scanning, which shall follow generally accepted best practices.

(iii) A swap execution facility shall conduct vulnerability testing by engaging independent contractors or by using employees of the swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(3) *External penetration testing.* A swap execution facility shall conduct external penetration testing of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A swap execution facility shall conduct such external penetration testing at a frequency determined by an appropriate risk analysis.

(ii) A swap execution facility shall conduct external penetration testing by engaging independent contractors or by using employees of the swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(4) *Internal penetration testing.* A swap execution facility shall conduct internal penetration testing of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A swap execution facility shall conduct such internal penetration testing at a frequency determined by an appropriate risk analysis.

(ii) A swap execution facility shall conduct internal penetration testing by engaging independent contractors or by using employees of the swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(5) *Controls testing.* A swap execution facility shall conduct controls testing of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A swap execution facility shall conduct controls testing, which includes testing of each control included in its program of risk analysis and oversight, at a frequency determined by an appropriate risk analysis. Such testing may be conducted on a rolling basis.

(ii) A swap execution facility shall conduct controls testing by engaging independent contractors or by using employees of the swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(6) *Security incident response plan testing.* A swap execution facility shall conduct security incident response plan testing sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A swap execution facility shall conduct such security incident response plan testing at a frequency determined by an appropriate risk analysis.

(ii) A swap execution facility's security incident response plan shall include, without limitation, the swap execution facility's definition and classification of security incidents, its policies and procedures for reporting security incidents and for internal and external communication and information sharing regarding security incidents, and the hand-off and escalation points in its security incident response process.

(iii) A swap execution facility may coordinate its security incident response plan testing with other testing required by this section or with testing of its other business continuity-disaster recovery and crisis management plans.

(iv) A swap execution facility may conduct security incident response plan testing by engaging independent contractors or by using employees of the swap execution facility.

(7) *Enterprise technology risk assessment.* A swap execution facility shall conduct enterprise technology risk assessment of a scope sufficient to satisfy the requirements set forth in paragraph (k) of this section.

(i) A swap execution facility shall conduct enterprise technology risk assessment at a frequency determined by an appropriate risk analysis. A swap execution facility that has conducted an enterprise technology risk assessment that complies with this section may

conduct subsequent assessments by updating the previous assessment.

(ii) A swap execution facility may conduct enterprise technology risk assessments by using independent contractors or employees of the swap execution facility who are not responsible for development or operation of the systems or capabilities being assessed.

(j) To the extent practicable, a swap execution facility shall:

(1) Coordinate its business continuity-disaster recovery plan with those of the market participants it depends upon to provide liquidity, in a manner adequate to enable effective resumption of activity in its markets following a disruption causing activation of the swap execution facility's business continuity-disaster recovery plan;

(2) Initiate and coordinate periodic, synchronized testing of its business continuity-disaster recovery plan with those of the market participants it depends upon to provide liquidity; and

(3) Ensure that its business continuity-disaster recovery plan takes into account the business continuity-disaster recovery plans of its telecommunications, power, water, and other essential service providers.

(k) *Scope of testing and assessment.* The scope for all system safeguards testing and assessment required by this part shall be broad enough to include the testing of automated systems and controls that the swap execution facility's required program of risk analysis and oversight and its current cybersecurity threat analysis indicate is necessary to identify risks and vulnerabilities that could enable an intruder or unauthorized user or insider to:

(1) Interfere with the swap execution facility's operations or with fulfillment of its statutory and regulatory responsibilities;

(2) Impair or degrade the reliability, security, or adequate scalable capacity of the swap execution facility's automated systems;

(3) Add to, delete, modify, exfiltrate, or compromise the integrity of any data related to the swap execution facility's regulated activities; or

(4) Undertake any other unauthorized action affecting the swap execution facility's regulated activities or the hardware or software used in connection with those activities.

(l) *Internal reporting and review.* Both the senior management and the Board of Directors of a swap execution facility shall receive and review reports setting forth the results of the testing and assessment required by this section. A swap execution facility shall establish and follow appropriate procedures for the remediation of issues identified through such review, as provided in paragraph (m) of this section, and for evaluation of the effectiveness of testing and assessment protocols.

(m) *Remediation.* A swap execution facility shall identify and document the vulnerabilities and deficiencies in its systems revealed by the testing and assessment required by this section. The swap execution facility shall conduct and document an appropriate analysis of the risks presented by such vulnerabilities and deficiencies, to determine and document whether to remediate or accept the associated risk. When the swap execution facility determines to remediate a vulnerability or deficiency, it must remediate in a timely manner given the nature and magnitude of the associated risk.

Subpart P—Designation of Chief Compliance Officer

§ 37.1500 Core Principle 15—Designation of chief compliance officer.

(a) *In general.* Each swap execution facility shall designate an individual to serve as a chief compliance officer.

(b) *Duties.* The chief compliance officer shall:

(1) Report directly to the board or to the senior officer of the facility;

(2) Review compliance with the core principles in this subsection;

(3) In consultation with the board of the facility, a body performing a function similar to that of a board, or the senior officer of the facility, resolve any conflicts of interest that may arise;

(4) Be responsible for establishing and administering the policies and procedures required to be established pursuant to this section;

(5) Ensure compliance with the Act and the rules and regulations issued under the Act, including rules prescribed by the Commission pursuant to section 5h of the Act; and

(6) Establish procedures for the remediation of noncompliance issues found during compliance office reviews, look backs, internal or external audit findings, self-reported errors, or through validated complaints.

(c) *Requirements for procedures.* In establishing procedures under paragraph (b)(6) of this section, the chief compliance officer shall design the procedures to establish the handling, management response, remediation, retesting, and closing of noncompliance issues.

(d) *Annual reports*—(1) *In general.* In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of:

(i) The compliance of the swap execution facility with the Act; and

(ii) The policies and procedures, including the code of ethics and conflict of interest policies, of the swap execution facility.

(2) *Requirements.* The chief compliance officer shall:

(i) Submit each report described in paragraph (d)(1) of this section with the appropriate financial report of the swap execution facility that is required to be submitted to the Commission pursuant to section 5h of the Act; and

(ii) Include in the report a certification that, under penalty of law, the report is accurate and complete.

§ 37.1501 Chief compliance officer.

(a) *Definitions.* For purposes of this part, the term—

Board of directors means the board of directors of a swap execution facility, or for those swap execution facilities whose organizational structure does not include a board of directors, a body performing a function similar to a board of directors.

Senior officer means the chief executive officer or other equivalent officer of the swap execution facility.

(b) *Chief compliance officer*—(1) *Authority of chief compliance officer.* (i) The position of chief compliance officer shall carry with it the authority and resources to develop, in consultation with the board of directors or senior officer, the policies and procedures of the swap execution facility and enforce such policies and procedures to fulfill the duties set forth for chief compliance officers in the Act and Commission regulations.

(ii) The chief compliance officer shall have supervisory authority over all staff acting at the direction of the chief compliance officer.

(2) *Qualifications of chief compliance officer.* (i) The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position.

(ii) No individual disqualified from registration pursuant to sections 8a(2) or 8a(3) of the Act may serve as a chief compliance officer.

(3) *Appointment and removal of chief compliance officer.* (i) Only the board of directors or the senior officer may appoint or remove the chief compliance officer.

(ii) The swap execution facility shall notify the Commission within two business days of the appointment or removal, whether interim or permanent, of a chief compliance officer.

(4) *Compensation of the chief compliance officer.* The board of

directors or the senior officer shall approve the compensation of the chief compliance officer.

(5) *Annual meeting with the chief compliance officer.* The chief compliance officer shall meet with the board of directors or senior officer of the swap execution facility at least annually.

(6) *Information requested of the chief compliance officer.* The chief compliance officer shall provide any information regarding the self-regulatory program of the swap execution facility as requested by the board of directors or the senior officer.

(c) *Duties of chief compliance officer.* The duties of the chief compliance officer shall include, but are not limited to, the following:

(1) Overseeing and reviewing compliance of the swap execution facility with section 5h of the Act and any related rules adopted by the Commission;

(2) Taking reasonable steps, in consultation with the board of directors or the senior officer of the swap execution facility, to resolve any material conflicts of interest that may arise;

(3) Establishing and administering written policies and procedures reasonably designed to prevent violations of the Act and the rules of the Commission;

(4) Taking reasonable steps to ensure compliance with the Act and the rules of the Commission;

(5) Establishing procedures reasonably designed to handle, respond, remediate, retest, and resolve noncompliance issues identified by the chief compliance officer through any means, including any compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint;

(6) Establishing and administering a compliance manual designed to promote compliance with the applicable laws, rules, and regulations and a written code of ethics for the swap execution facility designed to prevent ethical violations and to promote honesty and ethical conduct by personnel of the swap execution facility;

(7) Supervising the self-regulatory program of the swap execution facility with respect to trade practice surveillance; market surveillance; real-time market monitoring; compliance with audit trail requirements; enforcement and disciplinary proceedings; audits, examinations, and other regulatory responsibilities (including taking reasonable steps to ensure compliance with, if applicable, financial integrity, financial reporting, sales practice, recordkeeping, and other requirements); and

(8) Supervising the effectiveness and sufficiency of any regulatory services provided to the swap execution facility by a regulatory service provider in accordance with § 37.204.

(d) *Preparation of annual compliance report.* The chief compliance officer shall, not less than annually, prepare and sign an annual compliance report that covers the prior fiscal year. The report shall, at a minimum, contain:

(1) A description and self-assessment of the effectiveness of the written policies and procedures of the swap execution facility, including the code of ethics and conflict of interest policies to reasonably ensure compliance with the Act and applicable Commission regulations;

(2) Any material changes made to compliance policies and procedures during the coverage period for the report and any areas of improvement or recommended changes to the compliance program;

(3) A description of the financial, managerial, and operational resources set aside for compliance with the Act and applicable Commission regulations;

(4) Any material non-compliance matters identified and an explanation of the corresponding action taken to resolve such non-compliance matters; and

(5) A certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete in all material respects.

(e) *Submission of annual compliance report and related matters*—(1) *Furnishing the annual compliance report prior to submission to the Commission.* Prior to submission to the Commission, the chief compliance officer shall provide the annual compliance report for review to the board of directors of the swap execution facility or, in the absence of a board of directors, to the senior officer of the swap execution facility. Members of the board of directors and the senior officer shall not require the chief compliance officer to make any changes to the report.

(2) *Submission of annual compliance report to the Commission.* The annual compliance report shall be submitted electronically to the Commission not later than 90 calendar days after the end of the swap execution facility's fiscal year. The swap execution facility shall concurrently file the annual compliance report with the fourth quarter financial report pursuant to § 37.1306.

(3) *Amendments to annual compliance report.* (i) Promptly upon discovery of any material error or omission made in a previously filed annual compliance report, the chief compliance officer shall file an amendment with the Commission to correct the material error or omission. The chief compliance officer shall submit the amended annual compliance report to the board of directors, or in the absence of a board of directors, to the senior officer of the swap execution facility, pursuant to paragraph (e)(1) of this section.

(ii) An amendment shall contain the certification required under paragraph (d)(5) of this section.

(4) *Request for extension.* A swap execution facility may request an extension of time to file its annual compliance report from the Commission. Reasonable and valid requests for extensions of the filing deadline may be granted at the discretion of the Commission.

(f) *Recordkeeping.* The swap execution facility shall maintain all records demonstrating compliance with the duties of the chief compliance officer and the preparation and submission of annual compliance reports consistent with §§ 37.1000 and 37.1001.

(g) *Delegation of authority.* The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority to grant or deny a request for an extension of time for a swap execution facility to file its annual compliance report under paragraph (e)(4) of this section. The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

Appendix A to Part 37—Form SEF

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

FORM SEF

SWAP EXECUTION FACILITY
APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

REGISTRATION INSTRUCTIONS

Intentional misstatements or omissions of material fact may constitute federal criminal violations (7 U.S.C. 13 and 18 U.S.C. 1001) or grounds for disqualification from registration.

DEFINITIONS

Unless the context requires otherwise, all terms used in this Form SEF have the same meaning as in the Commodity Exchange Act, as amended ("Act"), and in the General Rules and Regulations of the Commodity Futures Trading Commission ("Commission") thereunder (17 CFR chapter I).

For the purposes of this Form SEF, the term "Applicant" shall include any applicant for registration as a swap execution facility or any applicant amending a pending application.

GENERAL INSTRUCTIONS

1. This Form SEF, which includes instructions, a Cover Sheet, and required Exhibits (together, "Form SEF"), is to be filed with the Commission by all Applicants, pursuant to section 5h of the Act and the Commission's regulations thereunder. Applicants may prepare their own Form SEF, but must follow the format prescribed herein. Upon the filing of an application for registration in accordance with the instructions provided herein, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written comments concerning such application. No application for registration shall be effective unless the Commission, by order, grants such registration.

2. Individuals' names, except the executing signature, shall be given in full (Last Name, First Name, Middle Name).

3. Signatures on all copies of the Form SEF filed with the Commission can be executed electronically. If this Form SEF is filed by a corporation, it shall be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, it shall be signed in the name of the limited liability company by a manager or member duly authorized to sign on the limited liability company's behalf; if filed by a partnership, it shall be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it shall be signed in the name of such organization or

association by the managing agent, *i.e.*, a duly authorized person who directs or manages or who participates in the directing or managing of its affairs.

4. If this Form SEF is being filed as an application for registration, all applicable items must be answered in full. If any item is inapplicable, indicate by "none," "not applicable," or "N/A," as appropriate.

5. Under section 5h of the Act and the Commission's regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this Form SEF from any Applicant seeking registration as a swap execution facility. Disclosure by the Applicant of the information specified in this Form SEF is mandatory prior to the start of the processing of an application for registration as a swap execution facility. The information provided in this Form SEF will be used for the principal purpose of determining whether the Commission should grant or deny registration to an Applicant. The Commission may determine that additional information is required from an Applicant in order to process its application. **A Form SEF that is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form SEF, however, shall not constitute a finding that the Form SEF has been filed as required or that the information submitted is true, current, or complete**.

6. Except in cases where confidential treatment is requested by the Applicant and granted by the Commission pursuant to the Freedom of Information Act and the rules of the Commission thereunder, information supplied on this Form SEF will be included in the public files of the Commission and will be available for inspection by any interested person.

APPLICATION AMENDMENTS

1. An Applicant amending a pending application for registration as a swap execution facility shall file an amended Form SEF electronically with the Secretary of the Commission in the manner specified by the Commission.

2. When filing this Form SEF for purposes of amending a pending application, an Applicant must re-file the entire Cover Sheet, amended if necessary, include an executing signature, and attach thereto revised Exhibits or other materials marked to show any amendments. The submission of an amendment to a pending application represents that the remaining items and Exhibits that are not amended remain true, current, and complete as previously filed.

WHERE TO FILE

This Form SEF must be filed electronically with the Secretary of the Commission in the manner specified by the Commission.

COMMODITY FUTURES TRADING COMMISSION

FORM SEF

SWAP EXECUTION FACILITY
APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

COVER SHEET

_____

Exact name of Applicant as specified in charter

_____

Address of principal executive offices

☐ If this is an **APPLICATION** for registration, complete in full and check here.

☐ If this is an **AMENDMENT** to a pending application, complete in full, list all items that are amended and check here.

_____

_____

_____

GENERAL INFORMATION

1. Name under which the business of the swap execution facility is or will be conducted, if different than name specified above (include acronyms, if any):

_____

2. If name of swap execution facility is being amended, state previous swap execution facility name:

_____

3. Contact information, including mailing address if different than address specified above:

_____

Number and Street

_____

City State Country Zip Code

_____

Main Phone Number Fax

_____

Website URL E-mail Address

4. List of principal office(s) and address(es) where swap execution facility activities are/will be conducted:

Office Address

_____

_____

_____

5. If the Applicant is a successor to a previously registered swap execution facility, please complete the following:

a. Date of succession

_____

b. Full name and address of predecessor registrant

_____
Name

_____
Number and Street

_____
City State Country Zip Code

_____
Main Phone Number Website URL

BUSINESS ORGANIZATION

6. Applicant is a:

☐ Corporation
☐ Partnership
☐ Limited Liability Company
☐ Other form of organization (specify)

_____

7. Date of incorporation or formation:

_____

8. State of incorporation or jurisdiction of organization:

_____

9. Date of fiscal year end of organization:

_____

10. The Applicant agrees and consents that the notice of any proceeding before the Commission in connection with this application may be given by sending such notice by certified mail to the person named below at the address given.

_____
Print Name and Title

_____
Name of Applicant

_____
Number and Street

_____
City State Zip Code

SIGNATURES

11. The Applicant has duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this _____ day of _____, 20_____. The Applicant and the undersigned represent hereby that all information contained herein is true, current, and complete. It is understood that all required items and Exhibits are considered integral parts of this Form SEF and that the submission of any amendment represents that all unamended items and Exhibits remain true, current, and complete as previously filed.

_____
Name of Applicant

_____
Signature of Duly Authorized Person

_____
Print Name and Title of Signatory

COMMODITY FUTURES TRADING COMMISSION

FORM SEF

SWAP EXECUTION FACILITY
APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

EXHIBIT INSTRUCTIONS

The following Exhibits must be filed with the Commission by each Applicant applying for registration as a swap execution facility pursuant to section 5h of the Act and the Commission's regulations thereunder. The Exhibits must be labeled according to the items specified in this Form SEF.

The application must include a Table of Contents listing each Exhibit required by this Form SEF and indicating which, if any, Exhibits are inapplicable. For any Exhibit that is inapplicable, next to the Exhibit letter specify "none," "not applicable," or "N/A," as appropriate. The Table of Contents must indicate whether each item submitted for each Exhibit required by this Form SEF is subject to a request for confidential treatment.

If an Applicant seeks confidential treatment of any Exhibit or a portion of any Exhibit, the Applicant must mark such Exhibit with a prominent stamp, typed legend, or other suitable form of notice on each page or portion of each page stating "Confidential Treatment Requested by [Applicant]." If marking each page is impracticable under the circumstances, a cover sheet prominently marked "Confidential Treatment Requested by [Applicant]" should be provided for each group of records submitted for which confidential treatment is requested. Each of the records transmitted in this manner shall be individually marked with an identifying number and code so that they are separately identifiable. An Applicant must also file a confidentiality request in a form and manner specified with the Secretary of the Commission.

LIST OF EXHIBITS

EXHIBITS — BUSINESS ORGANIZATION

1. Attach as **Exhibit A:**

   a. The name of any person who owns ten percent or more of the Applicant's stock or who, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of the Applicant.

   b. The full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

2. Attach as **Exhibit B,** a list of the present officers, directors, governors (and, in the case of an Applicant that is not a corporation, the members of all standing committees, grouped by committee), or persons performing functions similar to any of the foregoing, of the swap execution facility or of any entity that performs the regulatory activities of the Applicant, indicating for each:
   a. Name
   b. Title
   c. Dates of commencement and termination of present term of office or position
   d. Length of time each present officer, director, or governor has held the same office or position
   e. Brief account of the business experience of each officer and director over the last five years
   f. Any other business affiliations in the derivatives or securities industry
   g. For directors, list any committees on which they serve and any compensation received by virtue of their directorship
   h. A description of:
      (1) Any order of the Commission with respect to such person pursuant to section 5e of the Act;
      (2) Any conviction or injunction against such person within the past ten years;
      (3) Any disciplinary action with respect to such person within the last five years;
      (4) Any disqualification under sections 8b and 8d of the Act;
      (5) Any disciplinary action under section 8c of the Act; and
      (6) Any violation pursuant to section 9 of the Act.

3. Attach as **Exhibit C:**

   a. A copy of the constitution, articles of incorporation, formation, or association with all amendments thereto, partnership or limited liability agreements, and existing by-laws, operating agreement, committee charter, rules or instruments corresponding thereto, as applicable, of the Applicant.

   b. A narrative that sets forth the fitness standards for the Board of Directors and its composition including the number and percentage of public directors.

   c. A certificate of good standing dated within one week of the date of this Form SEF.

4. Attach as **Exhibit D:**

   a. A narrative or graphic description of the organizational structure of the Applicant. Include a list of the legal names of all affiliates of the Applicant and indicate the general nature of the affiliation. Note: If the swap execution facility activities of the Applicant are or will be conducted primarily by a division, subdivision, or other separate entity within the Applicant, corporation, or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit D a description only as it applies to the division, subdivision, or separate entity, as applicable.

b. Provide any relevant jurisdictional information, including any and all jurisdictions in which the Applicant and any affiliated entity engaged in financial services or markets activities, including, but not limited to, trading, clearing, or reporting of swaps are doing business; registration status, including pending applications (*e.g.*, country, regulator, registration category, date of registration); and nature of the business. Provide the address for legal service of process for each jurisdiction, which cannot be a post office box.

5. Attach as **Exhibit E:**

a. A narrative or graphic description of the personnel structure that specifies the reporting lines and identifies the name and position for each officer, manager, and supervisor employed by or seconded to the Applicant for the operation of the Applicant as a swap execution facility. The narrative or graphic description of the personnel should identify the reporting line and estimated number of positions within any other category of non-management and non-supervisory employees employed by or seconded to the Applicant or the division, subdivision, or other separate entity within the Applicant.

b. Provide a description of the duties as well as the background, skills, and any other qualifications necessary for each officer, manager, supervisor, and any other category of non-management and non-supervisory employees employed by or seconded to the Applicant or the division, subdivision, or other separate entity within the Applicant.

6. Attach as **Exhibit F**, a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the Applicant or any of its affiliates is a party or to which any of its or their property is the subject. Include the name of the court or agency where the proceeding(s) are pending, the date(s) instituted, the principal parties involved, a description of the factual basis alleged to underlie the proceeding(s), and the relief sought. Include similar information as to any proceeding(s) known to be contemplated by the governmental agencies.

EXHIBITS — FINANCIAL INFORMATION

7. Attach as **Exhibit G:**

a. The following financial statements: balance sheet, income statement, statement of cash flows, and all notes or schedules thereto, as of the most recent fiscal year of the Applicant. If the Applicant is a newly-formed entity and does not have these financial statements, then the Applicant should provide *pro forma* financial statements for a six-month operating period. If any financial statements certified by an independent public accountant are available, the Applicant should submit those statements with this Exhibit G. The financial statements shall be prepared in accordance with generally accepted accounting principles in the United States and denominated in U.S. dollars. Applicants not domiciled in the United States, and not otherwise required to prepare financial statements in accordance with generally

accepted accounting principles in the United States, may prepare their financial statements in accordance with either the International Financial Reporting Standards issued by the International Accounting Standards Board, or a comparable international standard the Commission may otherwise accept in its discretion.

b. A narrative with appropriate financial calculations demonstrating:

(1) That the value of the financial resources of the Applicant exceeds the total amount that would enable the Applicant to cover its operating costs for a period of at least one year, calculated on a rolling basis that would enable it to comply with the core principles set forth in section 5h of the Act and the Commission's regulations;

(2) That the Applicant has unencumbered, liquid financial assets (*i.e.*, cash and/or highly liquid securities) equal to at least the greater of three months operating costs or the cost to wind-down operations as a swap execution facility; and

(3) The methodology by which the Applicant has computed the current market value of each financial resource used to meet its regulatory obligations pursuant to § 37.1301 and § 37.1303 of the Commission's regulations (17 CFR 37.1301 and 37.1303) and indicate any reductions in value which reflect market and credit risk as appropriate.

c. Documentation demonstrating the existence of any committed lines of credit or similar facility relied upon for the purpose of meeting the requirements of § 37.1303 of the Commission's regulations (17 CFR 37.1303) (*e.g.*, copies of agreements establishing or amending a credit facility or similar facility).

d. A list of the Applicant's expenses which itemizes any costs excluded or pro-rated in determining the operating costs of the Applicant for a one-year period on a rolling basis. Provide an explanation of the basis for the Applicant's determination to exclude or pro-rate expenses.

e. An itemized list of all costs that the Applicant would incur to wind-down the operations of the Applicant as a swap execution facility, the projected amount of time of any such wind-down period, and an explanation of the basis by which the Applicant has determined such estimated costs and time.

8. Attach as **Exhibit H:**

a. A complete list of all dues, fees, and other charges to be imposed by or on behalf of the Applicant. Identify the service or services provided for each of these dues, fees, and other charges. Identify any market maker programs, other incentive programs, or any other discount on dues, fees, or other charges to be imposed by the Applicant.

b. A description of the basis, methods, and any factors used in determining the level and structure of the dues, fees, and other charges listed in paragraph (a) of this item.

EXHIBITS — COMPLIANCE

9. Attach as **Exhibit I,** a regulatory compliance chart with citations to the Applicant's relevant rules, policies, and procedures that describe the manner in which the Applicant is able to comply with each core principle. The Applicant must provide an explanation of any novel issues for which compliance with a core principle is not self-evident, including an explanation of how that item satisfies the core principles.

10. Attach as **Exhibit J,** a copy of the Applicant's rules (as defined in § 40.1 of the Commission's regulations, 17 CFR 40.1) and any technical manuals, other guides, or instructions for users of the Applicant, including minimum financial standards for market participants. Include rules on publication of daily trading information pursuant to the requirements of part 16 of the Commission's regulations (17 CFR part 16). The Applicant should include an explanation and any other form of documentation that would be helpful to explain or demonstrate how the documentation provided in this Exhibit J supports the Applicant's compliance with the core principles.

11. Attach as **Exhibit K,** a copy of any compliance manual and any other documents that describe with specificity the manner in which the Applicant will conduct trade practice, market, and financial surveillance and maintain trading data.

12. Attach as **Exhibit L,** executed or executable copies of all user agreements, including, but not limited to, on-boarding documentation, regulatory data usage consent agreements, intermediary documentation, and arrangements for alternative dispute resolution. Provide a narrative of the legal, operational, and technical requirements for users to directly or indirectly access the Applicant's facility.

13. Attach as **Exhibit M,**

    a. A list of the swap data repositories to which the Applicant will report data related to swaps and the respective asset classes for which the Applicant will report data related to swaps for each Commission-registered swap data repository.

    b. An executed copy of all agreements regarding the reporting of data related to swaps between the Applicant and each Commission-registered swap data repository to which the Applicant will report data related to swaps.

    c. A representation from each Commission-registered swap data repository that states that the Applicant has satisfactorily completed all legal, technical, and operational requirements, including all necessary testing, to enable the Commission-registered swap data repository to reliably accept swap reporting data from the Applicant.

14. Attach as **Exhibit N,** which is required only for an Applicant that seeks to offer swaps for trading that may be cleared through a clearing organization,

a. A list of the (1) Commission-registered derivatives clearing organizations and (2) derivatives clearing organizations that the Commission has determined are exempt from registration, to which the Applicant will submit swap transactions for clearing. The list shall identify the asset classes for which the Applicant will submit swap transactions for clearing.

b. A representation that clearing members of each (1) Commission-registered derivatives clearing organization and (2) derivatives clearing organization that the Commission has determined is exempt from registration, will guarantee all swap transactions submitted by the Applicant for clearing.

c. An executed copy of the clearing agreement and any related documentation for each (1) Commission-registered derivatives clearing organization and (2) derivatives clearing organization that the Commission has determined is exempt from Commission registration, that will clear swap transactions submitted by the Applicant.

d. A representation from each Commission-registered derivatives clearing organization and derivatives clearing organization that the Commission has determined is exempt from registration that will clear swap transactions for the Applicant, that states that the Applicant has satisfactorily completed all legal, technical, and operational requirements, including all necessary testing, to enable such clearing organization to reliably accept swap transactions from the Applicant.

15. Attach as **Exhibit O,** executed or executable copies of any agreements or contracts entered into or to be entered into by the Applicant, including third-party regulatory service provider agreements that enable the Applicant to comply with applicable core principles that are not otherwise attached within Exhibits L, M, N, or Q. For each agreement, identify the services that will be provided and the core principles addressed by such agreement.

16. Attach as **Exhibit P,** an explanation regarding the operation of the Applicant's trading system(s) or platform(s) and the manner in which the system(s) or platform(s) satisfy any Commission rules, interpretations, or guidelines regarding a swap execution facility's execution methods, including the requirements in § 37.201(a) of the Commission's regulations (17 CFR 37.201(a)). Where possible, this explanation should include screenshots of the Applicant's trading system(s) or platform(s).

EXHIBITS — OPERATIONAL CAPABILITY

17. Attach as **Exhibit Q,** information responsive to the Program of Risk Analysis and Oversight Technology Questionnaire. This questionnaire focuses on information pertaining to the Applicant's program of risk analysis and oversight. Main topic areas include: information security; business continuity-disaster recovery planning and resources; capacity and performance planning; systems operations; systems development and quality assurance; and physical security and environmental controls. The questionnaire will be available on the Commission's website.

PROGRAM OF RISK ANALYSIS AND OVERSIGHT
TECHNOLOGY QUESTIONNAIRE

Provide all relevant documents responsive to the information requests listed within each area below. In addition to the specific documents requested, provide any other policies, procedures, standards or guidelines, plans, independent assessments (including internal audits), test results, and representations that will assist the Commission in assessing the compliance of trading platform and related supporting systems with the applicable SYSTEM SAFEGUARDS CORE PRINCIPLE. The Systems Safeguards Core Principle require exchanges to (1) establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and the development of automated systems, that are reliable, secure, and have adequate scalable capacity;[1] (2) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the exchange; and (3) periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, transmission of matched orders to a designated clearing organization for clearing, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail.

1. Organizational Structure, System Description, Facility Locations, and Geographic Distribution of Staff and Equipment per the following:

    a. Provide high-level organization charts and staffing level information for all groups that are directly involved in supporting the development, operation, and maintenance of the systems, including systems development, quality assurance, system operations, event management, market operations, network and telecommunications, information security, capacity planning, contingency planning (including disaster recovery), market surveillance, and trade practice investigation; include a brief biography with applicable certifications for each key IT staff leader.

    b. Describe or provide a diagram showing the locations of all facilities that house the staff described above and the equipment on which your systems operate. Indicate the nature of the facilities (*e.g.,* headquarters, primary and backup data centers, primary and backup market operations centers, etc.), and a description of your rationale for the distribution of staff and system components across those facilities.

---

[1] An exchange's program of risk analysis and oversight with respect to its operations and automated systems shall address each of the following categories: (1) Enterprise risk management and governance; (2) Information security; (3) Business continuity-disaster recovery planning and resources, including pandemic planning; (4) Capacity and performance planning; (5) System operations (including configuration management, event management, and incident response); (6) Systems development and quality assurance (including security controls requirements, software change management, and outsourcing); and (7) Physical security and environmental controls. *See* 17 CFR 37.1401.

c. Provide a high-level application flow diagram and the specific information requested below for all systems that perform and support trading, price reporting, regulatory reporting, market surveillance, and trade practice investigation:

1) System description and overview.
2) A logical diagram of the software components, including the following information for each component:
   a) Name;
   b) Functional description; and
   c) Upstream and downstream feeds.
3) Provide a logical security architecture and description.
4) A representative physical diagram of the hardware components (servers and communications equipment) that exist at both the primary and backup data centers, and for each representative hardware component, provide the following information:
   a) Device type (*e.g.,* switch, server, SAN, etc.);
   b) Device O/S;
   c) Functional description;
   d) Internal redundancies (*e.g.,* power supplies, RAID); and
   e) External redundancies (*e.g.,* mirroring, clustering).
5) A physical diagram of the network topology within and between data centers and external entities, and for each connection provide the following information:
   a) Purpose(s) of connection;
   b) Type and bandwidth of each connection; and
   c) Identification of carrier.

2. Enterprise Risk Management and Governance. Describe your Enterprise Risk Management program as it relates to IT and your entity's approach for assessing and managing the risks associated with technology and cybersecurity, including procedures for risk escalation, adjudication, mitigation, and acceptance; include the following:

a. Provide a copy of your most recent annual Enterprise Technology Risk Assessment and Enterprise Risk Assessment.

b. Include a description of Board of Directors and/or Board Committee involvement in oversight of system safeguards and cybersecurity.

c. Provide a list of Board of Directors and Board Committee members, indicating for each: name, title, and description of any system safeguards and cyber security experience.

d. Provide copies of all system safeguards-related materials provided to the Board of Directors or applicable Board Committees for the four most recent meetings.

e. Provide copies of Board of Directors and Board Committee meeting minutes regarding system safeguards from the four most recent meetings.

f. Describe the process by which the Board is kept apprised of the status of systems safeguards related initiatives and assessments, including any escalation procedures or trigger points that automatically require Board notification and involvement.

g. Describe any ongoing education or training that Board members receive regarding systems safeguards, including cybersecurity. If a third party consultant is used in matters of system safeguards and cybersecurity risk, include the name, title and applicable qualifications for each consultant.

h. Describe your internal audit program, including:

1) Organizational structure of internal audit;
2) Audit staff qualifications and use of external staff;
3) Controls that ensure independence;
4) Process for development of IT audit plan, including prioritization and allocation of audit resources;
5) Follow up and resolution of IT audit findings and recommendations and quality assurance reviews of the internal audit program and processes; and
6) Provide the results of the most recent quality assurance review.

i. Submit the system evaluation documentation and information requested below for each of the following systems safeguard categories: (1) risk management; (2) systems development methodology; (3) information security; (4) system operations; (5) capacity and performance planning; (6) physical security and environmental controls, including data centers; and (7) business continuity and disaster recovery.

1) Provide your most recent audit or other risk assessment documents for each category, including complete reports (not only executive summaries), management's responses, and mitigation plans and results for addressing findings;
2) Describe your plans and schedule for ongoing independent audits, other risk assessments, and tests for each category;
3) Describe how you periodically assess compliance with applicable policies and procedures for each category.

j. Outsourcing and Vendor Management

1) Provide a copy of each service agreement currently in place for any IT services provided by a third party.
2) Describe your process for pre-contract due diligence and screening of IT service providers.
3) Describe your process for monitoring the performance of service agreements, including roles and responsibilities, scope and frequency of review, and remediation of identified deficiencies.

4) Describe inclusion of vendor relationships and outsourced systems in your ongoing risk management process.
5) Describe any information systems security testing and ongoing monitoring you may require and/or conduct of vendors.
6) Provide a list of all vendors who have any sort of connection or access to your systems and describe how you manage and mitigate the risks to your systems posed by this access on an ongoing basis.
7) Provide a list of critical service providers (those without whose functioning your entity cannot function).
8) Describe all testing you perform or participate in jointly with each of your critical service providers.
9) Describe how you ensure that you are notified of all significant changes to the systems, operations, management, or physical resources of your critical service providers.

3. Information Security

a. Provide documentation (policies, standards, guidelines) that attests to the development of and adherence to an ongoing information security program.

b. Describe your background investigation program's controls and procedures to include credit checking for the following:
1) Pre-assignment of personnel to sensitive roles; and
2) Recurring periodic investigations for staff in sensitive roles.

c. Provide information regarding security awareness training and education:

1) Describe the security awareness training provided to system users, including periodic refresher training.
2) Identify the roles of personnel that have significant system security or system development responsibilities and describe the security training they are required to complete.

d. Provide information regarding the access controls and procedures that are used to ensure the identification, authorization, and authentication of system users and any third-party service providers.

e. Provide information regarding the procedures that are used to ensure proper account management, including:

1) Establishing, changing, reviewing, and removing accounts (including emergency and other temporary accounts);
2) Password complexity and life cycle standards; and
3) Maintaining user awareness of the authorized uses of the system.

f. Provide information regarding the administrative procedures (such as adherence to least privilege and separation of duties concepts) and automated systems that will be employed to prevent and detect the unauthorized use of the system.

g. Provide information (including specific products used, guidelines for use, and roles and responsibilities) regarding the use and management of safeguards and security tools used to protect the critical data and system components, including:

1) Encryption and data compression (data at-rest and in-transit);
2) Denial of service protection;
3) Firewalls;
4) Routers;
5) DMZs and network segmentation;
6) Intrusion detection;
7) Event logging and log analysis, including:
   a) Scope of log coverage (*e.g.,* production/development; servers/firewalls);
   b) Focus of event details captured (e.g., unauthorized activities, system issues);
   c) Monitoring of system logging alerts (*e.g.,* log failure alert); and
   d) Frequency and level of log review, analysis, and reporting.
8) Virus protection;
9) Encryption and control of portable mobile devices;
10) Encryption and control of portable external media (*e.g.,* USB drives, optical media, external hard drives, etc.);
11) Data Loss Prevention (DLP) tools; and
12) Ongoing testing of the efficacy of safeguards and security tools for the areas enumerated above.

h. Provide policies, guidelines, and procedures for authorization and use of remote access capabilities to manage the system, including hardware and software tools that protect the information and system while using those capabilities. In your response, also address policies, guidelines or procedures governing third party access to your systems.

i. Provide information about your procedures for sanitization, destruction, and disposal of equipment and media.

j. Provide information regarding the manual and automated processes in place to facilitate the capture and secure storage of all records relating to the business of the facility, including a complete audit trail, for a period of five years.[2]

1) Identify the specific audit trail information captured.
2) Describe the controls that provide for reliable collection of audit information, including those that ensure sufficient capacity and alerting of audit failures.
3) For each copy of the audit trail information, describe the processes that protect the information from accidental and deliberate alteration or destruction prior to its planned disposal. Include information about:

[2] *See* 17 CFR 37.205 and 37.1001.

a) Access controls (physical and logical);
b) Environmental controls (*e.g.,* fire protection) provided at storage locations;
c) Schedule and procedures for secure movement of information;
d) Retention period; and
e) Distance between storage locations.

k. Provide information about your security incident response program, including:

1) Staffing;
2) Roles and responsibilities;
3) Training;
4) Procedures (including detection, analysis, containment, and recovery);
5) Communication/notification and reporting, including notification of appropriate regulators, law enforcement, and appropriate information sharing organizations; and
6) Testing of security incident response procedures.

l. Describe your cybersecurity threat intelligence capabilities, including:

1) Staffing (in-house and outsourced services);
2) Roles and responsibilities;
3) Training;
4) Intelligence gathering and analysis methodology;
5) Dissemination of intelligence within the organization and with appropriate information sharing organizations, and
6) Evaluating intelligence for tactical and strategic action.

m. Describe your participation in any information sharing organizations, *e.g.,* FS-ISAC.

4. Business Continuity and Disaster Recovery ("BC-DR"). Provide the following information:

a. A description of your DR sites, including the following information for each site:
1) State of readiness (hot, warm, cold);
2) Whether a commercial or self-managed site; and
3) Distance from production site.

b. A description of the public infrastructure (*e.g.,* water, electric, etc.) supporting each of your BC-DR sites, including redundancy, resilience, and physical security.

c. A list of the mission-critical systems that each BC-DR site will support on a routine, non-disaster basis, and a description of your reasons for this overall data center strategy.

d. A list of the mission-critical systems that each of your BC-DR sites will support in the event of a disaster.

e. Copies of all agreements, including service level agreements, with third parties to provide services in support of your BC-DR plans.

f. A description of your strategy for ensuring the availability of essential software and data, including security and testing of backups.

g. A description of your recovery point objective ("RPO"), and a description or assessment of your maximum potential data loss in the event of a disaster, including loss of in-transit data.

h. A description of your strategy for staffing DR sites in the event of a disaster, including a pandemic.

i. A description of any plans or capabilities for remote management and operation of your primary or DR sites in the event that they become inaccessible but remain functional. Include information regarding the systems security controls that will be applied to internal and third party (including service provider) users.

j. Briefing materials for senior management regarding BC-DR and pandemic plans.

k. BC-DR and pandemic training materials prepared for employees.

l. A description of your procedures for ensuring the currency and availability to team members of essential documentation.

m. Your technology-related BC-DR plans, including roles and responsibilities, staffing assignments, recovery procedures, test plans, external dependencies and any pandemic plans.

n. Your emergency communications plan, including emergency contact information.

o. A description of external communications and reporting regarding BC-DR events, including notification of customers and appropriate regulators.

p. A description of how your BC-DR plan is coordinated with members' BC-DR plans.

q. A description of your strategy for testing your DR sites, including frequency, types of tests, and scope of staff and market participant involvement.

r. A copy of the most recent SSAE16 Type II reports for each of your data centers, including, if applicable, any actions taken to remediate findings in the report.

s. Documentation from the three most recent operational tests conducted with respect to your DR sites, including the test plan, the results report, and the mitigation plan and results.

t. Documentation from your participation in the most recent industry wide test relating to BC-DR matters, including the test plan, the results report, and the mitigation plan and results.

u. A description of any instances of activation of your BC-DR plans, including the results report and the mitigation plan and results.

v. Explain your recovery time objective ("RTO") for each of the following:

1) Ability to meet the "next day" resumption of trading regulatory requirement.
2) Completed clearing of transactions executed prior to disruption.
3) Resumption of clearing of new transactions.
4) Resumption of market surveillance.
5) Access to audit trail information and resumption of trade practice surveillance.
6) Redirection to a secondary data center (when needed).

w. Explain your successfully tested recovery time capability for resuming fulfillment of your responsibilities and obligations as an exchange. Please provide test results.

5. Capacity Planning and Testing

a. Provide the capacity levels and associated performance (*i.e.*, response time) for each of the following system activities, including target, average daily, historical high, and system stress-tested sustained and peak levels:

1) Simultaneous workstation sessions;
2) Market participant transactions;
3) Trade matches;
4) Quote vendor transactions; and
5) Data mirroring transactions.

b. Describe any formal process you employ for the ongoing review of capacity and performance levels.

c. Describe current system bottlenecks, and the methods in which they are monitored.

d. Describe at what levels the addition of new system resources would be triggered to ensure adequate capacity and performance.

e. Describe the methods by which additional capacity and performance resources could be activated in an emergency situation and state how long those processes would take.

6. System Operations

a. Configuration management for hardware and software

Provide information regarding the controls and procedures that will be used to ensure:

1) Consistent inventory maintenance;
2) Adherence to standards for baseline configuration, including hardening;
3) Pre-installation testing and authorization;
4) Processes that ensure minimal configuration drift between primary and backup environments; and
5) Post-installation monitoring and testing.

b. System change management for hardware and software

Provide information regarding the controls and procedures that will be used to ensure the reliability of system software, including:

1) Testing;
2) Independent review for quality assurance;
3) Approval for production installation;
4) Processes that ensure minimal configuration drift between primary and backup environments;
5) Post-change monitoring, including testing to confirm planned vs. actual system configuration;
6) Separation of duties;
7) Controls in place to ensure quality, consistency, and security of code developed by third party developers; and
8) Controlled access to code libraries.

c. Patch management program

Provide information regarding the controls and procedures that will be used to ensure the timely application of essential patches, including:

1) Staffing;
2) Awareness;
3) Analysis of required patching to operational systems and any impact to computing environments;
4) Testing and Approval;
5) Emergency patch processes and procedures, including notification, analysis, testing, approval, and implementation;
6) Implementation and fallback procedures; and
7) Communication and reporting.

d. Password scanning

Provide information about any internal password scanning you perform, including:

1) Frequency of use;
2) Tools used;
3) Scope; and

4) Follow-up.

e. Event and problem management
Provide information regarding the controls and procedures that will be used to ensure the timely notification about operational events and resolution of operational problems, including:

1) Staffing;
2) Roles and responsibilities;
3) Use of monitoring systems;
4) Tracking and escalation;
5) Resolution; and
6) Internal and external reporting, including notification of appropriate regulators.

7. Systems Development Methodology

a. Describe your process, including roles and responsibilities, for identifying and approving functional, security, and capacity/performance requirements.

b. Describe your software change management process, including quality assurance and issue tracking and resolution.

1) Provide information regarding the testing methodology, including management controls, used to verify the system's ability to perform as intended (regarding functionality, security, and capacity and performance requirements).
2) Provide copies of current representative samples of your test results documentation.
3) Identify what group is responsible for recording, correcting, and retesting errors, and detail their procedures for those activities.

c. Describe the documentation required during the development of new software and as part of the software release package for installation, operation, and maintenance.

d. Describe the controls in place for promotion of application software into the production environment, including approval, access controls, and post-implementation monitoring.

8. Physical Security and Environmental Controls

a. Provide information regarding the physical security controls used in the communications and central computer facilities to protect system components and critical infrastructure. In your response, please address:

1) Perimeter and external building controls and monitoring, including:
a) Lights;
b) Cameras;
c) Motion detectors;

d) Guards;
e) Fences, gates, and other barriers; and
f) Building entrances, including loading docks.

2) Internal building controls and monitoring, including:
a) Engineering and physical security staffing, including shift coverage, minimum qualifications and training;
b) Metal detectors;
c) Door locks;
d) Visitor controls, including scheduling, identification, logbooks, and escort requirements;
e) Compartmentalization of computing, communications, and building infrastructure equipment;
f) Cameras, video recording, and monitoring stations;
g) Access authorization and review procedures; and
h) Mail and package handling procedures.

b. Provide copies of any internal or third party physical security assessments conducted for each of your operating locations.

c. Describe plans for third party physical security assessments for each of your operating locations.

d. Provide information regarding the environmental controls used in the communications and central computer facilities to ensure reliable availability of system components and critical infrastructure. Address redundancy, monitoring, maintenance, and testing of:

1) Electrical supply, including:
a) Sources and paths of commercial power;
b) Generators (and associated on-site fuel supply and fuel delivery contracts);
c) Power distribution units;
d) Uninterruptible Power Supply units; and
e) Emergency shutoff controls.

2) Cooling equipment, including:
a) HVAC units;
b) Air handlers;
c) Chillers; and
d) Other associated items such as water supply and humidifiers.

3) Fire control equipment, including:
a) Smoke and heat detection;
b) Fire suppression; and
c) Water damage protection.

e. Provide copies of any recent third party assessments of your communications and central computer facilities, including results and plans for remediation of any findings made.

f. Provide information regarding any Single Point of Failure reviews or assessments made of your communications, data center, and cloud infrastructure; including but not limited to carrier line diversity, points of presence, and oversight of changes.

9. Testing Program

a. Provide information regarding your use of internal and third party vulnerability scanning and testing to identify and eliminate vulnerabilities in the configuration of your computing and communications equipment. Address each of the following:

1) Scope of testing;
2) Frequency of use;
3) Methodology and tools;
4) Distribution of reports;
5) Remediation of findings by severity or risk posed; and
6) Tracking of mitigation activities, including notification of senior management or the Board.

b. Provide the results of the two most recent internal or third party vulnerability scans (for our assessment of progress made), including complete reports (not only summaries), management's responses, and mitigation plans and results for addressing findings.

c. Provide information regarding your use of internal and third party external and internal penetration testing to identify and eliminate vulnerabilities in the architecture and configuration of your computing and communications equipment. Address each of the following:

1) Scope of testing;
2) Frequency of use;
3) Methodology and tools;
4) Distribution of reports;
5) Remediation of findings by severity or risk posed; and
6) Tracking of mitigation activities, including notification of senior management or the Board.

d. Provide the results of the two most recent internal or third party penetration tests (for our assessment of progress made), including complete reports (not only summaries), management's responses, and mitigation plans and results for addressing findings.

e. Describe your program of periodic controls testing, including:

1) Selection of controls, including determination of key controls;
2) Frequency, scope, and schedule of testing;
3) Use of any third party assessors; and
4) Escalation, follow up and resolution of findings.

5) Provide representative samples of any periodic control testing.

f. Provide the results of your most recently performed Security Incident Response Plan test.

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Appendix B to Part 37—Guidance on, and Acceptable Practices in, Compliance With Core Principles

1. This appendix provides guidance on complying with core principles, both initially and on an ongoing basis, to maintain registration under section 5h of the Act and this part. Where provided, guidance is set forth in paragraph (a) following the relevant heading and can be used to demonstrate to the Commission compliance with the selected requirements of a core principle of this part. The guidance for the core principle is illustrative only of the types of matters a swap execution facility may address, as applicable, and is not intended to be used as a mandatory checklist. Addressing the issues set forth in this appendix would help the Commission in its consideration of whether the swap execution facility is in compliance with the selected requirements of a core principle; provided however, that the guidance is not intended to diminish or replace, in any event, the obligations and requirements of applicants and swap execution facilities to comply with the regulations provided under this part.

2. Where provided, acceptable practices meeting selected requirements of core principles are set forth in paragraph (b) following the guidance. Swap execution facilities that follow specific practices outlined in the acceptable practices for a core principle in this appendix will meet the selected requirements of the applicable core principle; provided however, that the acceptable practice is not intended to diminish or replace, in any event, the obligations and requirements of applicants and swap execution facilities to comply with the regulations provided under this part. The acceptable practices are for illustrative purposes only and do not state the exclusive means for satisfying a core principle.

Core Principle 1 of Section 5h of the Act—Compliance With Core Principles

(A) *In general.* To be registered, and maintain registration, as a swap execution facility, the swap execution facility shall comply with—the core principles described in section 5h of the Act; and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the Act.

(B) *Reasonable discretion of swap execution facility.* Unless otherwise determined by the Commission by rule or regulation, a swap execution facility described in paragraph (A) shall have reasonable discretion in establishing the manner in which the swap execution facility complies with the core principles described in section 5h of the Act.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Core Principle 2 of Section 5h of the Act—Compliance With Rules

A swap execution facility shall:

(A) Establish and enforce compliance with any rule of the swap execution facility, including the terms and conditions of the swaps traded or processed on or through the swap execution facility and any limitation on access to the swap execution facility;

(B) Establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means to provide market participants with impartial access to the market and to capture information that may be used in establishing whether rule violations have occurred;

(C) Establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades; and

(D) Provide by its rules that when a swap dealer or major swap participant enters into or facilitates a swap that is subject to the mandatory clearing requirement of section 2(h) of the Act, the swap dealer or major swap participant shall be responsible for compliance with the mandatory trading requirement under section 2(h)(8) of the Act.

(a) *Guidance.* (1) *Ethics training.* (i) Section 37.201(c)(4) requires a swap execution facility to ensure that its SEF trading specialists receive ethics training on a periodic basis. Such training should help SEF trading specialists be aware, and remain abreast, of, their continuing obligations with respect to the rules, policies, and procedures of the swap execution facility, as well as the applicable provisions of the Act and Commission regulations thereunder.

(ii) Ethics training for SEF trading specialists should account for the level and nature of SEF trading specialists' responsibilities within a swap execution facility. The training should address topics such as an explanation of applicable laws and regulations and the rules, policies, and procedures of the swap execution facility; how to act honestly and fairly and with due skill, care, and diligence in furtherance of the interests of market participants and the integrity of the market; protection of confidential information; and avoidance, proper disclosure, and handling of conflicts of interest. Such ethics training should also seek to ensure that SEF trading specialists remain current with regard to the ethical ramifications of new developments with respect to evolving technology, trading practices, products, and other relevant changes.

(iii) A swap execution facility, at its discretion, may develop and implement its own ethics training program or utilize a program offered by a third-party provider, or may implement some combination thereof. Third-party providers may include independent persons, firms, or industry associations. No specific format or class training is required, as the needs of a swap execution facility may vary according to its size and number of personnel that are SEF trading specialists. A swap execution facility may utilize electronic media, such as video presentations, internet-based transmissions, and interactive software programs as part of its ethics training program. A swap execution facility should ascertain the credentials of any provider of ethics training or training materials and should ensure that such persons have the appropriate level of industry experience and knowledge, including with respect to the swap execution facility's rules, policies, procedures, and operations.

(iv) A swap execution facility may determine the frequency and duration of ethics training but such frequency and duration should promote a corporate culture of high ethical and professional conduct and a continuous awareness of industry standards and practices.

(2) *Investigations—Timeliness.* A swap execution facility has reasonable discretion to determine the timely manner in which to complete investigations under § 37.203(f)(2).

(3) *Investigations—Investigation reports.* A swap execution facility's compliance staff should submit all investigation reports to the Chief Compliance Officer or other compliance department staff responsible for reviewing such reports and determining the next steps in the process. The Chief Compliance Officer or other responsible staff should have reasonable discretion to decide whether to take any action, such as presenting the investigation report to a disciplinary panel for disciplinary action.

(4) *Audit trail required.* A swap execution facility's audit trail data should be sufficient to reconstruct all indications of interest, requests for quotes, orders, and trades within a reasonable period of time and to provide evidence of any violations of the rules of the swap execution facility.

(5) *Audit trail reconstruction.* An effective audit trail reconstruction program should annually review an adequate sample of executed and unexecuted orders and trades from each execution method offered by the swap execution facility to verify the swap execution facility's ability to comprehensively and accurately reconstruct trading in a timely manner. A swap execution facility should have reasonable discretion to determine the meaning of adequate sample as used in this paragraph.

(6) *Enforcement staff.* A swap execution facility's enforcement staff should not include either members of the swap execution facility or persons whose interests conflict with their enforcement duties. A member of the enforcement staff should not operate under the direction or control of any person or persons with trading privileges at the swap execution facility.

(7) *Disciplinary panel procedures.* The rules of a swap execution facility governing the requirements that apply to the adjudication of a matter by a swap execution facility disciplinary panel should be fair, equitable, and publicly available. Such rules should require the disciplinary panel to promptly issue a written decision following a hearing or the acceptance of a settlement offer.

(8) *Emergency disciplinary actions.* A swap execution facility may impose a sanction, including suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable belief that such immediate action is necessary to protect the best interest of the marketplace.

(9) *Warning letters and sanctions.* A swap execution facility should have reasonable discretion to determine when to issue warning letters and apply sanctions under § 37.206(c)(1).

(b) *Acceptable Practices.* [Reserved]

Core Principle 3 of Section 5h of the Act—Swaps Not Readily Susceptible to Manipulation

The swap execution facility shall permit trading only in swaps that are not readily susceptible to manipulation.

(a) *Guidance.* Guidance in appendix C to this part—''Demonstration of Compliance that a Swap Contract is Not Readily Susceptible to Manipulation''—may be used as guidance in meeting this core principle for both new product listings and existing listed contracts.

(b) *Acceptable Practices.* [Reserved]

Core Principle 4 of Section 5h of the Act—Monitoring of Trading and Trade Processing

The swap execution facility shall:

(A) Establish and enforce rules or terms and conditions defining, or specifications detailing:

(1) Trading procedures to be used in entering and executing orders traded on or through the facilities of the swap execution facility; and

(2) Procedures for trade processing of swaps on or through the facilities of the swap execution facility; and

(B) Monitor trading in swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

(a) *Guidance.* The swap execution facility should have rules in place that allow it to intervene to prevent and reduce disorderly trading and disruptions. Once threatened or actual disorderly trading or disruption is detected, the swap execution facility should take steps to prevent the disorderly trading or disruption, or reduce its severity.

(1) *General requirements.* Real-time monitoring for disorderly trading and market or system anomalies is the most effective, but the swap execution facility's program may also be acceptable if some of the monitoring is accomplished on a T+1 basis. The monitoring of trading should use automated alerts to detect disorderly trading and any market or system anomalies, including abnormal price movements and unusual trading volumes in real-time and instances or threats of manipulation, price distortion, and disruptions on at least a T+1 basis. The T+1 detection and analysis should incorporate any additional data that becomes available on a T+1 basis, including the trade reconstruction data. In some cases, a swap execution facility may demonstrate that its manual processes are effective. The swap execution facility should act promptly to address the conditions that are causing price distortions or disruptions, including, when appropriate, changes to contract terms.

(2) *Physical-delivery swaps.* For a physical-delivery swap listed on the swap execution facility, the swap execution facility should monitor for conditions that may cause the swap to become susceptible to manipulation, price distortion, or market disruptions, including: Conditions influencing the convergence between the swap's price and the price of the underlying commodity such as the general availability of the commodity specified by the swap, the commodity's characteristics, and the delivery locations; and if available, information related to the size and ownership of deliverable supplies. Price convergence refers to the process whereby the price of a physically-delivered swap converges to the spot price of the underlying commodity, as the swap nears expiration. The hedging effectiveness of a physically-delivered swap depends in part upon the extent to which the swap price reliably converges to the comparable cash market price, or to a predictable differential to the comparable cash market price.

(3) *Ability to obtain information.* The swap execution facility should be able to obtain position and trading information directly from the market participants that conduct trading on its facility.

(4) *Risk controls for trading.* In developing and implementing an acceptable program for preventing and reducing the potential risk of price distortions and market disruptions, a swap execution facility should establish and maintain appropriate trading risk controls, in addition to pauses and halts. Risk controls should be adapted to the unique characteristics of the swap execution facility's trading system or platform and the swap contracts listed for trading and should be designed to avoid price distortions and market disruptions without unduly interfering with that market's price discovery function. The swap execution facility may choose from among controls that include: Pre-trade limits on order size, price collars or bands around the current price, message throttles, and daily price limits, or design other types of controls, as well as clear order-cancellation policies. Within the specific array of controls that are selected, the swap execution facility should set the parameters for those controls, so that the specific parameters are reasonably likely to serve the purpose of preventing price distortions and market disruptions. If a swap is fungible with, linked to, or a substitute for other swaps on the swap execution facility or contracts on other trading venues, such risk controls should, to the extent practicable, be coordinated with any similar controls placed on those other swaps or contracts. If a swap is based on the level of an equity index, such risk controls should, to the extent practicable, be coordinated with any similar controls placed on national security exchanges.

(b) *Acceptable Practices.* [Reserved]

Core Principle 5 of Section 5h of the Act—Ability To Obtain Information

The swap execution facility shall:

(A) Establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in section 5h of the Act;

(B) Provide the information to the Commission on request; and

(C) Have the capacity to carry out such international information-sharing agreements as the Commission may require.

(a) *Guidance.* If position and trading information is available through information-sharing agreements with other trading venues or a third-party regulatory service provider, the swap execution facility should cooperate, to the extent practicable, in such information-sharing agreements.

(b) *Acceptable Practices.* [Reserved]

Core Principle 6 of Section 5h of the Act—Position Limits or Accountability

(A) *In general.* To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, a swap execution facility that is a trading facility shall adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators.

(B) *Position limits.* For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a) of the Act, the swap execution facility shall:

(1) Set its position limitation at a level no higher than the Commission limitation; and

(2) Monitor positions established on or through the swap execution facility for compliance with the limit set by the Commission and the limit, if any, set by the swap execution facility.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Core Principle 7 of Section 5h of the Act—Financial Integrity of Transactions

The swap execution facility shall establish and enforce rules and procedures for ensuring the financial integrity of swaps entered on or through the facilities of the swap execution facility, including the clearance and settlement of the swaps pursuant to section 2(h)(1) of the Act.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Core Principle 8 of Section 5h of the Act—Emergency Authority

The swap execution facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any swap or to suspend or curtail trading in a swap.

(a) *Guidance.*

(1) A swap execution facility should have rules that authorize it to take certain actions in the event of an emergency, as defined in § 40.1(h) of this chapter. A swap execution facility should have the authority to intervene as necessary to maintain markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the swap execution facility's market or as part of a coordinated, cross-market intervention. A swap execution facility should have the flexibility and independence to address market emergencies in an effective and timely manner consistent with the nature of the emergency, as long as all such actions taken by the swap execution facility are made in good faith to protect the integrity of the markets. However, the swap execution facility should also have rules that allow it to take market actions as may be directed by the Commission, including actions that the Commission requires the swap execution facility to take as part of a coordinated, cross-market intervention.

Additionally, in situations where a swap is traded on more than one platform, emergency action should be taken as directed or agreed to by the Commission or the Commission's staff. A swap execution facility's rules should include procedures and guidelines for decision-making and implementation of emergency intervention that avoid conflicts of interest and include alternate lines of communication and approval procedures to address emergencies associated with real time events. To address perceived market threats, the swap execution facility should have rules that allow it to take emergency actions, including imposing or modifying position limits, imposing or modifying price limits, imposing or modifying intraday market restrictions, ordering the fixing of a settlement price, extending or shortening the expiration date or the trading hours, suspending or curtailing trading in any contract, or altering any contract's settlement terms or conditions, or, if applicable, providing for the carrying out of such actions through its agreements with its third-party provider of clearing or regulatory services.

(2) A swap execution facility should promptly notify the Commission of its exercise of emergency action, explaining its decision-making process, the reasons for using its emergency authority, and how conflicts of interest were minimized, including the extent to which the swap execution facility considered the effect of its emergency action on the underlying markets and on markets that are linked or referenced to the contracts traded on its facility, including similar markets on other trading venues. Information on all regulatory actions carried out pursuant to a swap execution facility's emergency authority should be included in a timely submission of a certified rule pursuant to part 40 of this chapter.

(b) *Acceptable Practices.* [Reserved]

Core Principle 9 of Section 5h of the Act—Timely Publication of Trading Information

(A) *In general.* The swap execution facility shall make public timely information on price, trading volume, and other trading data on swaps to the extent prescribed by the Commission.

(B) *Capacity of swap execution facility.* The swap execution facility shall be required to have the capacity to electronically capture and transmit trade information with respect to transactions executed on the facility.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Core Principle 10 of Section 5h of the Act—Recordkeeping and Reporting

(A) *In general.* A swap execution facility shall:

(1) Maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of five years;

(2) Report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the Act; and

(3) Keep any such records relating to swaps defined in section 1a(47)(A)(v) of the Act open to inspection and examination by the Securities and Exchange Commission.

(B) *Requirements.* The Commission shall adopt data collection and reporting requirements for swap execution facilities that are comparable to corresponding requirements for derivatives clearing organizations and swap data repositories.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Core Principle 11 of Section 5h of the Act—Antitrust Considerations

Unless necessary or appropriate to achieve the purposes of the Act, the swap execution facility shall not:

(A) Adopt any rules or take any actions that result in any unreasonable restraint of trade; or

(B) Impose any material anticompetitive burden on trading or clearing.

(a) *Guidance.* An entity seeking registration as a swap execution facility may request that the Commission consider under the provisions of section 15(b) of the Act, any of the entity's rules, including trading protocols or policies, and including both operational rules and the terms or conditions of products listed for trading, at the time of registration or thereafter. The Commission intends to apply section 15(b) of the Act to its consideration of issues under this core principle in a manner consistent with that previously applied to contract markets.

(b) *Acceptable Practices.* [Reserved]

Core Principle 12 of Section 5h of the Act—Conflicts of Interest

The swap execution facility shall:

(A) Establish and enforce rules to minimize conflicts of interest in its decision-making process; and

(B) Establish a process for resolving the conflicts of interest.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Core Principle 13 of Section 5h of the Act—Financial Resources

(A) *In general.* The swap execution facility shall have adequate financial, operational, and managerial resources to discharge each responsibility of the swap execution facility.

(B) *Determination of resource adequacy.* The financial resources of a swap execution facility shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the swap execution facility to cover the operating costs of the swap execution facility for a one-year period, as calculated on a rolling basis.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.*

(1) *Reasonable calculation of projected operating costs.* In connection with a swap execution facility calculating its projected operating costs, the Commission has determined that a reasonable calculation should include all expenses necessary for the swap execution facility to comply with the core principles set forth in section 5h of the Act and any applicable Commission regulations. This calculation should be based on the swap execution facility's current level of business and business model, and should take into account any projected modification to its business model (*e.g.,* the addition or subtraction of business lines or operations or other changes), and any projected increase or decrease in its level of business over the next 12 months. The Commission believes, however, that it may be reasonable for a swap execution facility to exclude the following expenses (''excludable expenses'') from its projected operating cost calculations:

(i) Costs attributable solely to sales, marketing, business development, product development, or recruitment and any related travel, entertainment, event, or conference costs;

(ii) Compensation and related taxes and benefits for swap execution facility personnel who are not necessary to ensure that the swap execution facility is able to comply with the core principles set forth in section 5h of the Act and any applicable Commission regulations;

(iii) If a swap execution facility offers two or more *bona fide* execution methods (*e.g.,* it offers both an electronic central limit order book and voice execution via voice brokers), the swap execution facility may include the costs related to at least one of the execution methods that it offers, and may exclude the costs related to the other execution method(s) that it offers (*i.e.,* if a swap execution facility includes in its projected operating costs the costs associated with its central limit order book, it may exclude the costs related to its voice execution service, or vice-versa). A *bona fide* method here refers to a method actually used by the SEF's market participants and not established by a SEF on a *pro forma* basis for the purpose of complying with—or evading—Core Principle 13.

(iv) Costs for acquiring and defending patents and trademarks for swap execution facility products and related intellectual property;

(v) Magazine, newspaper, and online periodical subscription fees;

(vi) Tax preparation and audit fees;

(vii) To the extent not covered by paragraphs (b)(1)(ii) or (iii) above, the variable commissions that a voice-based swap execution facility may pay to its SEF trading specialists (as defined under § 37.201(c)), calculated as a percentage of transaction revenue generated by the voice-based swap execution facility. Unlike fixed salaries or compensation, such variable commissions are not payable unless and until revenue is collected by the swap execution facility; and

(viii) Any non-cash costs, including depreciation and amortization.

(2) *Pro-rated expenses.* The Commission recognizes that, in the normal course of a swap execution facility's business, there may be an expense (*e.g.,* typically related to overhead) that is only partially attributable to a swap execution facility's ability to comply with the core principles set forth in section 5h of the Act and any applicable Commission regulations; accordingly, such expense may need to be only partially attributed to the swap execution facility's projected operating costs. For example, if a swap execution facility's office rental space includes marketing personnel and compliance personnel, the swap execution facility may exclude the pro-rated office rental expense

attributable to the marketing personnel. In order to pro-rate an expense, a swap execution facility should:

(i) Maintain sufficient documentation that reasonably shows the extent to which an expense is partially attributable to an excludable expense;

(ii) Identify any pro-rated expense in the financial reports that it submits to the Commission pursuant to § 37.1306; and

(iii) Sufficiently explain why it pro-rated any expense. Common allocation methodologies that can be used include actual use, headcount, or square footage. A swap execution facility may provide documentation, such as copies of service agreements, other legal documents, firm policies, audit statements, or allocation methodologies to support its determination to pro-rate an expense.

(3) *Expenses allocated among affiliates.* The Commission recognizes that a swap execution facility may share certain expenses with affiliated entities, such as parent entities or other subsidiaries of the parent. For example, a swap execution facility may share employees (including employees on secondment from an affiliate) that perform similar tasks for the affiliated entities or may share office space with its affiliated entities. Accordingly, the Commission believes that it would be reasonable, for purposes of calculating its projected operating costs, for a swap execution facility to pro-rate any shared expense that the swap execution facility pays for, but only to the extent that such shared expense is actually attributable to the affiliate and for which the swap execution facility is reimbursed. Similarly, a reasonable calculation of a swap execution facility's projected operating costs must include the pro-rated amount of any expense paid for by an affiliated entity to the extent that the shared expense is attributable to the swap execution facility. In order to pro-rate a shared expense, the swap execution facility should:

(i) Maintain sufficient documentation that reasonably shows the extent to which the shared expense is attributable to and paid for by the swap execution facility and/or affiliated entity;

(ii) Identify any shared expense in the financial reports that it submits to the Commission; and

(iii) Sufficiently explain why it pro-rated any shared expense. A swap execution facility may provide documentation, such as copies of service agreements, other legal documents, firm policies, audit statements, or allocation methodologies, that reasonably shows how expenses are attributable to, and paid for by, the swap execution facility and/or its affiliated entities to support its determination to pro-rate an expense.

Core Principle 14 of Section 5h of the Act—System Safeguards

The swap execution facility shall:

(A) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and automated systems, that:

(1) Are reliable and secure; and

(2) Have adequate scalable capacity;

(B) Establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for:

(1) The timely recovery and resumption of operations; and

(2) The fulfillment of the responsibilities and obligations of the swap execution facility; and

(C) Periodically conduct tests to verify that the backup resources of the swap execution facility are sufficient to ensure continued:

(1) Order processing and trade matching;

(2) Price reporting;

(3) Market surveillance; and

(4) Maintenance of a comprehensive and accurate audit trail.

(a) *Guidance.*

(1) *Risk analysis and oversight program.* In addressing the categories of its risk analysis and oversight program, a swap execution facility should follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(2) *Testing.* A swap execution facility's testing of its automated systems and business continuity-disaster recovery capabilities should be conducted by qualified, independent professionals. Such qualified independent professionals may be independent contractors or employees of the swap execution facility, but should not be persons responsible for development or operation of the systems or capabilities being tested.

(3) *Coordination.* To the extent practicable, a swap execution facility should:

(i) Coordinate its business continuity-disaster recovery plan with those of the market participants it depends upon to provide liquidity, in a manner adequate to enable effective resumption of activity in its markets following a disruption causing activation of the swap execution facility's business continuity-disaster recovery plan;

(ii) Initiate and coordinate periodic, synchronized testing of its business continuity-disaster recovery plan with those of the market participants it depends upon to provide liquidity; and

(iii) Ensure that its business continuity-disaster recovery plan takes into account such plans of its telecommunications, power, water, and other essential service providers.

(b) *Acceptable Practices.* [Reserved]

Core Principle 15 of Section 5h of the Act—Designation of Chief Compliance Officer

(A) *In general.* Each swap execution facility shall designate an individual to serve as a chief compliance officer.

(B) *Duties.* The chief compliance officer shall:

(1) Report directly to the board or to the senior officer of the facility;

(2) Review compliance with the core principles in this subsection;

(3) In consultation with the board of the facility, a body performing a function similar to that of a board, or the senior officer of the facility, resolve any conflicts of interest that may arise;

(4) Be responsible for establishing and administering the policies and procedures required to be established pursuant to this section;

(5) Ensure compliance with the Act and the rules and regulations issued under the Act, including rules prescribed by the Commission pursuant to section 5h of the Act; and

(6) Establish procedures for the remediation of noncompliance issues found during compliance office reviews, look backs, internal or external audit findings, self-reported errors, or through validated complaints.

(C) *Requirements for procedures.* In establishing procedures under paragraph (B)(6) of this section, the chief compliance officer shall design the procedures to establish the handling, management response, remediation, retesting, and closing of noncompliance issues.

(D) *Annual reports.*

(1) *In general.* In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of:

(i) The compliance of the swap execution facility with the Act; and

(ii) The policies and procedures, including the code of ethics and conflict of interest policies, of the swap execution facility.

(2) *Requirements.* The chief compliance officer shall:

(i) Submit each report described in clause (1) with the appropriate financial report of the swap execution facility that is required to be submitted to the Commission pursuant to section 5h of the Act; and

(ii) Include in the report a certification that, under penalty of law, the report is accurate and complete.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.*

(1) *Qualifications of chief compliance officer.* In determining whether the background and skills of a potential chief compliance officer are appropriate for fulfilling the responsibilities of the role of the chief compliance officer, the swap execution facility has the discretion to base its determination on the totality of the qualifications of the potential chief compliance officer, including, but not limited to, compliance experience, related career experience, training, and any other relevant factors to the position. A swap execution facility should be especially vigilant regarding potential conflicts of interest when appointing a chief compliance officer.

Appendix C to Part 37—Demonstration of Compliance That a Swap Contract Is Not Readily Susceptible to Manipulation

The swap execution facility shall permit trading only in swaps that are not readily susceptible to manipulation.

(a) *Guidance for cash-settled swaps.*

(1) *General provision.* In general, a cash-settled swap contract is an agreement to exchange a series of cash flows over a period of time based on some reference price, which could be a single price, such as an absolute level or a differential, or a price index calculated based on multiple observations. Such a reference price may be reported by the swap execution facility itself or by an independent third party. When listing a swap

contract for trading, a swap execution facility shall ensure the swap contract's compliance with Core Principle 3, focusing on the reference price used to determine the exchanges of cash flows. A swap execution facility should either (i) calculate its own reference price, using suitable and well-established acceptable methods; or (ii) carefully select a reliable third-party index.

(2) *Reference price susceptibility to manipulation.* A swap execution facility must specify the reference price used for its swap contract and determine that the reference price is not readily susceptible to manipulation pursuant to SEF Core Principle 3. Accordingly, any reference price that is used in establishing the swap contract's cash settlement price should be assessed for its reliability as an indicator of cash market values in the underlying commercial market. Documentation demonstrating that the reference price is a reliable indicator of market values and conditions and is widely recognized by industry/market agents should be provided. Such documentation may be in various forms, including carefully documented interviews with principal market trading agents, pricing experts, marketing agents, etc. Additionally, careful consideration should be given to the potential for manipulation or distortion, when using the reference price to establish the swap's cash settlement price. The cash-settlement calculation should involve appropriate computational procedures that eliminate or reduce the impact of potentially unrepresentative data (*i.e.,* outliers).

(i) Where a swap execution facility itself generates the reference price, the swap execution facility should establish calculation procedures that safeguard against potential attempts to artificially influence the price. For example, if the reference price is derived by the swap execution facility based on a survey of cash market sources, then the swap execution facility should maintain a list of such reputable sources with knowledge of the cash market. In addition, the sample of sources polled should be representative of the cash market, and the poll should be conducted at a time when trading in the cash market is active and include the most liquid markets.

(ii) Where an independent, private-sector third party calculates the reference price, the swap execution facility should verify that the third party utilizes business practices that minimize the opportunity or incentive to manipulate the cash-settlement price series. Such safeguards may include lock-downs, prohibitions against derivatives trading by its employees, or public dissemination of the names of sources and the price quotes they provide. Because a cash-settled swap contract may create an incentive to manipulate or artificially influence the underlying commercial market from which the cash-settlement price is derived or to exert undue influence on the cash-settlement computation in order to profit on a derivative position in that commodity, a swap execution facility should, whenever practicable, enter into an information-sharing agreement with the third-party provider which would enable the swap execution facility to better detect and prevent manipulative behavior. A swap execution facility should also consider the need for a licensing agreement that will ensure the swap execution facility's rights to the use of the price series to settle the listed contract.

(3) *Contract terms and conditions.* An acceptable specification of the terms and conditions of a cash-settled swap contract would include, but may not be limited to, rules that address, as appropriate, the following criteria and comply with the associated standards:

(i) *Commodity characteristics.* The terms and conditions of a cash-settled swap contract should describe or define all of the economically significant characteristics or attributes of the commodity underlying the contract.

(ii) *Contract size and trading unit.* For standardized swap contracts, the contract size or size range should be clearly defined and consistent with customary transactions in the cash market. A swap execution facility may opt to set the swap contract size smaller than that of standard cash market transactions. For non-standardized swap contracts, a swap execution facility may allow the contract size or size range to be negotiable.

(iii) *Cash settlement procedure.* A cash settlement price should be an accurate and reliable indicator of prices in the underlying cash market. A cash settlement price also should be acceptable to commercial users of the cash-settled swap contract. A swap execution facility should fully document that a settlement price is accurate, reliable, widely regarded by industry/market participants. To the extent possible, the cash settlement price series of the swap should be based on reference prices that are publicly available on a timely basis. A swap execution facility should make the cash settlement price, as well as any other supporting information that is appropriate for release to the public, available to the public when cash settlement is conducted. If the cash settlement price is based on reference prices that are obtained from non-public sources (*e.g.,* cash market surveys conducted by the swap execution facility or by third parties on behalf of the swap execution facility), then a swap execution facility should make available to the public the cash settlement price as well as any other supporting information that is appropriate or feasible to make available to the public.

(iv) *Minimum price fluctuation (minimum tick).* For standardized swap contracts, the minimum price increment (tick) should be set at a level that is consistent with cash market transactions for the underlying commodity. For non-standardized swap contracts, a swap execution facility may choose to not specify a minimum price increment (tick).

(v) *Intraday market restrictions.* A swap execution facility may have intraday market restrictions that pause or halt trading in the event of extraordinary price moves that may result in distorted prices. If a swap execution facility adopts such restrictions, they should not be unduly restrictive of trading. For swap contracts based on security indexes, intraday price limits and trading halts should be coordinated with circuit breakers of national security exchanges.

(vi) *Last trading day.* If a swap execution facility chooses to allow trading to occur through the determination of a settlement price, then the swap execution facility should demonstrate that swap trading would not distort the settlement price calculation. For standardized swap contracts, specification of the last trading day should take into consideration whether the volume of transactions underlying the cash settlement price would be unduly limited by the occurrence of holidays or traditional holiday periods in the cash market. For non-standardized swap contracts, a swap execution facility may allow the last trading day to be negotiable.

(b) *Guidance for physically-settled swaps.*

(1) *General definition.* A physically-settled swap contract is any swap agreement, as defined in section 1a(47) of the Act, that may result in physical settlement. Generally, these are agreements where the primary intent is to transfer the financial risk associated with the underlying commodity and not primarily to make or take delivery of the commodity.

(2) *Estimating deliverable supplies.* A swap execution facility should estimate the deliverable supply for which a swap contract is not readily susceptible to manipulation. The estimate of deliverable supply should be adequate to ensure that the swap contract is not readily susceptible to price manipulation. In general, the term ''deliverable supply'' means the quantity of the commodity meeting the swap contract's delivery specifications that reasonably can be expected to be readily available to short traders and salable by long traders at its market value in normal cash marketing channels at the swap contract's delivery points during the specified delivery period, barring abnormal movement in interstate commerce. For a non-financial physically-settled swap contract, this estimate should include all available supply that meets the swap contract's specifications and can be delivered at prevailing market prices via the delivery procedures set forth in the swap contract. Among this eligible supply, the estimate of deliverable supply can consist of:

(i) Commercially available imports;

(ii) Product which is in storage at the delivery point(s) specified in the swap contract; and

(iii) Product which is available for sale on a spot basis within the marketing channels that normally are tributary to the delivery point(s). Furthermore, an estimate of deliverable supply should exclude quantities that at current price levels are not economically obtainable or deliverable or were previously committed for long-term agreements. The size of commodity supplies that are committed to long-term agreements may be estimated by consulting with market participants. However, if the estimated deliverable supply that is committed for long-term agreements, or significant portion thereof, can be demonstrated by the swap execution facility to be consistently and regularly made available to the spot market for shorts to acquire at prevailing economic values, then those ''available'' supplies committed for long-term contracts may be included in the swap execution facility's estimate of deliverable supply for that

commodity. To the extent possible and that data resources permit, deliverable supply estimates should be constructed such that the data reflect the market defined by the swap contract's terms and conditions, and should be formulated, whenever possible, with government or publicly available data. All deliverable supply estimates should be fully defined, have all underlying assumptions explicitly stated, and have documentation of all data/information sources in order to permit estimate replication by Commission staff.

(iv) *Accounting for variations in deliverable supplies.* To assure the availability of adequate deliverable supplies, a swap contract's terms and conditions should assess adequately the potential range of deliverable supplies and account for variations in the patterns of production, consumption, and supply over a period of at least three years. This assessment also should consider seasonality, growth, and market concentration in the production/consumption of the underlying cash commodity. Patterns of variations in the deliverable supply are more apparent when deliverable supply estimates are calculated on a monthly basis and when such monthly estimates are provided for at least the most recent three years for which data resources permit. For commodities with seasonal supply or demand characteristics, the deliverable supply analysis should include that period when potential supplies typically are at their lowest levels. In addition, consideration should be given to the relative roles of producers, merchants, and consumers in the production, distribution, and consumption of the cash commodity and whether the underlying commodity exhibits a domestic or international export focus. Careful consideration also should be given to the quality of the cash commodity, the movement or flow of the cash commodity in normal commercial channels, and any external factors or regulatory controls that could affect the price or supply of the cash commodity.

(3) *Contract terms and conditions.* For a swap contract that is settled by physical delivery, the terms and conditions of the contract should conform to the most common commercial practices and conditions in the cash market for the commodity underlying the swap contract. The terms and conditions should be designed to avoid any impediments to the delivery of the commodity so as to promote convergence between the value of the swap contract and the cash market value of the commodity at the expiration of the swap contract. An acceptable specification of terms and conditions would include, but may not be limited to, rules that address, as appropriate, the following criteria and comply with the associated standards:

(i) *Quality standards.* The terms and conditions of a swap contract should describe or define all of the economically significant characteristics or attributes of the commodity underlying the contract. In particular, the quality standards should be described or defined so that such standards reflect those used in transactions in the commodity in normal cash marketing channels. Documentation establishing that the quality standards of the swap contract's underlying commodity comply with those accepted/established by the industry, by government regulations, and/or by relevant laws should also be submitted. For any particular swap contract, the specific attributes that should be enumerated depend upon the individual characteristics of the underlying commodity. These may include, for example, the following items: Grade, quality, purity, weight, class, origin, growth, issuer, originator, maturity window, coupon rate, source, hours of trading, etc. If the terms of the swap contract provide for the delivery of multiple qualities of a specific attribute of the commodity having different cash market values, then a ''par'' quality should be specified with price differentials applicable to the ''non-par'' qualities that reflect discounts or premiums commonly observed or expected to occur in the cash market for that commodity.

(ii) *Delivery points and facilities.* Delivery point/area specifications should provide for delivery at a single location or at multiple locations where the underlying cash commodity is normally transacted or stored and where there exists a viable cash market(s). If multiple delivery points are specified and the value of the commodity differs between these locations, a swap contract's terms should include price differentials that reflect usual and observed differences in value between the different delivery locations. If the price relationships among the delivery points are unstable and a swap execution facility chooses to adopt fixed locational price differentials, such differentials should fall within the range of commonly observed or expected commercial price differences. In this regard, any price differentials should be supported with cash price data for the delivery location(s) for a period of three years. The price differential should be updated periodically to reflect prevailing market conditions. The terms and conditions of a swap contract also should specify, as appropriate, any conditions the delivery facilities and/or delivery facility operators should meet in order to be eligible for delivery. Specification of any requirements for delivery facilities also should consider the extent to which ownership of such facilities is concentrated and whether the level of concentration would be susceptible to manipulation of the swap contract's prices. Physically-settled swap contracts also should specify appropriately detailed delivery procedures that describe the responsibilities of deliverers, receivers, and any required third parties in carrying out the delivery process. Such responsibilities could include allocation between buyer and seller of all associated costs such as load-out, document preparation, sampling, grading, weighing, storage, taxes, duties, fees, drayage, stevedoring, demurrage, dispatch, etc. Required accreditation for third-parties also should be detailed. These procedures should seek to minimize or eliminate any impediments to making or taking delivery by both deliverers and takers of delivery to help ensure convergence of the cash price and swap price.

(iii) *Delivery period and last trading day.* An acceptable specification of the delivery period would allow for sufficient time for deliverers to acquire the deliverable commodity and make it available for delivery, considering any restrictions or requirements imposed by the swap execution facility. For standardized swap contracts, specification of the last trading day for expiring swap contracts should consider whether adequate time remains after the last trading day to allow for delivery on the contract. For non-standardized swap contracts, a swap execution facility may allow the delivery period to be negotiable.

(iv) *Contract size and trading unit.* Generally, swap contract sizes and trading units for standardized contracts should be determined after a careful analysis of relevant cash market trading practices, conditions, and deliverable supply estimates, so as to ensure that the underlying commodity market and available supply sources are able to support the contract sizes and trading units at all times. For non-standardized swap contracts, a swap execution facility may allow the contract sizes and trading units to be negotiable.

(v) *Delivery pack.* The term ''delivery pack'' refers to the specific cash market packaging standards (*e.g.,* product may be delivered in burlap or polyethylene bags stacked on wooden pallets) or non-quality related standards regarding the composition of commodity within a delivery unit (*e.g.,* product must all be imported from the same country or origin). An acceptable specification of the delivery pack or composition of a swap contract's delivery unit should reflect, to the extent possible, specifications commonly applied to the commodity traded or transacted in the cash market.

(vi) *Delivery instrument.* An acceptable specification of the delivery instrument (*e.g.,* warehouse receipt, depository certificate or receipt, shipping certificate, bill of lading, in-line transfer, book transfer of securities, etc.) would provide for its conversion into the cash commodity at a commercially-reasonable cost. Transportation terms (*e.g.,* FOB, CIF, freight prepaid to destination) as well as any limits on storage or certificate daily premium fees should be specified. These terms should reflect cash market practices and the customary provision for allocating delivery costs between buyer and seller.

(vii) *Inspection provisions.* Any inspection/certification procedures for verifying compliance with quality requirements or any other related delivery requirements (*e.g.,* discounts relating to the age of the commodity, etc.) should be specified in the swap contract's rules. An acceptable specification of inspection procedures would include the establishment of formal procedures that are consistent with procedures used in the cash market. To the extent that formal inspection procedures are not used in the cash market, an acceptable specification would contain provisions that assure accuracy in assessing the commodity, that are available at a low cost, that do not pose an obstacle to delivery on the swap contract and that are performed by a reputable, disinterested third party or by qualified swap execution facility employees.

Inspection terms also should detail which party pays for the service, particularly in light of the possibility of varying inspection results.

(viii) *Delivery months.* Delivery months should be established based on the risk management needs of commercial entities as well as the availability of deliverable supplies in the specified months.

(ix) *Minimum price fluctuation (minimum tick).* For standardized swap contracts, the minimum price increment (tick) should be set at a level that is in line with cash market transactions for the underlying commodity. For non-standardized swap contracts, a swap execution facility may choose to not specify a minimum price increment (tick).

(x) *Maximum price fluctuation limits.* A swap execution facility may adopt price limits to (1) reduce or constrain price movements in a trading day that may not be reflective of true market conditions but might be caused by traders overreacting to news and (2) provide a ''cooling-off'' period for swap market participants to respond to bona fide changes in market supply and demand fundamentals that would lead to large cash and swap price changes. If price limit provisions are adopted, the limits should be set at levels that are not overly restrictive in relation to price movements in the cash market for the commodity underlying the swap contract.

(c) *Guidance for options on swap contracts.*

The Commission believes that, provided the underlying swap complies with the relevant guidance in this Appendix C, any specification of the following terms would be acceptable; the primary requirement is that such terms be specified in an objective manner in the option contract's rules:

(1) Exercise method;

(2) Exercise procedure;

(3) Strike price provisions;

(4) Automatic exercise provisions;

(5) Contract size;

(6) Option expiration and last trading day; and (vii) option type and trading convention; and

(7) For non-standardized swap contracts, a swap execution facility may allow these contract terms to be negotiable.

(d) *Guidance for options on physicals contracts.*

(1) Under the Commission's regulations, the term ''option on physicals'' refers to option contracts that do not provide for exercise into an underlying futures contract. Upon exercise, options on physicals can be settled via physical delivery of the underlying commodity or by a cash payment. Thus, options on physicals raise many of the same issues associated with trading in other types of swap contracts such as the adequacy of deliverable supplies or acceptability of the cash settlement price series. In this regard, an option that is cash settled based on the settlement price of a futures contract or a swap contract would be considered an ''option on physicals'' and the futures or swap settlement price would be considered the cash price series.

(2) In view of the above, acceptable practices for the terms and conditions of options on physicals contracts include, as appropriate, those practices set forth above for physical-delivery or cash-settled swap contracts plus the practices set forth for options on swap contracts.

PART 38—DESIGNATED CONTRACT MARKETS

■ 9. The authority citation for part 38 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6c, 6d, 6e, 6f, 6g, 6i, 6j, 6k, 6l, 6m, 6n, 7, 7a–2, 7b, 7b–1, 7b–3, 8, 9, 15, and 21, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376.

§§ 38.11 and 38.12 [Removed and reserved]

■ 10. Remove and reserve §§ 38.11 and 38.12.

PART 39—DERIVATIVES CLEARING ORGANIZATIONS

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

Authority: 7 U.S.C. 2, 7a–1, and 12a; 12 U.S.C. 5464; 15 U.S.C. 8325.

■ 12. In § 39.12, revise paragraph (b)(7) to read as follows:

§ 39.12 Participant and product eligibility.

* * * * *

(b) * * *

(7) *Time frame for clearing*—(i) *Coordination with markets and clearing members.* (A) Each derivatives clearing organization shall coordinate with each designated contract market and swap execution facility that lists for trading a product that is cleared by the derivatives clearing organization in developing rules and procedures to facilitate prompt, efficient, and accurate processing and routing of all agreements, contracts, and transactions submitted to the derivatives clearing organization for clearing.

(B) Each derivatives clearing organization shall coordinate with each clearing member that is a futures commission merchant, swap dealer, or major swap participant to establish systems that enable the clearing member, or the derivatives clearing organization acting on its behalf, to accept or reject each agreement, contract, or transaction submitted to the derivatives clearing organization for clearing by or for the clearing member or a customer of the clearing member as quickly as would be technologically practicable if fully automated systems were used.

(ii) *Agreements, contracts, and transactions submitted for clearing to a derivatives clearing organization.* Each derivatives clearing organization shall have rules that provide that the derivatives clearing organization will accept or reject for clearing all agreements, contracts, and transactions as quickly after submission to the derivatives clearing organization as would be technologically practicable if fully automated systems were used. The derivatives clearing organization shall accept all agreements, contracts, and transactions:

(A) For which the executing parties have clearing arrangements in place with clearing members of the derivatives clearing organization;

(B) For which a derivatives clearing organization has been identified as the intended clearinghouse; and

(C) That satisfy the criteria of the derivatives clearing organization, including, but not limited to, applicable risk filters; provided that such criteria are non-discriminatory across trading venues and are applied as quickly as would be technologically practicable if fully automated systems were used.

* * * * *

PART 43—REAL-TIME PUBLIC REPORTING

■ 13. The authority citation for part 43 continues to read as follows:

Authority: 7 U.S.C. 2(a), 12a(5) and 24a, as amended by Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 14. Revise § 43.2 to read as follows:

§ 43.2 Definitions.

As used in this part:

Act means the Commodity Exchange Act, as amended, 7 U.S.C. 1 *et seq.*

Affirmation means the process by which parties to a swap verify (orally, in writing, electronically or otherwise) that they agree on the primary economic terms of a swap (but not necessarily all terms of the swap). Affirmation may constitute ''execution'' of the swap or may provide evidence of execution of the swap, but does not constitute confirmation (or confirmation by affirmation) of the swap.

Appropriate minimum block size means the minimum notional or principal amount for a category of swaps that qualifies a swap within such category as a block trade or large notional off-facility swap.

As soon as technologically practicable means as soon as possible, taking into consideration the prevalence, implementation and use of technology by comparable market participants.

Asset class means a broad category of commodities including, without limitation, any ''excluded commodity'' as defined in section 1a(19) of the Act, with common characteristics underlying a swap. The asset classes include interest rate, foreign exchange, credit,

equity, other commodity and such other asset classes as may be determined by the Commission.

Block trade means a publicly reportable swap transaction that:

(1) Involves a swap that is listed on a registered swap execution facility or designated contract market;

(2) Is executed on a registered swap execution facility or occurs away from a designated contract market's trading system or platform and is executed pursuant to that designated contract market's rules;

(3) Has a notional or principal amount at or above the appropriate minimum block size applicable to such swap; and

(4) Is reported subject to the rules and procedures of the registered swap execution facility or designated contract market and the rules described in this part, including the appropriate time delay requirements set forth in § 43.5.

Business day means the twenty-four hour day, on all days except Saturdays, Sundays and legal holidays, in the location of the reporting party or registered entity reporting data for the swap.

Business hours mean the consecutive hours of one or more consecutive business days.

Cap size means, for each swap category, the maximum notional or principal amount of a publicly reportable swap transaction that is publicly disseminated.

Confirmation means the consummation (electronic or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the parties to all terms of a swap. A confirmation shall be in writing (electronic or otherwise) and shall legally supersede any previous agreement (electronic or otherwise) relating to the swap.

Confirmation by affirmation means the process by which one party to a swap acknowledges its assent to the complete swap terms submitted by the other party to the swap. If the parties to a swap are using a confirmation service vendor, complete swap terms may be submitted electronically by a party to such vendor's platform and the other party may affirm such terms on such platform.

Economically related means a direct or indirect reference to the same commodity at the same delivery location or locations, or with the same or a substantially similar cash market price series.

Embedded option means any right, but not an obligation, provided to one party of a swap by the other party to the swap that provides the party holding the option with the ability to change any one or more of the economic terms of the swap as those terms previously were established at confirmation (or were in effect on the start date).

Executed means the completion of the execution process.

Execution means an agreement by the parties (whether orally, in writing, electronically, or otherwise) to the terms of a swap that legally binds the parties to such swap terms under applicable law. Execution occurs simultaneous with or immediately following the affirmation of the swap.

Futures-related swap means a swap (as defined in section 1a(47) of the Act and as further defined by the Commission in implementing regulations) that is economically related to a futures contract.

Large notional off-facility swap means an off-facility swap that has a notional or principal amount at or above the appropriate minimum block size applicable to such publicly reportable swap transaction and is not a block trade as defined in § 43.2.

Major currencies mean the currencies, and the cross-rates between the currencies, of Australia, Canada, Denmark, New Zealand, Norway, South Africa, South Korea, Sweden, and Switzerland.

Non-major currencies mean all other currencies that are not super-major currencies or major currencies.

Novation means the process by which a party to a swap transfers all of its rights, liabilities, duties and obligations under the swap to a new legal party other than the counterparty to the swap. The transferee accepts all of the transferor's rights, liabilities, duties and obligations under the swap. A novation is valid as long as the transferor and the remaining party to the swap are given notice, and the transferor, transferee and remaining party to the swap consent to the transfer.

Off-facility swap means any publicly reportable swap transaction that is not executed on or pursuant to the rules of a registered swap execution facility or designated contract market.

Other commodity means any commodity that is not categorized in the other asset classes as may be determined by the Commission.

Physical commodity swap means a swap in the other commodity asset class that is based on a tangible commodity.

Public dissemination and publicly disseminate means to publish and make available swap transaction and pricing data in a non-discriminatory manner, through the internet or other electronic data feed that is widely published and in machine-readable electronic format.

Publicly reportable swap transaction means:

(1) Unless otherwise provided in this part—

(i) Any executed swap that is an arm's-length transaction between two parties that results in a corresponding change in the market risk position between the two parties; or

(ii) Any termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap that changes the pricing of the swap.

(2) Examples of executed swaps that do not fall within the definition of publicly reportable swap may include:

(i) Internal swaps between one-hundred percent owned subsidiaries of the same parent entity; and

(ii) Portfolio compression exercises.

(3) These examples represent swaps that are not at arm's length and thus are not publicly reportable swap transactions, notwithstanding that they do result in a corresponding change in the market risk position between two parties.

Real-time public reporting means the reporting of data relating to a swap transaction, including price and volume, as soon as technologically practicable after the time at which the swap transaction has been executed.

Reference price means a floating price series (including derivatives contract prices and cash market prices or price indices) used by the parties to a swap or swaption to determine payments made, exchanged or accrued under the terms of a swap contract.

Remaining party means a party to a swap that consents to a transferor's transfer by novation of all of the transferor's rights, liabilities, duties and obligations under such swap to a transferee.

Reporting party means the party to a swap with the duty to report a publicly reportable swap transaction in accordance with this part and section 2(a)(13)(F) of the Act.

Super-major currencies mean the currencies of the European Monetary Union, Japan, the United Kingdom, and United States.

Swaps with composite reference prices mean swaps based on reference prices that are composed of more than one reference price from more than one swap category.

Transferee means a party to a swap that accepts, by way of novation, all of a transferor's rights, liabilities, duties and obligations under such swap with respect to a remaining party.

Transferor means a party to a swap that transfers, by way of novation, all of

its rights, liabilities, duties and obligations under such swap, with respect to a remaining party, to a transferee.

Trimmed data set means a data set that has had extraordinarily large notional transactions removed by transforming the data into a logarithm with a base of 10, computing the mean, and excluding transactions that are beyond four standard deviations above the mean.

Unique product identifier means a unique identification of a particular level of the taxonomy of the product in an asset class or sub-asset class in question, as further described in § 43.4(f) and appendix A to this part. Such unique product identifier may combine the information from one or more of the data fields described in appendix A to this part.

Widely published means to publish and make available through electronic means in a manner that is freely available and readily accessible to the public.

Issued in Washington, DC, on November 6, 2018, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices To Swap Execution Facilities and Trade Execution Requirement—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

Appendix 1—Commission Voting Summary

On this matter, Chairman Giancarlo and Commissioners Quintenz, Behnam, and Stump voted in the affirmative. Commissioner Berkovitz voted in the negative.

Appendix 2—Statement of Chairman J. Christopher Giancarlo

I start by referencing an important White Paper written in 1970 by a young graduate student in economics at UC Berkeley. That White Paper, entitled, ''Preliminary Design for an Electronic Market,'' written for the Pacific Commodity Exchange, was the world's first written conceptualization of a fully electronic, for-profit futures exchange.

The White Paper was written by Dr. Richard Sandor. That White Paper has now been republished in a new book by Dr. Sandor.[1] In it, he recounts how his idea lay mostly dormant through the 1970s to mid-1980s before being slowly developed, in fits and starts, first in Europe in the 1990s and then in the United States in the 2000s. His book notes that electronic execution of futures products with continuous liquidity has become almost ubiquitous today, while other exchange traded asset classes with more episodic liquidity, like options and swaps, continue to trade by voice.

What I found fascinating in Dr. Sandor's recounting of this five-decade long evolution from trading pits to electronic trading of futures was the absence of any grand plan behind the transformation. Instead, it was a series of incremental commercial developments and technology innovations. At all times, the impetus was the demands of market participants and the response of market operators to reduce trading costs and transaction friction. At no time, did government step in and say, ''Henceforth, all futures trading shall be on electronic exchanges.'' Instead, market evolution happened because a good idea was coupled with capable technology and mutual commercial interest with enough time to catch on and gain traction.

Before I joined the Commission, I spent a decade and a half at a leading operator of swaps marketplaces. We launched many innovative electronic platforms still in use today. Some of the platforms caught right on with our customers, others did not. Yet, we designed all of them to increase efficiency and reduce trading friction. It was just that sometimes our competitors designed better or cheaper ones or just simply got the timing right.

The point is that the design of trading platforms and the evolution of market structure is best done by platform operators, through trial and error, customer demand, commercial response and technological innovation. Regulators will never be close enough to the heartbeat of the markets, the spark of technology or the cost of development to prescribe the optimal design of trading platforms or business methods. Regulators can never know which trading methods will work best in the full range of market conditions, from low to extreme volatility.

Congress understood this. That is why Title VII of Dodd-Frank permits Swap Execution Facilities (SEFs) to conduct their activities through ''any means of interstate commerce,'' not ''such means that may be chosen by regulators.''

Once regulators step in and dictate who serves who with what type of service, we are picking winners and losers. We are simply not authorized, nor are we competent, to act in this way. If we do, the winners will invariably be those with the most persuasive voices and best lobbyists.

Congress knew that swaps are not traded by retail participants, but for sophisticated, institutional traders. Wall Street banks, hedge funds, prop shops and large energy companies have the wherewithal to demand the transaction services they need without regulators holding their hands. And the platform operators are not public utilities, but seasoned competitors. If there is money to be made, trading efficiencies to be achieved, customers to be served or costs to be saved, they will find them. If there is a better mousetrap to be built, they will build it.

Unfortunately, the CFTC did not listen to Congress. Contrary to provisions of Dodd-Frank that permit SEFs to operate by ''any means of interstate commerce,'' the current SEF rules constrain swaps trading to two methods of execution—request-for-quote or order book. While swaps not subject to the trade execution mandate can utilize other methods, SEFs must nevertheless provide an order book for such permitted transactions. All other ''required'' transactions have to be executed exclusively on one of those two options. Further, the rules incorporate a number of practices from futures markets that are antithetical to swaps trading, such as the 15 second ''cross'' and execution of block trades off platform. Additionally, the SEF core principles are interpreted in ways that are not conducive to environments in which swaps liquidity is formed and price discovery is conducted.

One effect of this approach has been to incentivize the shift of swaps price discovery and liquidity formation away from SEFs to introducing brokers (or ''IBs''). SEFs have turned into booking engines for trades formulated elsewhere, often on IBs. Yet, IBs are not appropriate vehicles to formulate swaps transactions. The intended purpose of IBs in the CFTC's regulatory framework is to solicit orders for futures transactions, not swaps. Moving swaps price discovery and liquidity formation away from SEFs to IBs is not what Congress intended in Dodd-Frank. The goal was to have the entire process of swaps liquidity formation, price discovery and trade execution take place on licensed SEF platforms. IBs are not subject to conduct and compliance requirements appropriate for swaps trading. Their employees are not required to pass exams for proficiency in serving institutional market participants in over-the-counter swaps markets but they are for retail customers who are prohibited from trading swaps.

Another effect of the current approach is the paucity of platform innovation and new platform operators competing for market share. The stagnation has allowed a few incumbents to consolidate and dominate market share. According to one large swaps trader, ''the biggest disappointment of SEFs is that nothing has really changed. I'm still trading the same way today as I was 10 years ago.'' [2] And, yet, the current rules were supposed to have caused as much as a hundred firms to register as SEFs.[3]

I have written a few white papers of my own. I have called for revising our current restrictions on SEF activity and allowing flexible methods of execution for swaps transactions using any means of interstate commerce, exactly as Congress intended.[4]

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[1] Sandor, Richard L., ''*Electronic Trading & Blockchain: Yesterday, Today and Tomorrow,*'' 2018, World Scientific Publishing Co. Pte. Ltd.

[2] Robert Mackenzie Smith, ''*SEF reforms could distort new, sounder benchmark rates,*'' Risk.net, 19 Oct. 2016, at: *https://www.risk.net/derivatives/6049931/sef-reforms-could-distort-new-sounder-benchmark-rates.*

[3] Christopher Doering & Roberta Rampton, ''*US May See 100 New Swaps Execution Entities: Broker,*'' Reuters, Oct. 12, 2010, at: *https://www.reuters.com/article/us-financial-regulation-sefs/u-s-may-see-100-new-swap-execution-entities-broker-idUSTRE69B69020101012.*

[4] Commissioner J. Christopher Giancarlo, *Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank,* Jan. 29, 2015, *http://www.cftc.gov/idc/groups/public/@newsroom/*

Today's proposal does just that. It will allow SEFs to innovate to meet customer demand and operate trading environments that are more salutatory to the more episodic nature of swaps liquidity. At the same time, it will make the ''made available for trading'' determination synonymous with the clearing determination to include all swaps subject to the clearing requirement and listed by a SEF or DCM. This is meant to bring the full range of liquidity formation, price discovery and trade execution on SEFs for a broader range of swaps products.

The promotion of swaps trading on SEFs brings ''daylight to the marketplace'' by subjecting a much broader range of swaps products to SEF record keeping, regulatory supervision and oversight, just as Congress intended.

It is said that if CFTC mandates for minimum trading functionality go away, so will the current degree of electronic execution in the market. Sorry, but that is a naïve concern. Those electronic SEF platforms that are successful provide too much competitive advantage and cost efficiency and sunk costs to be shut down simply because they are no longer subject to a regulatory mandate. No firm is going to give up electronic trading market share and profitability and increase trading friction because regulation suddenly becomes less prescriptive.

A word about ''impartial access,'' Dodd-Frank requires SEFs to have rules to provide market participants with ''impartial access'' to the market *and* permits SEFs to establish rules regarding any limitation on access.

''Impartial access'' means just that, ''impartial''. It does not mean that SEFs must serve every type of market participant in an all-to-all environment. If it did, then Congress would not have allowed SEFs to establish rules for limitation of access.

The new proposal would establish what is meant by ''impartial access''. The proposal will generally define ''impartial'' as transparent, fair and non-discriminatory as applied to all similarly situated market participants in a fair and non-discriminatory manner based on objective, pre-established requirements.

Today's proposal would also enhance the professionalism of SEF personnel who exercise discretion by adopting proficiency requirements and conduct standards suitable for swaps. Furthermore, the proposal adopts rule changes in a number of places where staff has previously issued guidance or no-action relief from the current rules, thereby increasing regulatory clarity and certainty.

We have approached today's proposal with the principle that the CFTC engage its international counterparts with respect and due consideration. The staff of the CFTC and I have made every effort to ensure that non-U.S. authorities had the opportunity to review and discuss the 2015 SEF White Paper that set out the concepts underlying today's proposal. Based on that outreach, I see no reason why today's proposal would be viewed as inconsistent with the regulatory systems of other G20 jurisdictions. We certainly welcome further dialogue with them. In fact, today's proposal is entirely consistent with, and anticipated by, recent discussions with foreign authorities about the CFTC's SEF regime, including the equivalence agreement for swaps trading platforms with the European Commission that EC Vice President Dombrovskis and I announced one year ago here in this room. That agreement, which focused on an outcomes-based approach toward EU equivalence and CFTC exemptions, was made by both parties with full knowledge and understanding of the changes advocated in the 2015 SEF White Paper and presented to us today.

Let me briefly address today's request for comment on the practice of name give up in swaps markets. There are a range of perspectives on this market practice. I have an open mind as to the advisability of restrictions on the practice and what form a rule would take, if at all. I look forward to comments and hearing more about the current impact of this practice in the marketplace.

One final point: Today's proposal will invariably be slammed by opponents of change as a ''rollback'' of Dodd-Frank. Any such characterization would be disingenuous.

Those who examine my record know that I have been a consistent supporter of the swaps reforms embodied in Title VII of the Dodd-Frank Act. In fact, of the current five Commissioners, I may have been the first to publicly state my support for Title VII.[5] And, I have not waivered since. Congress got Title VII right. There, I said it again.

My support for the Title VII reforms—swaps clearing, swap dealer registration and requirements, trade reporting and regulated swaps execution—is not based on academic theory or political ideology. It is based on fifteen years of commercial experience. Done right, the reforms are good for American markets.

So is today's proposal. It is not a rollback, but a policy improvement, a step forward, to enhance swaps market health and vitality that is true to Congressional intent and purpose. I trust that market participants and interested parties will fairly consider it with the good faith with which it is presented. I look forward to a broad and active discussion.

In closing, I compliment the DMO staff for putting together a balanced rule proposal and request for comment. I would like to commend them for their many hours of hard work, the quality of the written proposal and their thoughtfulness and engagement throughout.

You know, it is satisfying to see how an old White Paper, with ample time and reflection, can become a formal proposal, an arrow hitting its mark.

I look forward to the public's comments, healthy discussion, and a final rule in 2019.

Appendix 3—Supporting Statement of Commissioner Brian D. Quintenz

I will vote in favor of issuing today's proposed rule and the request for comment reforming the regulatory regime of swap execution facilities (SEFs). The Chairman has shown great thought leadership and transparency in consistently and fully articulating his vision for swaps trading rules that would create a more cohesive, liquid swap marketplace. Today's proposal represents a significant step toward executing that vision. I look forward to hearing from market participants about how these broad reforms will work collectively to impact SEF trading dynamics and liquidity formation. Mr. Chairman, I know this day has been a long time coming, and I congratulate you and the Division of Market Oversight for all of your and their tireless work on this proposed rule.

Appendix 4—Concurring Statement of Commissioner Rostin Behnam

Introduction

Today, the Commission votes to issue proposed rules that would constitute an overhaul of the existing framework for swap execution facilities (SEFs). Given the breadth and complexity of the proposed rules before us, the process of public comment is particularly important. I look forward to receiving input from market participants and the public who would be impacted, in any way, by a reworking of the SEF rules.

Background

As we consider the goals and therefore the direction of any SEF reform, I think it is very important that we first review how we got where we are today. Prior to the 2008 financial crisis, swaps were largely exempt from regulation and traded exclusively over-the-counter, rather than on a regulated exchange.[1] Lack of transparency in the over-the-counter swaps market contributed to the financial crisis because both regulators and market participants lacked the visibility necessary to identify and assess swaps market exposures and counterparty relationships.[2] In the aftermath of the financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 (Dodd-Frank Act).[3] The Dodd-Frank Act largely incorporated the international financial reform initiatives for over-the-counter derivatives laid out at the 2009 G20 Pittsburgh Summit aimed at improving transparency, mitigating systemic

documents/file/sefwhitepaper012915.pdf; (''2015 SEF White Paper''); and *Swaps Regulation Version 2.0: An Assessment of the Current Implementation of Reform and Proposals for Next Steps,* April 26, 2018.

[5] *Wholesale Markets Brokers' Association, Americas, Commends Historic US Financial legislation,* Jul. 21 2010, available at: *http://www.lexissecuritiesmosaic.com/gateway/CFTC/Speech/01_WMBAA-Dodd-Frank-Law-press-release-final123.pdf.*

[1] *See* Commodity Futures Modernization Act of 2000, Public Law 106–554, 114 Stat. 2763 (2000).

[2] *See* The Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States (Official Government Edition), at 299, 352, 363–364, 386, 621 n. 56 (2011), *available at https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.*

[3] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

risk, and protecting against market abuse.[4] Title VII of the Dodd-Frank Act amended the Commodity Exchange Act (CEA or Act) to establish a comprehensive new swaps regulatory framework that includes the registration and oversight of a new registered entity—SEFs. A key goal of Title VII of the Dodd-Frank Act is to bring greater pre-trade and post-trade transparency to the swaps market. The concept of transparency runs throughout Title VII—starting with the title itself: The ''Wall Street *Transparency* and Accountability Act of 2010.'' [5]

As part of the Dodd-Frank effort to provide more transparency, in 2013 the Commission adopted the part 37 rules in order to implement a regulatory framework for SEFs.[6] In so doing, the Commission emphasized that ''[pre-trade] transparency lowers costs for investors, consumers, and businesses; lowers the risks of the swaps market to the economy; and enhances market integrity to protect market participants and the public.'' [7]

The relatively young SEF framework has in many ways been a success. There are currently 25 registered SEFs.[8] Trading volume on SEF has been steadily growing each year.[9] The Commission's work to promote swaps trading on SEFs has resulted in increased liquidity, while adding pre-trade price transparency and competition.[10]

This is not to say that the SEF rules were perfect from the start and would not benefit from some targeted changes. Most SEFs operate under multiple no-action letters granted by the Division of Market Oversight. While the purpose of this form of targeted relief was often to smooth the implementation of the SEF framework, codifying or eliminating the need for existing no-action relief would provide market participants with greater legal certainty.

The current SEF rules have not brought as much trading onto SEFs as intended or envisioned. We can improve upon that. Currently, the Commission has a regulatory process for SEFs to demonstrate through a multi-factor analysis that a swap has been made-available-to-trade, or ''MAT,'' [11] meaning that it is required to trade on a SEF or DCM. The current process has resulted in relatively few MAT determinations and, after an initial flurry of submissions for the most standardized and liquid products, no further submissions have been made. I believe that addressing the MAT process could bring more activity on SEF, bringing pre-trade transparency to more products without dismantling the aspects of the SEF rules that are working currently.

Notice of Proposed Rulemaking (NPRM)

While I believe targeted reforms could bring more products onto SEFs, increase transparency, and lower costs for market participants, today's NPRM is far from targeted, and in some instances may represent a regulatory overreach. I therefore have a number of very serious concerns with the NPRM's approach and its far-ranging alterations. First, the NPRM violates the clear language of the Act, which states that one of the major goals of the SEF regulatory regime is to promote pre-trade transparency in the swaps market. As discussed below, the NPRM does exactly the opposite. Second, in addition to reducing transparency, the proposed rule also increases limitations on access to SEFs. The NPRM purports to increase choice and flexibility for SEFs; however, it simultaneously allows SEFs to limit choice and flexibility for market participants. Third, as commenters and the Commission think about the NPRM, I think it is also important to consider whether we would be creating a new registration scheme that adds significant costs for market participants, while failing to address the fixable issues that exist in the market today.

Pre-Trade Transparency

Section 1a(50) of the Act defines a SEF as ''a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce. . . .'' [12] Section 5h(e) of the Act states that ''[t]he goal of this section is to promote trading of swaps on swap execution facilities *and to promote pre-trade transparency in the swaps market.*'' [13] The existing SEF rules establish two methods of execution for required transactions: The central limit order book (CLOB) and the Request for Quote (RFQ) system.[14] These methods were chosen specifically because they provide pre-trade transparency.

I am concerned that the NPRM goes too far by allowing, literally, any means of execution. The NPRM's preamble states that the approach ''*should* also promote pre-trade transparency in the swaps market by allowing execution methods that maximize participation and concentrate liquidity. . . .'' This simply cannot be true. Absent a clear standard of what constitutes pre-trade transparency, it is fairly easy to envision an execution method that would not provide pre-trade transparency—one need look no further than the over-the-counter system that preceded the financial crisis. But this is more than a case of what the Commission *should* or *should not* do. The statute is clear. The Commission must ''promote pre-trade transparency in the swaps market.'' Today's NPRM would not do that.

That is not to say that expanding methods of execution—in a more limited and targeted way—is a bad idea or violates the Act. There are likely other execution methods that fit within section 1a(50) and would promote pre-trade transparency. I look forward to hearing from commenters as to what those methods might be, and debating with my fellow Commissioners as to whether they are appropriate within the confines of congressional intent and ultimately the Act.

Made Available To Trade

As I mentioned earlier, the MAT process is seemingly broken. The Commission stopped receiving MAT submissions after an initial set of submissions for the most standardized and liquid swaps contracts.[15] The Commission has not received any MAT submissions or made any MAT determinations since 2014.[16] This is not what the Commission envisioned in promulgating the Made Available to Trade rule.[17] The solution posited today is, in a sense, a simple, elegant one. The NPRM states that the phrase ''makes the swap available to trade'' in CEA section 2h(8) should be interpreted to mean that ''once the clearing requirement applies to a swap, then the trade execution requirement applies to that swap upon any single SEF or DCM listing the swap for trading.'' This would take both the SEF and the Commission out of the determination process.

My concern, however, is that there may be products that are more appropriately traded off SEF. In addition, tying the trade execution requirement to the clearing requirement could have unintended consequences—it could actually discourage voluntary central clearing.

I look forward to hearing from commenters regarding the appropriate interpretation of the term ''made available to trade'', including how to improve the existing process.

Impartial Access

One of the most troubling aspects of the NPRM is that it would alter the Commission's interpretation of ''impartial access'' under SEF Core Principle 2. Core Principle 2 of the Act requires SEFs to establish and enforce participation rules that ''provide market participants with impartial access to the market.'' [18] Current Commission regulation 37.202(a) states that a SEF ''shall provide *any* eligible contract participant . . .

[4] G20, *Leaders' Statement, The Pittsburgh Summit* (Sept. 24–25, 2009) at 9, *available at https://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf.*

[5] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, title VII, Section 701, 124 Stat. 1376 (2010).

[6] Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476 (Jun. 4, 2013).

[7] *Id.* at 33477.

[8] *See Trading Organizations—Swap Execution Facilities (SEF), CFTC.gov, https://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=SwapExecutionFacilities* (last visited Nov. 4, 2018).

[9] *See FIA SEF Tracker, FIA.org, https://fia.org/node/1901/* (last visited Nov. 4, 2018).

[10] *See* Bank of England Staff Working Paper No. 580, Centralized Trading, Transparency and Interest Rate Swap Market Liquidity: Evidence from the Implementation of the Dodd-Frank Act (May 2018), pp. 2–4, 18–24, *available at https://www.bankofengland.co.uk/-/media/boe/files/working-paper/2018/centralized-trading-transparency-and-interest-rate-swap-market-liquidity-update.*

[11] *See* 17 CFR 37.10, 38.12.

[12] 7 U.S.C. 1a(50).

[13] 7 U.S.C. 7b–3(e).

[14] *See* 17 CFR 37.9.

[15] *See* CFTC, Industry Oversight, Industry Filings, Swaps Made Available to Trade Determination, *https://sirt.cftc.gov/sirt/sirt.aspx?Topic=%20SwapsMadeAvailableToTradeDetermination.*

[16] *Id.*

[17] *See* Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 FR 33606 (Jun. 4, 2013).

[18] 7 U.S.C. 7b–3(f)(2).

with impartial access to its market(s) and market services.'' (emphasis added). The Commission was clear in the preamble to the existing rules that ''the purpose of the impartial access requirement is to prevent a SEF's owners from using discriminatory access requirements as a competitive tool'' against certain eligible contract participants.[19] The current rule provides that a SEF can restrict access based on disciplinary history or financial or operational soundness, if objective, pre-established criteria are used. What a SEF cannot do is restrict access to certain types of participants.

Today's NPRM would roll back this interpretation, leaving the term ''impartial access'' an empty shell. The proposed rule would ''allow SEFs to serve different types of market participants or have different access criteria for different execution methods.'' This is exactly the type of discrimination that the ''impartial access'' provision in the Act was intended to prevent.

I believe that *all* market participants should have impartial access to a SEF whose access criteria is applied in a fair and non-discriminatory manner. Rather than erecting new barriers to participation, we should focus on applying our existing regulations as they are clearly written. It seems to me that impartial access theoretically would go hand-in-hand with the proposed widening of SEF execution methods. Instead, the Commission seems to be bending over backwards to be impartial regarding SEFs' modes of execution, while allowing the SEFs themselves to discriminate. This threatens to take us back to the world as it was pre-Dodd-Frank and pre-financial crisis, undermining some of the key successes of the existing SEF regulatory regime regarding transparency and market access.

Registration/Costs

I would like to turn for a minute to the potential costs to market participants—and the Commission—from this proposed rule. Currently, there are 25 registered SEFs.[20] The Proposal will drastically increase the number of SEFs—likely by multiples. In the cost benefit considerations to the NPRM, the Commission estimates that approximately 40–60 swaps broking entities, including interdealer brokers, and one single-dealer aggregator platform would need to register as a SEF. That is the universe that we know—the market as we understand it to exist today. There could be more—perhaps many more—entities that will fall under the expanded registration requirements. Just as importantly, we do not know how these new rules will incentivize SEFs—whether they will lead to consolidation or myriad SEFs with myriad methods of execution.

The new registration regime, and the many changes that come along with it, will result in substantial costs all around: To both existing SEFs and new SEF registrants, and to their participants. I note with some concern that, while the preamble provides a laundry list of what rule changes will result in costs, there is no effort to quantify them. Operating or participating in a regulated market comes with costs; but, these incremental costs are offset, in part, by the benefits of having access to a transparent, safe market ecosystem that demands accountability and punishes wrongdoers. I do not mean to suggest anything else. However, as the Commission proceeds with this NPRM, I am hopeful that the best, most cost effective regulatory solutions will prevail as the Commission seeks to improve and advance the health and vibrancy of the SEF marketplace.

Comment Period

I also want to quickly raise a non-substantive concern, but one that may greatly impact the substance of the NPRM. The comment period for the proposal is only 75 days. As I have stated previously, this rulemaking is complex and impacts a wide range of market participants in fundamental ways. There are 105 numbered questions for commenters in the NPRM's preamble, in addition to general requests for comment. I think it is very important that we give market participants time to carefully consider the proposed rule and make reasoned comments. Recent proposed rules that raised complex issues, like the capital rule and Reg AT, had 90 day comment periods followed by extensions of at least an additional 60 days.[21] The original part 37 notice of proposed rulemaking ultimately had open comment periods totaling 90 days, and market participants had 7 months between publication of the notice of proposed rulemaking and the end of the final comment period.[22] Today's NPRM deserves careful consideration, both from the public and from the Commission, and I hope that the Commission will give market participants the time they need to respond thoughtfully and thoroughly.

Name Give Up Request for Comment

Before I conclude, I would like to turn briefly to the name give-up request for comment that is before us as well, as it is inextricably tied to the SEF NPRM. Post-trade name give-up also relates to the issue of impartial access, which I discussed earlier. While today's SEF NPRM reworks the SEF rules generally, the NPRM does not address the long standing practice of disclosing the identity of each swap counterparty to the other after a trade has been matched anonymously. Instead, the Commission is voting to issue a request for comment seeking public comment on the practice. While I appreciate the desire to be measured and thoughtful on this issue, I fear that not taking a view at this time in the proposal may function as an endorsement of the status quo. The request for comment puts name give-up on a slower track than the rest of the rule. Any rule to address the issue will now be well behind the process for the rest of the SEF rules.

Conclusion

As outlined above, I have numerous concerns about this NPRM, both in terms of what the Commission *should* do as policy makers, and in terms of what the Commission *can* do under the law. Congress was clear in the Dodd-Frank Act—the Commission is tasked with bringing greater pre-trade transparency to the swaps market. Today's NPRM not only fails to advance pre-trade transparency, it actually undermines pre-trade transparency that has been achieved through our existing regulations. In addition to the few issues I raise today, the NPRM's changes also demand thoughtful deliberation on equally important issues related to cross-border implications, investigations, audit trails, recordkeeping, and disciplinary hearings to name just a few.

As I read through the NPRM, I noticed a common thread that naturally aims to shift the current part 37 regime to a less prescriptive, and more principles based regime. The frequent weaving of words into the text of the NPRM like, *defer, flexible, reasonable, and discretion* stand as a clear declaration of where this proposal's authors want it to go. I have long been a proponent of sensible principles based regulation. I believe our markets, and more importantly this agency, are strongly rooted in a principles based regulatory regime. However, like the words of this NPRM, I have woven my own thoughts on striking the right balance between principles based and rules based regulation. Principles based regulation certainly does not mean an absence of rules—or the absence of supervision.

In remarks I delivered in February of this year, I stated, ''. . . [w]hile I strongly oppose any roll backs of Dodd-Frank initiatives, I believe a principles-based approach to implementation can be suitable in certain instances. A principles-based approach provides greater flexibility, but more importantly focuses on thoughtful consideration, evaluation, and adoption of policies, procedures, and practices as opposed to checking the box on a predetermined, one-size-fits-all outcome. However, the best principles-based rules in the world will not succeed absent: (1) Clear guidance from regulators; (2) adequate means to measure and ensure compliance; and (3) willingness to enforce compliance and punish those who fail to ensure compliance with the rules.'' [23]

If the Commission was voting on a final rule today, my vote would be no. However,

[19] *Supra* note 7 at 33508.

[20] *See Trading Organizations—Swap Execution Facilities (SEF), CFTC.gov, https://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=SwapExecutionFacilities (last visited Nov. 4, 2018).*

[21] Capital Requirements of Swap Dealers and Major Swap Participants, 81 FR 91252 (proposed Dec. 16, 2016), and Capital Requirements of Swap Dealers and Major Swap Participants, 82 FR 13971 (March 16, 2017) (extending comment period an additional 60 days); Regulation Automated Trading, 80 FR 78824 (proposed Dec. 17, 2015), Regulation Automated Trading, 81 FR 85334 (proposed Nov. 25, 2016), and Regulation Automated Trading, 82 FR 8502 (Jan. 26, 2017).

[22] Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 25274 (May 4, 2011), *available at https://www.gpo.gov/fdsys/pkg/FR-2011-05-04/pdf/2011-10884.pdf.*

[23] Rostin Behnam, Commissioner, U.S. Comm. Fut. Trading Comm'n, Remarks of Rostin Behnam before FIA/SIFMA Asset Management Group, Asset Management Derivatives Forum 2018, Dana Point, California (Feb. 8, 2018), *https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam2.*

I fully recognize that our existing part 37 rules are not perfect. Bringing more activity on SEF is a laudable goal, both from a policy perspective and because Congress has tasked the Commission with doing so. I will support today's proposed rule because I believe that it is important that we hear from market participants regarding what aspects of the NPRM will improve the regulatory framework for SEFs, while staying within our responsibilities under the law.

Appendix 5—Dissenting Statement of Commissioner Dan M. Berkovitz

I. Summary of Dissenting Views

I respectfully dissent from the Commodity Futures Trading Commission's (''CFTC'' or ''Commission'') notice of proposed rulemaking regarding Swap Execution Facilities and Trade Execution Requirement (the ''Proposal''). This Proposal would reduce competition and diminish price transparency in the swaps market, which will lead to higher costs for end users and increase systemic risks.

The Proposal would abandon the commitments the United States made at the G20 Summit in Pittsburgh in 2009 to trade standardized swaps on exchanges or electronic trading platforms and is contrary to Congressional direction in the Dodd-Frank Act and the Commodity Exchange Act (''CEA'') reflecting those commitments. It would retreat from the progress made by the Commission and the financial industry in implementing those reforms.

The Proposal would reduce competition by cementing the oligopoly of the largest bank dealers as the main source of liquidity and pricing in the swaps markets. It would diminish transparency by removing the requirement that highly liquid swaps be traded through competitive methods of trading. By reducing competition and diminishing price transparency, the Proposal would increase systemic risks and lead to higher swaps prices for commercial and financial end-users. Ultimately, the millions of Americans who indirectly participate in the swaps market through their investments in retirement accounts, pension plans, home mortgages, and mutual funds will pay that higher cost. Finally, the Proposal would provide SEFs with too much discretion to set their own rules and in so doing, weaken regulatory oversight and enforcement capabilities.

II. Major Flaws in the Proposal

The evidence is clear that the Dodd-Frank reforms, including the Commission's swap execution regulations, have led to more competition, greater liquidity, more electronic trading, better price transparency, and lower prices for swaps that are required to be traded on regulated platforms. Numerous academic studies and reports by market consultants have documented these benefits.[1] The Proposal ignores this evidence and analysis.

The Proposal would jettison the regulatory foundation for the way swap execution facilities (''SEFs'') currently operate. It would delete the requirement that swaps that are subject to the trade execution mandate (''Required Transactions'') be traded either on Order Book or by a request for quote from at least three market participants (''RFQ–3''). This would undermine the Congressional directive in the Dodd-Frank Act that for Required Transactions, a SEF provide multiple participants with ''the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system.'' [2] Consequently, the Proposal would lead to less price transparency and less competition.

The Proposal also would gut the impartial access requirement in the Dodd-Frank Act. The statute requires SEFs to establish rules that ''provide market participants with impartial access to the market.'' [3] Authorizing discrimination based on the type of entity will permit the largest bank-dealers to establish and maintain exclusive pools of liquidity for themselves. By denying other market participants access to the most favorable prices in the dealer-to-dealer market, bank dealers can prevent others from cost-effectively competing with them for customers. Eliminating competition will result in higher prices for customers. Permitting large banks and dealers to discriminate in this manner is inconsistent with sound economic principles underpinning competitive markets and the CEA's impartial access requirement.

In pursuit of the goal of ''flexibility'' for SEF markets, the Proposal deletes, reverses, or waters down many key trading, access, and compliance requirements for SEFs. The wide latitude that would be granted to SEFs as to how swaps may be traded, who may trade them, the oversight of the marketplace, and the conduct of the brokers looks very much like the ''light-touch'' approach to regulation that was discredited by the financial crisis.

Seven years ago, as the Commission was formulating the current regulations, very little data was available on swap trading and pricing. But now, after six years of experience with those regulations, we have an extensive amount of data, collected by SEFs and swap data repositories. The Commission should base its regulatory decisions on this data and the studies and literature that have analyzed this data and demonstrated the benefits of the current swap trading requirements.

Unfortunately, the Proposal does not consider the available data and market studies that demonstrate the current RFQ–3 system is working well to provide highly competitive prices and low transaction costs. For example, the Proposal ignores the following studies and conclusions:

- **CFTC economists' study (2018).**[4] This study, conducted by four CFTC economists, concluded: ''Judged from our evidence, SEF-traded index CDS market seems to be working well after Dodd-Frank—dealers' response rates are high, the vast majority of customer orders result in trades, and customers' transaction costs are low.'' [5] With respect to the most liquid CDS index swaps, the CFTC economists found that ''the average transaction cost is statistically and economically close to zero.'' [6]
- **Bank of England Staff Working Paper (2018).**[7] This Bank of England paper concluded that the CFTC's trade execution mandate, including the RFQ–3 requirement, has led to a ''sharp increase in competition between swap dealers'' in dealer-to-customer transactions for interest rate swaps subject to the mandate.[8] The study concluded that this competition had led to ''a substantial reduction in execution costs,'' amounting ''to daily savings in execution costs of as much as $3–$6 million for end-users of USD swaps.'' [9]
- **Study of ''Market Structure and Transaction Costs of Index CDSs'' (2017).**[10] This study found that prices customers obtained in the dealer-to-customer market through the RFQ system often were better than the prices that were available on the interdealer Order Book.[11] ''[O]ur results show that the current market structure delivers very low transaction costs. . . .[12]

The Proposal conjectures that novel ''flexible methods of execution'' will benefit the trading of all swaps. The Proposal, however, does not identify any trading methodology that can provide lower costs than the RFQ–3 method as applied to interest rate swaps and index CDS subject to the current trade execution mandate. In discarding the trading requirements for Required Transactions to bring more swaps onto SEFs, the Proposal throws the baby out with the bathwater.

Today, a small number of large dealers provide liquidity to the swaps market. Five very large banks were party to over 60 percent of interest rate swap transactions.[13] Liquidity in highly standardized swaps is fragmented between a dealer-to-dealer market and a dealer-to-customer market. There are no non-dealers in the dealer-to-dealer market. This high degree of reliance on a few large bank dealers to supply liquidity to all swaps market participants presents systemic risks as well as other types of risk that arise in highly concentrated markets.

One of the fundamental purposes of the CEA is to ''promote responsible innovation

[1] *See infra* section II.

[2] 7 U.S.C. 1a(50).

[3] 7 U.S.C. 7b–3(f)(2)(B)(i).

[4] Lynn Riggs (CFTC), Esen Onur (CFTC), David Reiffen (CFTC) & Haoxiang Zhu (MIT, NBER, and CFTC), *Swap Trading after Dodd-Frank: Evidence from Index CDS* (Jan. 26, 2018) (''CFTC Economist Study'').

[5] *Id.* at 50.

[6] *Id.* at 43.

[7] Evangelos Benos, Richard Payne & Michalis Vasios, *Centralized trading, transparency and interest rate swap market liquidity: Evidence from the implementation of the Dodd-Frank Act,* Bank of England Staff Working Paper No. 580 (May 2018) (''Bank of England Study'').

[8] *Id.* at 31.

[9] *Id.* The authors explain that during this period these EUR-mandated swaps were not traded on SEFs due to the fragmentation of the EUR swaps market. *Id.* at 28.

[10] Pierre Collin-Dufresne, Benjamin Junge & Anders B. Trolle, *Market Structure and Transaction Costs of Index CDSs* (Sept. 12, 2017) (''Collin-Dufresne, Junge, and Trolle Study'').

[11] *Id.* at 38.

[12] *Id.* at 6.

[13] *Quantifying Interest Rate Swap Order Book Liquidity,* Greenwich Associates, Q1 2016 (''Greenwich Report''), at 8.

and fair competition among boards of trade, other markets and market participants.'' [14] It is the CFTC's mission, and incumbent upon this agency in carrying out that mission, to ensure that there is fair competition among all market participants. This means ensuring no market participant or limited group of participants has excessive market power. Market structure and price competition should develop in the interest of all market participants, rather than in the interest of just a few of the largest banks. The Commission should strive to remove the existing barriers to broader participation and fair competition in the swaps markets. In my view, the Proposal seeks to perpetuate existing barriers.

III. Targeted Reforms To Consider

The current system is not perfect; there are flaws that should be addressed. But the evidence is clear that the current system has provided substantial benefits over the unregulated system that existed prior to the financial crisis and the Dodd-Frank reforms. The Proposal would return the swaps market to the dealer-dominated, trade-however-you-want system heavily reliant on voice brokers that existed prior to the financial crisis. At the G20 Summit in Pittsburgh in 2009, the United States made an international commitment to move away from the dealer-dominated, voice-brokered approach and Congress expressly rejected the dealer-dominated, flexible approach when it adopted the Dodd-Frank Act.

My sense from working with and talking to swap market participants is that many do not see a need for a major overhaul of the swaps regulatory framework. The benefits of the current system are due not just to the regulations, but also are the result of major efforts and investments by market participants and operators of SEFs in electronic trading technology and personnel. Many market participants do not want to deal with another round of costs and uncertainties that wholesale regulatory changes will generate. They believe the current system is working, despite its flaws. They prefer that we consider more targeted reforms to address specific issues with the current system, rather than scrap the current system entirely. They do not want to face the possibility that the Commission will continue to engage in a repetitive cycle of de-regulation and re-regulation.

Rather than completely rewrite the SEF regulatory structure, and turn our back on the progress made in transparency and competition, I favor a more limited, data-based approach to build on our progress and improve upon the current structure. This could be accomplished by removing some of the unnecessary barriers to greater participation on SEFs. Banks and other swap dealers play a critical role in providing liquidity. We need them to participate. However, a highly concentrated dealer oligopoly is not a prerequisite for sufficient liquidity. We should seek ways to bring in more sources of liquidity and competition. Robust competition leads to healthier markets and improves the overall welfare of all market participants.

[14] 7 U.S.C. 5(b).

I support the goal of bringing more types of swaps onto the SEF trading environment. I could support a more narrow approach to achieve this goal that does not undermine the progress that has been made to date.

I am not persuaded that we should continue to have two separate pools of liquidity in the swaps market for all types of swaps, regardless of liquidity characteristics—one in which the dealers trade amongst themselves, and another in which the dealers trade with customers. Perhaps we should look for ways to consolidate rather than separate the swaps markets.

Specifically, I support considering the following regulatory measures to improve competition in the swaps market:

- **Abolish Name Give-Up.** The Commission should prohibit the practice of name give-up for cleared swaps. On many platforms that provide anonymous trading, the identity of a counterparty is provided to the dealer after the completion of a trade. Name give-up is a major deterrent to non-dealers seeking to participate on dealer-only platforms as it provides the dealers with valuable information about a counterparty's positions. Name give-up is a relic of the pre-Dodd-Frank era when most swaps were not cleared and the identity of the counterparty was necessary to manage credit risks.
- **Expand Floor Trader registration.** The Commission should amend the floor trader provision in the swap dealer definition to remove overly restrictive conditions. This would permit a wider range of proprietary traders to provide liquidity and compete with large bank dealers on price.
- **Revise capital requirements.** The Commission should work with the prudential regulators to ensure that capital requirements do not unduly restrict the availability of clearing services by futures commission merchants (''FCMs''). The current capital requirements have had the unintended consequences of discouraging FCMs from providing additional clearing services to the cleared swaps market.
- **Enable average pricing.** The Commission should work with market participants and facilities to enable buy-side firms to obtain average pricing for buy-side swap trades. Although average pricing is available for futures, it currently is not available for swaps, which limits the direct participation of buy-side asset managers on SEFs.

We should explore these and other ways to increase competition in the swaps market rather than retreat from the progress that has been made. What follows is a more detailed explanation of how the current regulatory system has improved the swaps market and how the Proposal would undermine those improvements.

IV. Specific Concerns With the Proposal

The Proposal raises the following specific concerns:

- Less competition
- Less transparency
- Higher prices for end-users
- Diminished CFTC supervision and enforcement abilities

A. Less Competition, Less Transparency, and Higher Prices

The first three concerns—higher prices, less competition, and less transparency—arise from the repeal of two critical and inter-related provisions of the current regulations.

Elimination of Order Book/RFQ–3. The Dodd-Frank Act sets forth a Rule of Construction that the goal of the SEF regulations is ''to promote the trading of swaps on swap execution facilities and to promote pre-trade price transparency in the swaps market.'' [15] A key requirement facilitating the statutory goal of pre-trade price transparency is that all Required Transactions must be traded by Order Book or RFQ–3.[16] Under RFQ–3, a customer must request quotes from at least three dealers prior to entering into a transaction. In this manner, dealers must compete on price.

The Proposal would delete the Order Book/RFQ–3 requirement, even for swaps already traded on SEFs and subject to the trade execution requirement. Instead, the Proposal states that ''a SEF may utilize 'any means of interstate commerce' for purposes of execution and communication, including, but not limited to, the mail, internet, email and telephone.'' [17]

Authorizing discrimination; eviscerating impartial access. Next, the Proposal flips on its head the impartial access requirement. CEA section 5h(f)(2)(B)(i) requires a SEF to ''provide market participants with impartial access to the market.'' [18] Under existing Commission Regulation 37.202, which implements this statutory provision, any SEF criteria governing access must be ''impartial, transparent, and applied in a fair and non-discriminatory manner.'' [19] In the 2013 SEF rulemaking, the Commission explicitly rejected a proposed interpretation that would permit SEFs to discriminate against types of market participants. ''[T]he Commission believes that the impartial access requirement of Core Principle 2 does not allow a SEF to limit access to its trading systems or platforms to certain types of [eligible contract participants (''ECPs'')] or [independent software vendors (''ISVs'')] as requested by some commenters. The Commission notes that the rule states

[15] 7 U.S.C. 7b–3(e).

[16] 17 CFR 37.9. In the 2013 rulemaking adopting the current SEF regulations, the Commission explained the rationale for this requirement: ''[T]he Commission believes that an RFQ System, as defined in § 37.9, operating in conjunction with a SEF's minimum trading functionality (*i.e.,* Order Book) is consistent with the SEF definition and promotes the goals provided in [CEA Section 5h(e), 7 U.S.C. 7b–3(e)], which are to: (1) Promote the trading of swaps on SEFs and (2) promote pre-trade price transparency in the swaps market. The Commission notes that the RFQ System definition requires SEFs to provide market participants the ability to access multiple market participants, but not necessarily the entire market, in conformance with the SEF definition.'' Core Principles and Other Requirements for Swap Execution Facilities (''2013 SEF Rulemaking''), 78 FR 33476, 33496 (June 4, 2013).

[17] Notice of proposed rulemaking, Swap Execution Facilities and Trade Execution Requirement (''Proposal''), section IV.I.4.b.

[18] 7 U.S.C. 7b–3(f)(2)(B)(i).

[19] 17 CFR 37.202(a)(1).

'impartial' criteria and not 'selective' criteria as recommended by some commenters.'' [20]

The Proposal would replace this critical requirement and allow each SEF to establish exclusionary criteria determining what *types* of market participants are ''similarly situated market participants'' that are allowed to trade on the SEF (let's call this what it is, the ''Discriminatory Access Provision''). This approach flips the statutory ''impartial access'' requirement on its head by empowering SEFs to build limited liquidity pools for a select few market participants such as the dealers seeking to hedge with each other.

Under the Discriminatory Access Provision, it is reasonable to expect that the large bank swap dealers would encourage discriminatory SEF participation criteria such that only large bank swap dealers would be ''similarly situated market participants'' able to participate in dealer-to-dealer liquidity pools. Proprietary trading firms and smaller dealers provide competition to the large banks in pricing swaps, and are one major reason customers are able to obtain favorable prices through the current RFQ process. If discrimination is permitted, these other types of firms would not be able to use the dealer-to-dealer market to effectively hedge or offset trades with customers, and therefore would not be able to compete with the large bank swap dealers in the dealer-to-customer market. In this manner, the Discriminatory Access Provision would result in a significant loss of competition in the dealer-to-customer market, which ultimately would result in higher prices for end users.[21]

If the current trade execution requirement is repealed, dealers also could establish single-dealer platforms and call them SEFs to siphon liquidity away from the RFQ platforms. The dealers wield significant market power in the swaps market. Five dealers currently account for nearly two-thirds of the interest rate swap market, which is the largest swap product category.[22] Although SEFs that currently offer RFQ–3 functionality might continue to do so even if the requirement is repealed, once the customers are no longer required to use that functionality, the dealers could undermine the effectiveness of the RFQ process by offering incentives to trade on single-dealer platforms or voice-brokered SEFs. This outcome would reduce liquidity for the RFQ platforms. In the long run, draining liquidity from RFQ–3 platforms to single-dealer or voice-brokered systems will result in less direct competition between dealers, less transparency, and higher costs for customers.[23]

The Proposal asserts that all-to-all markets are ''inimical'' to ''fundamental'' swaps trading features.[24] The Proposal also states that ''market participants have rarely used Order Books to trade swaps on SEFs,'' and that ''this low level of swaps trading on Order Books is attributable to an Order Book's inability to support the broad and diverse range of products traded in the swaps market that trade episodically, rather than on a continuous basis.'' [25] Following a brief discussion of why the Order Book is unsuitable for *some* swaps, the Proposal states that the Order Book should be eliminated for *all* swaps: ''[B]ased in part on its experience, the Commission proposes to eliminate the minimum trading functionality requirement and the regulatory Order Book definition.'' [26]

Similarly, the Proposal eliminates the RFQ requirement because it states that this method of execution may be unsuitable for some additional types of swaps that are currently traded off SEF. ''[T]he Commission believes that [Order Book and RFQ–3] would not be suitable for the broad swath of the swaps market that would become newly subject to the trade execution requirement.'' [27]

This reasoning is flawed. From the proposition that an Order Book may be unsuitable for *some* episodically traded swaps, it does not follow that an Order Book is unsuitable for *all* swaps, even highly liquid ones. Nor does it follow from the proposition that the RFQ process may be unsuitable for *some* swaps that it should be removed for *all* swaps. Yet this flawed logic appears to be the rationale for the elimination of both the Order Book and RFQ–3 functionality requirements, even for highly liquid standardized swaps.[28]

RFQ–3 has improved competition and lowered trading costs. Empirical evidence demonstrates that the Order Book/RFQ–3 and impartial access requirements for standardized, highly liquid cleared swaps have increased competition and transparency and brought low trading costs to swap markets. The Bank of England Study found that the RFQ–3 requirement significantly improved liquidity for U.S. dollar interest rate swaps, which reduced swap execution costs for end-users by an estimated $3 to $6 million *per day* relative to Euro swaps, which were not traded pursuant to the trade execution mandate.[29]

The Bank of England Study also assessed the impact of the SEF trading mandate on dealer market power.[30] The study found that, prior to the SEF trading mandate, 28 percent of customers for U.S. and Euro interest rate swaps that became subject to the mandate dealt with only a single dealer, and over 50 percent of customers dealt with three or fewer dealers.[31] After the SEF trading requirements went into effect, those percentages dropped to 8 percent and 20 percent, respectively.[32] The study states that ''[w]ith the improvements in pre-trade transparency, customer search costs have fallen and it has become easier for customers to trade with the dealer showing the best price.'' [33]

Other studies have found similar results. Collin-Dufresne, Junge, and Trolle compared the prices on the Order Books used in the interdealer market with the prices generated in the dealer-to-customer market through the RFQ system. The authors found that prices customers obtained in the dealer-to-customer market through the RFQ system often were better than the prices that were available on the interdealer Order Book.[34]

Economists in the CFTC's Office of Chief Economist examined data regarding the customer trading of index CDS on the Bloomberg and Tradeweb SEFs, which are the leading SEFs for dealer-to-customer trading.[35] The CFTC economists found that very little customer trading occurred on the Central Limit Order Book (''Clob'') of either facility, but rather that most of the trading occurred either by RFQ or by request-for-streaming (''RFS'').[36] Focusing on customer

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[20] 2013 SEF Rulemaking, 78 FR at 33508. The Commission also stated that ''the purpose of the impartial access requirements is to prevent a SEF's owners or operators from using discriminatory access requirements as a competitive tool against certain ECPs or ISVs.'' *Id.*

[21] It is unclear under the Proposal what happens to market participants subject to the SEF trading requirements who are not given access to a SEF because of the Discriminatory Access Provision.

[22] Greenwich Report at 8. One market participant has commented on the ability of the dealers to determine market structure through the exercise of their market power:

''There is no commercial explanation for having a market that is not open to a lot more people. It just doesn't make any sense. But the ability of people to enforce change outside the incumbent dealers is very limited,'' says the expert. ''The part that frustrates me more than anything is pretending that the leverage of the incumbent dealers over this market isn't real. When I hear people talk about the natural market evolution, I would contend that progress has been 100% prevented to date.''

Robert Mackenzie Smith, *US swap trading overhaul may reinforce market split, users warn,* Risk.net, Mar. 21, 2018, *https://www.risk.net/derivatives/5440516/us-swap-trading-overhaul-may-reinforce-market-split-users-warn.*

[23] In the equities market, the forced transition away from a market centered around multiple dealers improved prices substantially. *See, e.g.,* Michael J. Barclay, William G. Christie, Jeffrey H. Harris, Eugene Kandel & Paul H. Schultz, *The Effects of Market Reform on the Trading Costs and Depths of Nasdaq Stocks,* Journal of Finance, Vol. 54, Issue 1, at 1–2 (1999) (''Our results indicate that quoted and effective spreads fell dramatically without adversely affecting market quality.'').

[24] Proposal at section VII.A.1.a.

[25] *Id.* at section IV.C.2.

[26] *Id.*

[27] Proposal at section IV.I.4.b.

[28] In the Cost-Benefit Considerations, the Proposal acknowledges that ''the overall amount of pre-trade price transparency in swap transactions currently subject to the trade execution requirement may decline if the Order Book and RFQ-to-3 requirement[s are] eliminated. This potential reduction in pre-trade price transparency could reduce the liquidity of certain swaps trading on SEFs and increase the overall trading costs.'' Proposal at section XXIII.C.

[29] Bank of England Study at 31. As discussed further below, the Proposal appears to consider liquidity solely in terms of total volume of trades. The Bank of England Study measures liquidity using various price dispersion measures complemented by a price impact measure and a bid-ask spread. *See id.* at 4. This measure of liquidity better assesses how liquidity affects efficient execution, pricing, and timing of trading.

[30] *Id.* at section 5.

[31] *Id.* at 26.

[32] *Id.*

[33] *Id.*

[34] Collin-Dufresne, Junge, and Trolle Study at 38.

[35] The study reports that, according to the SEF Tracker, at the time of the study, Bloomberg held a market share of 71% and Tradeweb held a market share of 13.6%. CFTC Economist Study at 2.

[36] Under RFS, customers ask multiple dealers to send indicative quotes in a continuous manner, and can respond to one of them by proposing to trade at the dealers' quote.

trading through the RFQ mechanism, the CFTC economists found that, on average, a customer requests quotes from 4.1 dealers and gets back 3.6 responses.[37]

The CFTC economists concluded that the current regulatory structure is working well: ''Judged from our evidence, SEF-traded index CDS market seems to be working well after Dodd-Frank—dealers' response rates are high, the vast majority of customer orders result in trades and customers' transaction costs are low.'' [38] Specifically, the CFTC economists found that transaction costs were low for index CDS contracts:

The transaction costs of on-the-run CDX.NA.IG and iTraxx Europe have a mean around 0.2 bps and a standard deviation of 1.4 bps, so the average transaction cost is statistically and economically close to zero. For on-the-run CDX.NA.HY and iTraxx Crossover, the average costs are larger, at about 0.5 and 1.1 bps, but again not significant compared to their standard deviations of about 2.6 and 3.5 bps. The first off-the-run contracts have comparable average transaction costs but a much higher standard deviation due to the relatively few number of trades in these contracts.[39]

Market participants have expressed similar concerns about removing the Order Book/RFQ–3 and impartial access requirements. One senior executive at a trading firm recently stated that the SEF regulations have helped halve the bid-offer spread in US dollar swaps and increased price competition. ''My fear is we take too big a step back from having the competitive pricing in the market,'' he said. ''It is still a dealer-controlled market and if the biggest dealers simply say: 'Great, I don't have to put a competitive price on the screen anymore, and if someone wants my most competitive price then you've got to pick up the phone again,' I don't want to take that step backwards.'' [40]

Similarly, the CEO of one SEF cautioned, ''[o]ne of the risks of this concept of 'any means of interstate commerce' is you have benchmarks and fixings that rely on better liquidity coming in from liquid Clobs. You wouldn't want to go backwards in that respect.'' [41]

In 2016, Greenwich Associates reported that ''the buy side feels the executions they are receiving under the current paradigm are sufficient, if not excellent.'' [42] Greenwich Associates noted that, for many asset managers, sending a request for quote to three market participants and selecting the best-priced response (no matter how many respond) ''has long been considered an appropriate approach to achieving best execution.'' [43]

The Proposal does not reference any of these findings or views of market participants. In contrast to these data-based empirical studies regarding the benefits of the current regulatory system, the Proposal speculates—without any evidentiary support—that the ''flexibility'' afforded by the elimination of the Order Book/RFQ–3 requirement *may* provide various benefits. For example, the Proposal asserts ''SEFs would have broader latitude to innovate and develop new and different methods of execution tailored to their markets.'' [44] The Proposal further opines that these new, flexible methods ''*could be* more efficient,'' ''*may* lead to reduced costs and increased transparency,'' and ''*may* provide opportunities for new entrants in the SEF market.'' [45]

However, the Proposal provides no factual basis for any of these hypothetical benefits. In light of the very low execution costs that have been documented for interest rate and index CDS swaps traded through RFQ–3, it is difficult to understand why RFQ–3 should be eliminated, at least for the swaps to which it currently applies.

Effect of expanded trading mandate on liquidity. The overriding rationale for the Proposal is to attract greater liquidity formation to SEFs. The Proposal seeks to accomplish this goal by expanding the SEF trading requirement to include all mandatorily cleared swaps for which SEF trading exists, with several exceptions. Although the Proposal would expand the trade execution mandate in this manner, it also would eliminate the Order Book/RFQ–3 requirements and provide effectively unlimited flexibility as to the trading methods for all swaps subject to the expanded trading mandate. The Proposal broadly asserts, without providing any evidentiary support, that the expanded trading mandate will improve liquidity and pre-trade price transparency and reduce market fragmentation.

In asserting that the expanded execution mandate will increase on-SEF liquidity, the Proposal appears to measure liquidity solely in terms of volume. But volume does not equal liquidity. It is not apparent how simply moving this volume from off SEF to being traded within a SEF will have any effect on other traditional measures of liquidity, such as cost of transaction or price dispersion. Indeed, the only difference is that the swaps would be traded on SEF, but by the same people and using the same methods that they now use to trade them off SEF. It is not apparent how this would lead to any greater price transparency or lower costs.

How many and what types of swaps would be brought onto SEFs under the expanded trading mandate? The Proposal presents little data to answer this question. One approach would be to assume that all swap transactions that are currently subject to clearing would become subject to the expanded trading mandate under the Proposal. This amount may be significantly larger than the actual result because many swaps subject to clearing may not be easily traded on SEF. But by comparing this amount to the amount of swaps currently traded on SEF, we can estimate an upper bound on the incremental increase in on-SEF trading resulting from the Proposal.

The Proposal notes that an estimated 57% of the notional amount of interest rate swaps are being traded on SEF, and that 85% are subject to the clearing requirement. Accordingly, an upper bound of about 28% of interest rate swaps could be moved on SEF under the Proposal.[46] This estimate is consistent with a recent estimate provided by Clarus that approximately two-thirds of the fixed/float USD interest rate swap market is traded on SEF.[47] Examining the one-third of interest rate swaps that are being traded off SEF, Clarus found that ''[g]enerally speaking, everything off-SEF is bespoke.'' [48]

Again, it is not apparent how moving the trading of bespoke swaps from being traded by introducing brokers (''IBs'') outside a SEF to being traded by swap trading specialists inside a SEF will have any effect on the prices of those bespoke swaps. It is even less apparent how the trading of these bespoke swaps within a SEF will have any impact upon the trading of the highly liquid standardized swaps already being traded within a SEF under the RFQ–3 methodology. In fact, eliminating RFQ–3 for those liquid swaps could raise the prices for those swaps, and in turn may also negatively impact pricing for less liquid swaps, because most interest rate swaps—including bespoke swaps—are priced in part on a standard rate curve developed from prices for liquid swaps at various point along the curve.

Other impacts from excessive flexibility and discretion. The Proposal establishes an overly flexible approach that allows each SEF to self-determine how it will operate in almost every respect. Among other areas, a SEF would use discretion (a word used over 150 times in the Proposal) to tailor policies and procedures regarding trading procedures and rules, access, pre-execution communication, personnel oversight and ethics training, SEF compliance requirements, trading surveillance, error trade policies, record keeping, trade documentation, internal investigations and enforcement, setting fees, financial resource requirements, and supervision of third party services. Most of these changes would loosen current regulatory requirements.

Documentation of executed swaps would no longer be required at the time of execution, but as soon as technologically

[37] *Id.* at 17. The study also found that customers are more likely to request quotes from dealers with whom they have a clearing or pre-existing trading relationship, although customers realize small actual price benefits from requesting quotes from relationship dealers. *Id.* at 5.

[38] *Id.* at 50.

[39] *Id.* at 43.

[40] Robert Mackenzie Smith, *Sef reforms could distort new, sounder benchmark rates,* Risk.net, Oct. 19, 2018, *https://www.risk.net/derivatives/6049931/sef-reforms-could-distort-new-sounder-benchmark-rates* (remarks of Stephen Berger, Managing Director, Government and Regulatory Policy, Citadel).

[41] *Id.* (remarks of Scott Fitzpatrick, Chief Executive Officer, Tradition SEF).

[42] Greenwich Report at 7.

[43] *Id.* at 11.

[44] Proposal at section XXIII.C.4.b(1) (emphasis added).

[45] *Id.*

[46] Using the same method, available data from ISDA indicates that only about 4–5% of index CDS that are currently subject to mandatory clearing are not currently traded on SEF. *See* SwapsInfo Full Year 2017 and Fourth Quarter 2017 Review, ISDA, at 13–14 (Feb. 2018).

[47] *What is Left Off-SEF,* Clarus Financial Technology (Mar. 16, 2016), *https://www.clarusft.com/what-is-left-off-sef/.*

[48] *Id.*

possible. The Proposal acknowledges that creating flexibility for execution methods and trading technology makes simultaneous documentation ''impracticable.'' [49] In other words, moving away from electronic trading back to telephones will delay the time within which counterparties receive full confirmation of price and terms, preventing precision in the time of pricing, creating a higher likelihood of errors, and leading to less pre-trade price transparency.

Many of the changes in the Proposal would allow the SEF to exercise discretion in brokering trades and establishing rules to facilitate broking away from electronic platforms. The Proposal explains that one of the reasons for granting the SEF greater discretion is to allow voice-broking to occur directly within the SEF.

Traditional introducing broking, by its nature, is slower and less transparent at establishing prices as compared to electronic trading. As a broker calls around to multiple dealers for prices, the broker might make trade adjustments over time and prices from one call to the next may change. As time passes, prices may become stale, even within seconds. Dealers and other liquidity providers will add a cushion to the spread to account for this delay. This means that as the length of time increases between when a quote is first received and when the trade is executed and the price is reported, spreads become wider and pricing becomes less transparent. For certain trades, such as block trades, timing delays in price transparency might be appropriate for reasons related to the unique nature of each trade. However, we should not be adopting regulations that would degrade the current level of transparency for liquid swaps that are being efficiently traded using an Order Book or RFQ system.

Similarly, the Proposal would allow extensive pre-trade negotiation for all swaps so long as the SEF defines it into the SEF's trading rules. Pre-trade negotiation may be appropriate for certain bespoke or large sized swaps. However, to create flexibility in SEF trading methods, the Proposal would allow SEFs to include pre-trade negotiations for any and all types of swaps including standardized swaps currently traded electronically. However, the Proposal would allow SEFs to include pre-trade negotiations for more liquid, standardized swaps for which pre-trade price transparency is better achieved through electronic trading, as explained in the studies discussed above.

In addition, the Proposal would allow SEF trading specialists, when acting as brokers, to exercise discretion in sharing different market information with different market participants. The Proposal acknowledges that this ''trading discretion exercised by SEF trading specialists may affect the manner in which market participants are treated on a facility.'' [50] The Proposal suggests that this is somehow ''consistent with impartial access'' because it facilitates more trading. More likely, this greater degree of sanctioned discretion—the extent of which is largely left up to the SEFs to determine—would lead to unfair treatment of different market participants and less pre-trade price transparency because SEF trading specialists can decide who gets what information pre-trade.

The statements above should not be interpreted as critical of intermediary broking services. These services provide important options for trading and pricing certain types of swaps, such as bespoke swaps, package trades, and block sizes. Rather, my concern is that these important services and the professionals who provide them may become less regulated, and that they will become intermediaries for transactions that are required to be traded electronically.

B. Diminished Oversight and Enforcement

I am also concerned that this Proposal waters down the robust, and uniform, standards of conduct and supervision to which it currently holds SEFs, IBs, associated persons (''APs'') of IBs, and other market participants. This could lead to SEFs reducing their focus on compliance, require the Commission to take on an enhanced oversight role, and constrain the Commission's ability to investigate and prosecute abusive trade practices involving SEFs.

As previously discussed, this Proposal grants extensive discretion to SEFs to create rules governing their operations and does away with some of the specific compliance and recordkeeping obligations currently required by the regulations governing SEFs, set forth in Part 37 of the Commission's Regulations.[51] The Proposal suggests that providing SEFs with greater flexibility to tailor their compliance and oversight programs will mitigate compliance challenges that SEFs have encountered in implementing part 37, yet fails to describe in any detail those challenges.[52] On the other hand, we know that our current system of oversight provides market participants and regulatory authorities with uniform and descriptive standards of conduct and compliance procedures. Enumerating these standards (1) prevents a race to the bottom, in which market participants pare back their policies and procedures to the bare minimum, and (2) provides the registrant and the Commission with the tools they need to successfully enforce compliance with those standards.

As an example, the Proposal would remove the requirement set forth in Regulation 37.203(c) that a SEF establish and maintain sufficient compliance staff and resources to (i) conduct specific monitoring, including audit trail reviews, trade practice and market surveillance, and real-time market monitoring; (ii) address unusual market or trading events; and (iii) complete investigations in a timely manner. Rather, the Proposal would only require that the SEF establish and maintain sufficient compliance staff and resources to ensure that it can fulfill its self-regulatory obligations under the CEA and Commission Regulations. Without specific requirements on what compliance resources are needed, each SEF will be free to determine what level of resources is sufficient for such a broad mandate. In essence, the SEF need not map its compliance resources to specific compliance tasks. Additionally, experience has shown that conducting oversight and examinations of the sufficiency of a registrant's compliance resources is more difficult to undertake on a standard and fair basis across registrants when each one has a different view of what resources will meet the generalized requirement.

As another example, the Proposal eliminates the specific requirements that a SEF establish an annual audit trail review and related enforcement program, and retain certain categories of documents currently required by Regulation 37.205. The Proposal assumes, however that ''SEFs would continue to fulfill their information collection burdens in a manner similar to the status quo.'' [53] If the expectation is that SEFs will continue to comply with the current requirements, then why is it necessary to remove or weaken them? Many still view the compliance function as a cost center. It is unrealistic to assume that we can remove many of the specific conduct and recordkeeping obligations and expect that market participants will continue to comply, when competitive market pressures will drive the allocation of resources elsewhere. Moreover, market participants have dedicated significant resources to developing these compliance policies and systems, and changing them without sufficient justification does not make practical sense.

As a final example, the Proposal removes some of the specific requirements in Regulation 37.204 for oversight of third-party regulatory services. SEFs would no longer be required to conduct regular meetings with, and periodic reviews of, service providers or provide records of such oversight to the Commission. Instead, SEFs are given broad latitude to determine the necessary processes to supervise these providers. When registrants delegate critical functions to third-party providers, it is imperative that the registrant maintain diligent supervision over the provider's handling of these functions.[54] In my view, the Proposal does not provide satisfactory reasons for removing these unambiguous requirements, considering that doing so could hamper the Commission's ability hold SEFs accountable for supervising third-party providers.

Equally concerning is the sweeping change the Proposal makes to the way in which SEFs and their employees and agents will be registered, and in turn, the Commission's oversight of their conduct. Under the current system, swaps broking entities that meet the definition of an IB must be registered with

[49] Proposal at section IV.F.2.b.

[50] Proposal at section VII.A.1.a(1)(iii).

[51] 17 CFR part 37.

[52] Proposal at section I.C.

[53] Proposal at section XXIII.B.1.f.

[54] *See, e.g., In re AMP Global Clearing LLC,* CFTC No. 18–10, 2018 WL 898755 (Feb. 12, 2018) (consent order) (charging registrant with failing to supervise diligently its information technology provider's implementation of registrant's information systems security program); *In re Tillage Commodities, LLC,* No. 17–27, 2017 WL 4386853 (Sept. 28, 2017) (consent order) (charging registrant with failing to supervise diligently its fund administrator's operation of the registrant's bank account containing participant funds).

the Commission as such. The individuals who are involved in soliciting or accepting orders at IBs, or involved in supervising such individuals, must register as APs of IBs. As NFA members, IBs and APs are not only subject to the applicable Commission Regulations, but are also subject to uniform rules governing swaps brokering, trade practices, reporting, minimum financial requirements, proficiency testing, training standards, and supervision. In addition, NFA monitors IBs' swaps broking activity and compliance with all applicable statutes and rules. In furtherance of that responsibility, NFA conducts periodic examinations of swap IB member firms and has the ability to discipline IBs and APs where appropriate.

Under the Proposal, which limits the activity that can be conducted off SEF, IBs will need to register with the Commission as SEFs to continue to broker swaps transactions. Given that the majority of IBs engaging in swap transactions on SEF are affiliated with SEFs, it is likely that many of these entities, or their employees, will merge into or join the affiliated SEF. We can also expect to see the formation of new SEFs, which presumably would not be required to register as IBs.[55] SEFs and SEF employees would be free to withdraw their IB and AP registrations and memberships with NFA, leaving a regulatory vacuum with no self-regulatory organization oversight. Already strained Commission resources inevitably would need to fill that void.

Further, the Proposal creates an entirely new category of persons: The SEF trading specialist. As proposed, SEF trading specialists will perform ''core functions'' that facilitate swaps trading and execution, including negotiating trade terms, arranging bids and offers, and discussing market color with market participants, or directly supervising a person who engages in such functions. In fact, the Proposal notes that broadening the SEF registration and trade execution requirements would increase the level of discretion that these SEF employees and agents would exercise in connection with swaps trading. However, despite these key, customer-facing functions, SEF trading specialists would not be required to register with the Commission.

For this reason, I am also concerned that the Proposal would weaken the supervisory function within the SEF. Regulation 166.3 imposes a duty on all Commission registrants who act in a supervisory capacity, including APs, to diligently supervise the activities of employees and agents relating to their business as a Commission registrant.[56] However, if the SEF is not registered as an IB, and its employees are thereby not registered as APs, the SEF employees themselves will have no duty to supervise under Regulation 166.3. The Proposal imposes a separate duty on SEFs to supervise the activities of its SEF trading specialists ''in the facilitation of trading and execution on the swap execution facility.'' [57] Critically, however, that duty runs only to the SEF as an entity and not to its employees, including the SEF trading specialists. As a result, SEF trading specialists or other SEF employees with supervisory duties cannot be held individually liable for failure to supervise under any Commission regulation if they are not duly registered as APs of IBs. Individual accountability is an important tool in incentivizing corporate responsibility and I think it must be preserved.

Finally, in at least one instance, the flexibility afforded to SEFs to establish a code of conduct for their SEF trading specialists is in direct conflict with the supervision rules applicable to all registrants under Regulation 166.3. The Proposal states that a SEF's Code of Conduct ''*may* provide'' that, among other things, a SEF trading specialist ''not engage in fraudulent, manipulate, or disruptive conduct.'' [58] However, Regulation 166.3 requires that Commission registrants establish and maintain meaningful procedures for detecting and deterring fraud and other prohibited conduct by their employees and agents.[59] This could create another potential gap in our supervisory structure that could weaken the Commission's enforcement capabilities.

V. Conclusion

This Proposal is a fundamental overhaul of the SEF regulatory regime. The changes create a trading system that is so flexible that all swaps traded on SEFs—including the most liquid—could be traded the same way they were before the Dodd-Frank reforms were adopted. The Proposal would allow the largest dealers to establish separate dealer-to-dealer liquidity pools through exclusionary access criteria. Competition would be reduced and price transparency diminished. This is not what Congress intended when it passed the Dodd-Frank Act.

I am open to appropriate, targeted amendments to the regulations, several of which I have suggested above. However, empirical studies have shown that the existing SEF regulations have made great progress in achieving the statutory goals of promoting on-SEF trading and pre-trade price transparency. With respect to the swaps markets that are working and providing low costs to the buy side and end users, we should live by the adage, ''if it ain't broke, don't fix it.''

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[55] The Proposal is not clear on whether an existing IB that now must register as a SEF, but continues to primarily conduct phone broking and other IB-related activities, and continues to meet the IB definition, would need to be dually registered.

[56] 17 CFR 166.3.

[57] Proposal at section VI.A.3.f. Unlike Regulation 166.3, which applies to all activities relating to a registrant's business, the language ''in facilitation of trading and execution on the swap execution facility'' is susceptible to various interpretations and could considerably narrow the conduct that is required to be supervised.

[58] *Id.* at section VI.A.3.e (emphasis added).

[59] *See, e.g., CFTC* v. *Sidoti,* 178 F.3d 1132, 1137 (11th Cir. 1999); *Sansom Refining Co.* v. *Drexel Burnham Lambert, Inc.,* CFTC No. 82–R448, 1990 WL 10830742 (Feb. 16, 1990) (registrant has ''a duty to develop procedures for the 'detection and deterrence of possible wrongdoing by its agents.' ''). Moreover, various provisions of the CEA and Commission Regulations prohibit fraudulent and manipulative conduct, so adequate supervision necessarily dictates that entities and supervisors monitor for this conduct. *See, e.g.,* 7 U.S.C. 6b, 9.

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Part IV

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 422 and 423
Modernizing Part D and Medicare Advantage To Lower Drug Prices and Reduce Out of Pocket Expenses; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 422 and 423

[CMS–4180–P]

RIN 0938–AT92

Modernizing Part D and Medicare Advantage To Lower Drug Prices and Reduce Out-of-Pocket Expenses

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the Medicare Advantage (MA) program (Part C) regulations and Prescription Drug Benefit program (Part D) regulations to support health and drug plans' negotiation for lower drug prices and reduce out-of-pocket costs for Part C and D enrollees.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on January 25, 2019.

ADDRESSES: In commenting, please refer to file code CMS–4180–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov*. Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–4180–P, P.O. Box 8013, Baltimore, MD 21244–8013. Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–4180–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Christian Bauer, (410) 786–6043, Part D Issues. Marty Abeln, (410) 786–1032, Jelani Murrain, (410) 786–2274, or Brandy Alston, (410) 786–1218, Part C Issues.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: *http://www.regulations.gov*. Follow the search instructions on that website to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Executive Summary and Background

A. Purpose

The primary purposes of this proposed rule are to: Make revisions to the Medicare Advantage (MA) program (Part C) and Prescription Drug Benefit Program (Part D) regulations to support health and drug plans' negotiation for lower drug prices; and reduce out-of-pocket costs for enrollees. This regulation would improve the regulatory framework to facilitate development of Part C and Part D products that better meet the individual beneficiary's healthcare needs and reduce out-of-pocket spending for beneficiaries at the pharmacy and other sites of care.

B. Summary of the Major Provisions

1. Providing Plan Flexibility To Manage Protected Classes (§ 423.120(b)(2)(vi))

Current Part D policy requires sponsors to include on their formularies all drugs in six categories or classes: (1) Antidepressants; (2) antipsychotics; (3) anticonvulsants; (4) immunosuppressants for treatment of transplant rejection; (5) antiretrovirals; and (6) antineoplastics; except in limited circumstances. This regulatory provision proposes three exceptions to this protected class policy that would allow Part D sponsors to: (1) Implement broader use of prior authorization (PA) and step therapy (ST) for protected class drugs, including to determine use for protected class indications; (2) exclude a protected class drug from a formulary if the drug represents only a new formulation of an existing single-source drug or biological product, regardless of whether the older formulation remains on the market; and (3) exclude a protected class drug from a formulary if the price of the drug increased beyond a certain threshold over a specified look-back period.

The first proposed exception would allow Part D sponsors to use PA and ST for protected class drugs, including to determine use for protected class indications, without distinguishing between new starts and existing therapies, as is currently allowed for all other drug categories and classes. We would also allow indication-based formulary design and utilization management for protected class drugs. This would be consistent with our July 25, 2018 Health Plan Management System (HPMS) memorandum titled, ''Indication-Based Utilization Management.'' It would also be consistent with our August 29, 2018 HPMS memorandum titled, ''Indication-Based Formulary Design Beginning in Contract Year (CY) 2020,'' and we are proposing to codify this policy for protected class drugs. This would also allow Part D sponsors to exclude the protected class drug from the formulary for non-protected class indications. As is required for all other drug categories and classes, these formulary design and utilization management edits would be subject to CMS review and approval as part of our annual formulary review and approval process, which includes reviews of prior authorization and step therapy edits that would restrict access, step therapy criteria, prior authorization outliers, and prior authorization criteria. (For an extensive description of our annual formulary checks see the January 2014 proposed rule (79 FR 1939).)

The second proposed exception would permit Part D plans to exclude from the formulary protected class drugs that are a new formulation of a protected class Part D drug, even if the older formulation is removed from the market. That is, Part D plans would be permitted to exclude from their formularies a protected class drug that is a new formulation that does not provide a unique route of administration, regardless of whether the older formulation remains on the market.

The third proposed exception is to permit Part D sponsors to exclude from the formulary any protected class drug whose price increases, relative to the price in a baseline month and year, beyond the rate of inflation. The rate of inflation would be calculated based on

the Consumer Price Index for all Urban Consumers (CPI–U).

2. E-Prescribing and the Part D Prescription Drug Program; Updating Part D E-Prescribing Standards (§ 423.160)

This rule proposes to require that Part D plan sponsors implement an electronic real-time benefit tool (RTBT) capable of integrating with prescribers' e-Prescribing (eRx) and electronic medical record (EMR) systems under section 1860D–4(e)(2)(D) of the Act. We believe that requiring Part D plan sponsors' implementation of electronic access to real-time benefits (RTB) information would be appropriate given the timing requirements at section 1860D–4(e)(2)(D) of the Act, and would improve the cost-effectiveness of the Part D benefit. RTBTs have the ability to make beneficiary-specific drug coverage and cost information visible to prescribers who want to consider that information at the point-of-prescribing. Because we believe that there currently are no industry-wide electronic standards for RTBTs, we are proposing that each Part D plan implement at least one RTBT of its choosing that is capable of integrating with prescribers' e-Rx and EMR systems to provide prescribers who service its beneficiaries complete, accurate, timely and clinically appropriate patient-specific real-time formulary and benefit (F&B) information (including cost, formulary alternatives and utilization management requirements) by January 1, 2020.

3. Medicare Advantage and Step Therapy for Part B Drugs (§§ 422.136, 422.568, 422.570, 422.572, 422.584, 422.590, 422.618, and 422.619)

This rule proposes requirements under which MA plans may apply step therapy as a utilization management tool for Part B drugs. In this proposed rule, we reaffirm MA plans' existing authority to implement appropriate utilization management and prior authorization programs for managing Part B drugs to reduce costs for both beneficiaries and the Medicare program. The use of utilization management tools, such as step therapy, for Part B drugs would enhance the ability of MA plans to negotiate Part B drug costs and ensure that taxpayers and MA enrollees face lower per unit costs or pay less overall for Part B drugs while maintaining medically necessary access to Medicare-covered services and drugs. Additionally, and in order to make sure enrollees maintain access to all medically necessary Part B covered drugs, we propose to modify Part C adjudication time periods for organization determinations and appeals involving Part B drugs.

4. Pharmacy Price Concessions to Drug Prices at the Point of Sale (§ 423.100)

The ''negotiated prices'' of drugs, as the term is currently defined in § 423.100, must include all pharmacy payment adjustments except those contingent amounts that cannot ''reasonably be determined'' at the point-of-sale. As a result of this exception, negotiated prices typically do not reflect any performance-based pharmacy price concessions that lower the price a sponsor ultimately pays for a drug, based on the rationale that these amounts are contingent upon performance measured over a period that extends beyond the point of sale and thus cannot reasonably be determined at the point of sale.

In this proposed rule, we are considering for a future year, which could be as soon as 2020, eliminating this exception for contingent pharmacy price concessions. We are considering deleting the existing definition of ''negotiated prices'' at § 423.100 and adopting a new definition for the term ''negotiated price'' at § 423.100, which would mean the lowest amount a pharmacy could receive as reimbursement for a covered Part D drug under its contract with the Part D plan sponsor or the sponsor's intermediary (that is, the amount the pharmacy would receive net of the maximum negative adjustment that could result from any contingent pharmacy payment arrangement and before any additional contingent payment amounts, such as incentive fees). To implement the change we are considering to the definition of negotiated price at the point of sale, Part D sponsors and their PBMs would load revised drug pricing tables reflecting the lowest possible reimbursement into their claims processing systems that interface with contracted pharmacies.

We are also considering adding a definition of ''price concession'' at § 423.100. While ''price concession'' is a term important to the adjudication of the Part D program, it has not yet been defined in the Part D statute, Part D regulations, or sub-regulatory guidance. We are considering defining price concession in a broad manner to include all forms of discounts and direct or indirect subsidies or rebates that serve to reduce the costs incurred under Part D plans by Part D sponsors.

C. Summary of Costs and Benefits

Provision	Description	Impact
Providing Plan Flexibility to Manage Protected Classes (§ 423.120(b)(2)(vi)).	We propose to allow the following exceptions related to protected class drugs: (1) Allow broader use of prior authorization and step therapy for protected class drugs, including to determine use for protected class indications; (2) allow plans to exclude a protected class drug from the formulary if the drug is a new formulation that does not provide a unique route of administration; and (3) allow plans to exclude a protected class drug from the formulary if the drug had a price increase beyond a certain threshold.	The estimated savings to the Trust Fund are $141–$180.5 million in 2020–2024, increasing to $195–$240 million in 2025–2029. The governments saves $1.85 billion. Enrollees save $692 million in cost sharing.
E-Prescribing and the Part D Prescription Drug Program; Updating Part D E-Prescribing Standards (§ 423.160).	We propose to require each Part D plan Sponsors' implementation of one or more RTBT of its choosing that are capable of integrating with providers' e-Rx and EMR systems and delivering complete, accurate, timely and clinically appropriate patient-specific real-time F&B information beginning on or before 01/01/2020.	The scoring of this provision is complex. While there is potential for savings to the Trust Fund arising from substitution of lower cost-sharing tier drugs, we have no way of quantifying this. Also, we are uncertain at this point of the cost to industry to implement this provision. The implementation would most likely involve plans building their own software or use of 3rd party vendors. Both these options are very expensive and might outweigh the savings.
Part D Explanation of Benefits (§ 423.128) ...	We propose to require the inclusion of negotiated drug pricing information and lower cost alternatives in the Part D Explanation of Benefits. The intent of the proposal is to provide enrollees with greater transparency, thereby encouraging lower costs.	There is an estimated cost of $0.2 million in the first year of implementation.

Provision	Description	Impact
Medicare Advantage and Step Therapy for Part B Drugs (§§ 422.136, 422.568, 422.570, 422.572, 422.584, 422.590, 422.618, and 422.619).	We propose certain new requirements for when MA plans may apply step therapy as a utilization management tool for Part B drugs.	The estimated savings to enrollees due to reduced out-of-pocket costs are between $5 and $7 million for 2020–2024 and are between $7 and $10 million for 2025–2029. The savings to the Trust Fund are between $145 and $185 million for 2020–2024 and between $195 and $240 million for 2025–2029. There is a modest cost to the government and its contractors of $1 to $1.3 million in 2020–2029 due to a projected increased in appeals. These estimates reflect use of step therapy for which CMS announced authority for MA organizations beginning 2019; that is, estimates reflect impact on the Medicare Trust Fund if plans start using step therapy in 2020.
Pharmacy Price Concessions in the Negotiated Price (§ 423.100).	We are considering for a future plan year, which may be as early as 2020, to redefine negotiated price as the baseline, or lowest possible, payment to a pharmacy.	If this policy were adopted for 2020 or a future year, there would be an impact on beneficiaries, the government, and manufacturers. Beneficiaries would save $7.1 to $9.2 billion over 10 years (2020 to 2029), resulting from reduced cost-sharing, offset by slightly higher premiums. However, the provision would be estimated to cost the government $13.6 to $16.6 billion over that span. Manufacturers would also save, about $4.9 to $5.8 billion from 2020 to 2029. Part D sponsors would incur a first year cost of $0.1 million in additional administrative activities related to submission of PDE data.

D. Background

The Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33) created a new ''Part C'' in the Medicare statute (sections 1851 through 1859 of the Social Security Act (the Act)) which established what is now known as the Medicare Advantage (MA) program. The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173), enacted on December 8, 2003, added a new ''Part D'' to the Medicare statute (sections 1860D–1 through 42 of the Act) entitled the Medicare Prescription Drug Benefit Program (PDP), and made significant changes to the existing Part C program, which it renamed the Medicare Advantage (MA) Program. The MMA directed that important aspects of the Part D program be similar to, and coordinated with, law for the MA program. Generally, the provisions enacted in the MMA took effect January 1, 2006. The final rules implementing the MMA for the MA and Part D prescription drug programs appeared in the January 28, 2005 **Federal Register** (70 FR 4588 through 4741 and 70 FR 4194 through 4585, respectively).

Since the inception of both Parts C and D, we have periodically revised our regulations to improve the CMS customer experience through our knowledge obtained through experience with both programs. For instance, in the April 2018 final rule (83 FR 16440), we revised certain delivery and disclosure requirements to be consistent with changing technologies and beneficiary access to on-line information and to revise the marketing and communication standards applicable to MA organizations and Part D Sponsors to focus our mandatory review of marketing materials more effectively.

Through our experience implementing the Part C and D programs and through the research conducted in developing the HHS Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs (May 16, 2018, 83 FR 22692), we have identified several proposed regulatory changes that would lower the cost of medications and reduce out-of-pocket costs for enrollees in the Part D program. These changes would also streamline different aspects of the Part D program and reduce associated burden on the government and sponsoring organizations of MA plans and Part D plans.

II. Provisions of the Proposed Regulations

A. Providing Plan Flexibility To Manage Protected Classes (§ 423.120(b)(2)(vi))

Section 1860D–4(b)(3)(G) of the Act requires Part D sponsors to include in their formularies all Part D drugs in classes and categories of clinical concern identified by the Secretary using criteria established through rulemaking. The statute specifies that until such time as the Secretary establishes the criteria to identify drug categories or classes of clinical concern through rulemaking, the following categories or classes shall be identified as categories or classes of clinical concern: Anticonvulsants, antidepressants, antineoplastics, antipsychotics, antiretrovirals, and immunosuppressants for the treatment of transplant rejection. This policy is frequently called the ''protected class'' policy in the Part D program, with the drug categories and classes of clinical concern being the ''protected classes.'' Section 1860D–4(b)(3)(G) of the Act permits the Secretary to establish exceptions that permit a Part D sponsor to exclude from its formulary (or to otherwise limit access to such a drug, including through prior authorization or utilization management) a particular Part D drug that is otherwise required to be included in the formulary. The Secretary must engage in rulemaking to establish these exceptions. Section 423.120(b)(2)(vi) currently provides three regulatory exceptions to the protected class policy that permit Part D sponsors to exclude from their formulary therapeutically equivalent drugs, apply utilization management edits for safety, and exclude other drugs that CMS specifies through a medical and scientific process which also permits public notice and comment.

We are not proposing to change or remove any of the protected classes identified in section 1860D–4(b)(3)(G)(iv) of the Act. Instead, we are proposing to use the authority under section 1860D–4(b)(3)(G) of the Act to establish additional exceptions to the requirement that all drugs in a protected class be included in the formulary and to permit additional use of prior authorization and utilization management. We propose to revise § 423.120(b)(2)(vi) to permit Part D sponsors to implement prior authorization and step therapy requirements for protected class drugs for broader purposes than allowed currently. We also propose to permit Part D sponsors to exclude specific protected class drugs from their formularies if they are a singlesource

drug or biological product for which the manufacturer introduces a new formulation with the same active ingredient or moiety that does not provide a unique route of administration or to exclude single-source drugs or biological products that have certain price increases. We believe these exceptions would strengthen the Part D program by allowing Part D sponsors to better manage protected class drugs to help ensure their safe and appropriate use, limit the protected class requirement to the intended protected class indications, and provide Part D sponsors with additional tools to negotiate as competitive a price as possible in order to provide drug pricing relief for Medicare Part D enrollees, while maintaining beneficiary access to protected class drugs when used for protected class indications. Specifically, we are proposing three exceptions that would allow Part D sponsors to: (1) Implement broader use of prior authorization and step therapy for protected class drugs, including to determine use for protected class indications; (2) exclude a protected class drug from a formulary if the drug is a new formulation of an existing single-source drug or biological product, regardless of whether the older formulation remains on the market; and (3) exclude a protected class drug from a formulary if the price of the drug increased beyond a certain threshold over a specified look back period. However, we note that these exceptions would apply only to the requirement that the drug be included on the formulary because it is a protected class drug. In other words, an exception from the protected class policy would not supersede our other formulary requirements in § 423.120(b)(2).

1. Background

a. History of the Protected Class Policy

Section 1860D–11(e)(2)(D)(i) of the Act requires that in order to approve a plan, we must not find that the design of the plan and its benefits (including any formulary and tiered formulary structure) are likely to substantially discourage enrollment by certain Part D-eligible individuals. We refer to this as our ''non-discrimination'' policy. Under this authority, in 2005 before the start of the Part D program, we directed Part D sponsors through guidance to include on their formularies all or substantially all drugs in six categories or classes: (1) Antidepressants; (2) antipsychotics; (3) anticonvulsants; (4) immunosuppressants for treatment of transplant rejection; (5) antiretrovirals; and (6) antineoplastics.

This guidance helped to ensure a smooth transition of the approximately 6 million Medicare-Medicaid dually-eligible enrollees who were converting from Medicaid drug coverage to Medicare drug coverage at the start of the Part D program (79 FR 1937). Under the circumstances existing at the time of implementation of the Part D benefit, any formularies that did not have all or substantially all drugs in these categories or classes potentially would have been discriminatory for the dually-eligible population, because state Medicaid program formularies were generally open at the time compared to the Part D formularies that we were anticipating Part D sponsors to adopt prior to the beginning of the Part D program. Thus, it stood to reason that dually-eligible enrollees and many of their providers were largely unaccustomed to drug utilization management techniques. That is, for the most part they had little experience dealing with the rejection of a drug claim at the point-of-sale because the drug was either not on formulary, or another drug needed to be tried first, or because more information was required to determine whether the drug could be covered under the plan. Moreover, because the majority of the dually-eligible enrollees did not make a decision to elect their new plan but were instead auto-enrolled into a Part D plan, these individuals may not have understood or known whether their current medications would continue to be covered under their new Medicare Part D plan. Because the Part D program would be administered by private plans with extensive experience managing prescription drug costs through tighter formularies and a variety of utilization management techniques, we anticipated the need for a learning curve to avoid delays associated with navigating new plan prescription drug benefit processes beginning January 1, 2006 that might put at risk the enrollees who needed access to drugs in these particular categories or classes. Therefore, we established our policy for coverage of the six drug classes of clinical concern.

However, the circumstances that existed when this policy was originally implemented have changed dramatically in the nearly 12 years the program has been in operation. In addition to advances in e-prescribing, which can also provide streamlined e-prior authorization processes, CMS, Part D sponsors, providers, our partners that assist enrollees with making enrollment choices, and particularly dually-eligible enrollees and their advocates have had a great deal of experience working with Part D plans since 2005. Additionally, under § 423.120(b)(3), each Part D sponsor must provide for an appropriate transition process for Part D drugs that are not on its formulary. (For a detailed explanation of our transition requirements, see section 30.4 of Chapter 6 of the Medicare Prescription Drug Benefit Manual, available at *https://www.cms.gov/Medicare/Prescription-Drug-Coverage/PrescriptionDrugCovContra/Downloads/Part-D-Benefits-Manual-Chapter-6.pdf.* We also finalized changes to the days' supply required by the Part D transition process in our April 2018 final rule (83 FR 16601). Other enrollee protections include our formulary requirements, formulary transparency, reassignment formulary coverage notices, and the expedited exception, coverage determination, and appeal processes.

After the Part D provisions of the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) were enacted in 2003, the Medicare Improvements for Patients and Providers Act (MIPPA) was enacted in 2008 and established specific criteria that should be used to identify drug categories or classes of Part D drugs of clinical concern for which all Part D drugs therein shall be included on Part D sponsor formularies. While we worked to identify them, the Patient Protection and Affordable Care Act was enacted in 2010 and superseded the MIPPA provisions. Section 3307 of the Patient Protection and Affordable Care Act amended section 1860D–4(b)(3)(G) of the Act to specify that the existing drug categories or classes of clinical concern would remain so until such time as the Secretary established new criteria to identify drug categories or classes of clinical concern under section 1860D–4(b)(3)(G) of the Act through notice and comment rulemaking.

Our next applicable notice and comment rulemaking was the January 2014 proposed rule titled ''Medicare Program; Contract year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs'' (79 FR 1917) (hereinafter referred to as the January 2014 proposed rule). For purposes of the remainder of this Background section, we are summarizing the January 2014 proposed rule but are including detail when it is directly relevant to our current proposal.

In the January 2014 proposed rule (79 FR 1936), we proposed to interpret the Patient Protection and Affordable Care Act authority at section 1860D–4(b)(3)(G)(i) of the Act to limit protected classes to those for which access to all

drugs in the drug category or class is necessary: (1) In less time than the timeline for expedited exception, coverage determination, and appeals processes provide; and (2) when more specific formulary requirements would not suffice. This proposal would have specified that antidepressants, antipsychotics, and immunosuppressants for the treatment of transplant rejection were no longer protected classes. In response to comments, we did not finalize this proposal.

b. CMS Concerns With the Protected Class Policy and Proposals

The protected class policy, inclusive of its current limitations on prior authorization, is unique to the Medicare Part D program and does not appear elsewhere in other Federal programs, such as the Veteran's Health Administration (VA), TRICARE, the Federal Employees Health Benefits Program (FEHBP), the Affordable Care Act Essential Health Benefits (EHB) Benchmark Plans, or in commercial private health plans. We are concerned that requiring essentially open coverage of certain drug categories and classes presents both enrollee cost and welfare concerns, as well as increased costs for the Part D program as a result of overutilization (for example, antipsychotics used for sedation or lack of safety edits) and increased drug prices due to lack of competition between manufacturers to achieve inclusion on plan formularies. We have previously detailed concerns that the policy potentially facilitates the overutilization of drugs within the protected classes. By limiting the ability of Part D sponsors to implement utilization management tools (for example, prior authorization or step therapy requirements) for an entire category or class, we also limit their ability to prevent the misuse or abuse of drugs that are not medically necessary. Not only can this increase Part D costs, but inappropriate use can also lead to adverse effects that can harm the beneficiary and require medical treatment that would otherwise not have been necessary. We believe the profitability of products not subject to normal price negotiations as the result of protected class status is a strong incentive for the promotion of overutilization, particularly off-label overutilization, of some of these drugs.

Additionally, an open coverage policy substantially limits Part D sponsors' ability to negotiate price concessions in exchange for formulary placement of drugs in these categories or classes. Since the beginning of the Part D program we have heard from stakeholders that this policy—frequently referred to as the ''protected classes'' policy—significantly reduces any leverage the sponsor has in price negotiations and results in higher Part D costs. A report by the OIG in March 2011 documented similar assertions from selected Part D sponsors, including assertions that ''they received either no or minimal rebates for the drugs in these six classes,'' that ''there is little incentive for drug manufacturers to offer rebates for these six classes of drugs because they do not need to compete for formulary placement,'' and that '' 'if [a rebate] is provided, it's probably at a lower percentage than [the rebate for the drugs] that had some competition.' '' (HHS Office of Inspector General, ''Concerns with Rebates in the Medicare Part D Program'', March 2011, OEI–02–08–00050) (For a detailed explanation of these concerns, see the January 2014 proposed rule, 79 FR 1937.) We solicit comments on these concerns. Specifically, we ask commenters to provide evidence and research indicating that these concerns are warranted given real world experience.

Second, as a means to negotiate additional rebates, Part D sponsors can, in theory, subject enrollees to higher cost sharing by placing protected class drugs on non-preferred tiers (for example, non-preferred brand or non-preferred generic) or the ''specialty tier.'' However, Part D sponsors can only utilize the ''specialty tier'' if the cost of the drug exceeds the specialty tier threshold of $670 per month. Moreover, the 11.7 million dually-eligible enrollees whom the policy was originally intended to protect are shielded from the cost sharing usually applied to drugs on the non-preferred and specialty tiers because they receive a low-income cost-sharing subsidy. Thus, while a 2013 Avalere study found that Part D sponsors place anticonvulsants on higher tiers than do commercial plans, the data do not support the same conclusion for the five remaining protected classes. (Brantley, Kelly, Wingfield, Jacqueline, and Washington, Bonnie, Avalere, ''An Analysis of Access to Anticonvulsants in Medicare Part D and Commercial Health Insurance Plans,'' June 2013, *http://avalere.com/research/docs/Anticonvulsants_in_Part_D_and_Commercial_Health_Insurance.pdf*.) Finally, this option is not ideal because Part D sponsors typically apply rebates to reduce premiums, and therefore higher manufacturer rebates are not applied to reduce enrollee cost-sharing.

Indeed, many expert studies continue to demonstrate the role that the protected class policy plays in higher drug prices for protected class drugs in general. A 2008 study conducted by the actuarial and consulting firm Milliman found that the six protected drug classes disproportionately accounted for between 16.8 percent and 33.2 percent of total drug spend among sponsors surveyed (Kipp RA, Ko C). (See ''Potential cost impacts resulting from CMS guidance on 'Special Protections for Six Protected Drug Classifications' and Section 176 of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) (Pub. L. 110–275)'' available at: *http://amcp.org/WorkArea/DownloadAsset.aspx?id=9279*). Milliman reported that the Part D program administrators (Part D sponsors and PBMs) commented that the protected status of these drug classes limited Part D sponsors' ability to effectively negotiate lower costs with manufacturers since it is known that these drugs must be included on the formulary. The Milliman report estimated that affected drug costs were on average 10 percent higher than they would be in the absence of the protected class policy and that this represented $511 million per year in excess costs to beneficiaries and the Part D program. We note that numerous brand drug patents expired since this report was published, which might reduce cost projections. Another 2008 study from the National Bureau of Economic Research (NBER) suggested that while Medicare Part D led to a substantial decline in average pharmaceutical prices, Medicare-intensive drugs in protected classes did not experience price declines as did their counterparts not in protected classes and may have actually experienced price increases (Duggan M, Morton FS. 2010. ''The Effect of Medicare Part D on Pharmaceutical Prices and Utilization,'' American Economic Review, American Economic Association, volume 100(1), pages 590–607). Part D sponsors can still negotiate with manufacturers for preferred or non-preferred tier placement of protected class drugs, but CMS does not have any information on the justification for the relative magnitude of these rebates. However, it can reasonably be anticipated that such rebates would vary widely for individual manufacturers and sponsors, and anecdotal evidence would suggest the leverage these options provide sponsors may be minimal when compared to leverage available in connection with an initial decision regarding formulary inclusion, especially since tier placement has no impact on statutory LIS cost sharing

levels. Consequently, we would predict future savings for both beneficiaries and the Part D program from both increased price competition as newly approved drugs come onto the market and more immediate savings if plans were able to remove some currently covered agents from their formularies. Another recent study by Milliman, prepared on behalf of America's Health Insurance Plans (AHIP), found that brand drugs in the protected classes had the lowest proportion of drugs with rebates and the lowest rebates as a percentage of gross drug cost for those drugs receiving rebates. Out of 124 protected class brand drugs, 16 drugs (13 percent) received rebates, compared to 36 percent of brand drugs overall. Protected class brand drugs without rebates accounted for $16.3 billion in gross drug spending compared to $6.0 billion for protected class drugs with rebates. Of protected class brand drugs that received rebates, the average rebate as a percentage of gross drug cost was 14 percent, whereas non-protected brand drugs with direct competition had average rebates of 39 percent. (Milliman, ''Prescription Drug Rebates and Part D Drug Costs: Analysis of historical Medicare Part D drug prices and manufacturer rebates.'' July 2018. *https://www.ahip.org/wp-content/uploads/2018/07/AHIP-Part-D-Rebates-20180716.pdf.*) Additionally, although we are not able to speak to the actual rebate values provided by Milliman, CMS internal analyses of rebate data reported by Part D sponsors generally support Milliman's conclusion that Part D sponsors obtain substantially smaller rebates for protected class drugs than they do for non-protected class drugs.

In contrast to the numerous studies we reviewed that support the assertion that the limited negotiation ability Part D sponsors have for protected class drugs results in higher prices for such drugs, we identified at least one report, published by The Pew Charitable Trusts, that suggested that given the current high rates of generic use within the protected classes, there may be limited potential for savings from changes to the protected class policy, and that rebates on protected-class drugs are consistent with other brand-name drugs. (The Pew Charitable Trusts. ''Policy Proposal: Revising Medicare's Protected Classes Policy.'' March 7, 2018. *https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2018/03/policy-proposal-revising-medicares-protected-classes-policy.*) We disagree with these suggestions. First, as mentioned earlier in the preamble, CMS's internal analyses of rebate data reported by Part D sponsors generally support the assertion that Part D sponsors obtain substantially smaller rebates for protected class drugs than they do for non-protected class drugs. Second, the Pew study itself notes ''the possibility that plans could obtain higher-than-average rebates for these products if they had a greater ability to exclude them from coverage.''

We conclude that despite some formulary flexibility and ability to use drug utilization techniques for protected class drugs, Part D sponsors are not able to negotiate rebates across the protected classes at levels commensurate with other Part D drugs or prescription drugs covered in the commercial market. Consequently, although we are not proposing to eliminate any of the protected classes, we now propose to use the authority under section 1860D–4(b)(3)(G) of the Act to propose revisions to § 423.120(b)(2)(vi). Specifically, we propose to permit Part D sponsors to implement prior authorization and step therapy requirements on protected class drugs for broader purposes than allowed currently and to exclude specific protected class drugs from their formularies based upon price increases or if they are a new formulation of a single-source drug or biological product with the same active ingredient or moiety that does not provide a unique route of administration, regardless of whether the older formulation is removed from the market. By ''single-source drug or biological product,'' we mean a covered Part D drug that is either produced or distributed under a new drug application (NDA) under section 505(b) of the Federal Food, Drug, and Cosmetic Act (FDCA) or is an authorized generic as defined in section 505(t)(3) of the FDCA, or a biological product licensed under section 351 of the Public Health Service Act. We believe these exceptions would strengthen the Part D program by allowing Part D sponsors to better manage the protected class drugs to help ensure their safe and appropriate use, limit the protected class requirements to the intended protected class indications, and provide Part D sponsors with additional tools to negotiate as competitive a price as possible in order to provide drug pricing relief to Medicare Part D enrollees. Specifically, we are proposing three exceptions that would allow Part D sponsors to: (1) Implement broader use of prior authorization and step therapy for protected class drugs, including to determine use for protected class indications; (2) exclude a protected class drug from a formulary if the drug is a new formulation of an existing single-source drug or biological product, regardless of whether the older formulation remains on the market; and (3) exclude a protected class drug from a formulary if the price of the drug increased beyond a certain threshold over a specified look back period. However, we note that these exceptions would apply only to the requirement that the drug be included on the formulary because it is a protected class drug. In other words, an exception from the protected class policy would not supersede our other formulary requirements in § 423.120(b)(2).

2. Broader Use of Prior Authorization for Protected Class Drugs

Under section 1860D–4(b)(3)(G)(i)(II) of the Act, the Secretary can establish exceptions to permit a Part D sponsor to exclude from its formulary, or otherwise limit access through prior authorization or utilization management, a particular Part D drug that is otherwise required to be on the formulary because it is in a protected class. Moreover, this authority applies without regard to whether an enrollee is initiating therapy (new starts) or is currently taking a drug (existing therapy).

As explained earlier, although Part D sponsors can employ some drug utilization management techniques within the protected classes, their ability to do so is not comparable with the commercial market. We find this concerning because prior authorization, as a standard feature of larger, industry-wide utilization management programs, is an important tool to identify clinically inappropriate therapy and control costs within the Part D program. For example, coverage under Part D is not available for drugs that are not medically necessary or used for a medically-accepted indication, or for drugs covered under Medicare Parts A or B as prescribed and dispensed or administered. Therefore, existing limits on Part D coverage permit prior authorization as a tool to determine whether a drug is a Part D drug being used for a medically-accepted indication, as defined in section 1860D–2(e)(4) of the Act, or to verify a drug is medically necessary or is not covered under Medicare Parts A or B as prescribed and dispensed or administered, as specified under sections 1860D–2(e)(3)(A) and 1860D–2(e)(2)(B) of the Act. As another example, as previously discussed in this preamble, we have concerns regarding the overutilization of protected class drugs, and in particular, antipsychotic drugs, among Medicare Part D enrollees. (For a detailed explanation of these

concerns, see the January 2014 proposed rule, 79 FR 1938). Additionally, a number of protected class drugs have medically-accepted indications for non-protected class uses. CMS considers a medically-accepted indication consistent with the description of the drug category or class of the protected class to be a ''protected class indication.'' The protected class indications for anticonvulsants, antidepressants and antipsychotics, antiretrovirals, and antineoplastics in the Part D program would be seizure disorders, mental disorders, HIV/AIDS, and cancer, respectively. Because the statute at section 1860D–4(b)(3)(G)(iv) of the Act specifies ''immunosuppressants for treatment of transplant rejection,'' the protected class indication for immunosuppressants in the Part D program would be treatment of transplant rejection only.

For example, antineoplastic and immunosuppressant drugs are also used for medically-accepted indications (that is, a use that is approved by the Food and Drug Administration (FDA) or is supported by one or more citations included or approved for inclusion in specified compendia) that are not protected class indications, such as rheumatological disorders. Thus, unless a Part D sponsor can use prior authorization to determine the indication for which the drug has been prescribed, there is the potential to increase Part D program costs when there may be a less expensive alternative available to treat rheumatological disorders that would be clinically appropriate. Under this proposed policy, prior authorization requirements would be allowed for any protected class drug with more than one medically-accepted indication to determine that it is being used for a protected class indication, regardless of its status as a new start or existing therapy. This would strengthen an important tool Part D sponsors use to ensure clinically appropriate therapy (for example, to ensure use for a medically appropriate indication or medical necessity, or to implement step therapy or quantity limits), differentiate between protected and non-protected indications, and appropriate management of costs.

This proposal would expand the use of prior authorization within the protected classes to be consistent with what is currently permitted for non-protected classes given that (1) section 1860D–4(b)(3)(G)(i)(II) of the Act authorizes us to allow Part D sponsors to limit access to protected class drugs through prior authorization and utilization management for both new starts and existing therapy; (2) our expedited exception, coverage determination, and appeals processes are mature and have proven workable; and (3) Part D sponsors need additional tools to control costs of protected class drugs. Unlike our proposal in the January 2014 proposed rule, this expansion would preserve the six protected classes. Specifically, we propose to allow Part D sponsors to use prior authorization as is currently allowed for all other drug categories and classes, including to implement step therapy for protected class drugs or to determine use for protected class indications or both, without distinguishing between new starts or existing therapies, consistent with section 30.2.2 of Chapter 6 of the Medicare Prescription Drug Benefit Manual. We would also allow indication-based formulary design and utilization management for protected class drugs. This would be consistent with our July 25, 2018 Health Plan Management System (HPMS) memorandum titled, ''Indication-Based Utilization Management,'' in which we clarified that Part D sponsors can use indication-based utilization management for non-protected class drugs. (While the HPMS memo allows indication-based utilization management for non-protected class drugs starting in 2019, indication-based utilization management for protected class drugs would not be permitted until 2020, if this proposal is finalized.) It would also be consistent with our August 29, 2018 HPMS memorandum titled, ''Indication-Based Formulary Design Beginning in Contract Year 2020,'' which we are proposing to codify for protected class drugs later in this rule. While we are proposing to permit prior authorization for protected class drugs for both new starts and existing therapy, we would not approve onerous prior authorization criteria that are not clinically supported. As is required for all other drug categories and classes, these utilization management edits would be subject to our review and approval, as part of our annual formulary review and approval process, which includes formulary tier review, and relative to prior authorization and step therapy, restricted access, step therapy criteria, prior authorization outlier, and prior authorization criteria reviews. (For an extensive description of our annual formulary checks see the January 2014 proposed rule (79 FR 1939)). Also, we seek comment on whether this exception should be limited to new starts only.

We propose to codify this proposal by redesignating current § 423.120(b)(2)(vi)(C) as § 423.120(b)(2)(vi)(F), and adding an exception at new § 423.120(b)(2)(vi)(C) for prior authorization and step therapy requirements that are implemented to confirm that the intended use is for a protected class indication, ensure clinically appropriate use, promote utilization of preferred formulary alternatives, or a combination thereof, subject to CMS review and approval.

It has been brought to our attention that some Part D sponsors have assumed that, because all protected class drugs have to be on the formulary, that there is no need for retrospective drug utilization review, as described in section 10.6.1 of Chapter 6 of the Medicare Prescription Drug Benefit Manual (available at *https://www.cms.gov/Medicare/Prescription-Drug-Coverage/PrescriptionDrugCovContra/Downloads/Part-D-Benefits-Manual-Chapter-6.pdf*). We would like to clarify that this is not, and has never been, the case, nor does this proposal obviate the requirement that Part D sponsors conduct retrospective drug utilization review on protected class drugs. Further, this exception does not preclude a Part D sponsor from taking appropriate action should they determine that, upon retrospective drug utilization review, protected class drugs were not prescribed for a particular individual for a medically-accepted indication or may have been fraudulent.

Additionally, we note that the August 2018 HPMS memorandum entitled, ''Prior Authorization and Step Therapy for Part B Drugs in Medicare Advantage'' and section II.F. of this proposed rule, entitled ''Medicare Advantage and Step Therapy for Part B Drugs'' would allow MA–PD plans to require step therapy of a Part B drug before a Part D drug. If both proposals in section II.A.2. of this proposed rule (this proposal, Broader Use of Prior Authorization for Protected Class Drugs) and section II.F. of this proposed rule are finalized, the result would be to allow MA–PD plans, starting in 2020, to require step therapy of Part B drugs before Part D drugs for the protected classes as well. Again, as is required for all other drug categories and classes, these step therapy requirements would be subject to our review and approval as part of our annual formulary review and approval process, which includes formulary tier review, and relative to prior authorization and step therapy, restricted access, step therapy criteria, prior authorization outlier, and prior authorization criteria reviews.

3. New Formulations

Before the start of the Part D program, we directed Part D sponsors to include on their formularies all or substantially all drugs in the six protected classes. ''Substantially all'' in this context meant that all drugs and unique dosage forms in these categories were expected to be included on Part D sponsor formularies, with the following exceptions:

- Multiple-source drugs of the identical molecular structure.
- Extended-release products when the immediate-release product is included.
- Products that have the same active ingredient or moiety.[1]
- Dosage forms that do not provide a unique route of administration (for example, tablets and capsules versus tablets and transdermals).

However, we codified in our June 2010 final rule (75 FR 32858) an exception at § 423.120(b)(2)(vi)(A) for drug products that are rated as therapeutically equivalent (under the FDA's most recent publication of ''Approved Drug Products with Therapeutic Equivalence Evaluations,'' also known as the Orange Book).

Since that time, one manufacturer introduced a more expensive extended-release version of a drug to the market while also withdrawing from the market the predecessor immediate-release version when no generic was available. We are concerned that such a scenario could arise with a protected class drug that might leave Part D sponsors with no option but to add the new, more expensive product to their formularies and could result in increased costs for Part D enrollees and the Part D program. To prevent such behavior from occurring within the protected classes, we propose to permit Part D sponsors to exclude from their formularies a protected class single-source drug or biological product for which the manufacturer introduces a new formulation with the same active ingredient or moiety that does not provide a unique route of administration.

First, we would revise § 423.120(b)(2)(vi)(A) to reflect the forthcoming introduction of interchangeable biological products to the market. Specifically, we propose to amend § 423.120(b)(2)(vi)(A) to specify drug or biological products that are rated as—(1) therapeutically equivalent (under the Food and Drug Administration's most recent publication of ''Approved Drug Products with Therapeutic Equivalence Evaluations,'' also known as the Orange Book); or (2) interchangeable (under the FDA's most recent publication of the Purple Book: Lists of Licensed Biological Products with Reference Product Exclusivity and Biosimilarity or Interchangeability Evaluations).''

Second, we propose to add a new exception at new paragraph § 423.120(b)(2)(vi)(D) that would specify that, in the case of a single-source drug or biological product for which the manufacturer introduces a new formulation with the same active ingredient or moiety that does not provide a unique route of administration, the new formulation may be excluded from a Part D sponsors' formulary.

Part D plans are not required to include a new formulation of a drug on their formularies when the older formulation is still available. This policy would still apply. In other words, the purpose of this proposed exception is to specify that even if a new formulation of a single-source drug or biological product in the protected class becomes the only formulation available, Part D sponsors could exclude it from their formularies, except as required by our other formulary requirements in § 423.120(b)(2) and subject to our review and approval, as part of our annual formulary review and approval process.

4. Pricing Threshold for Protected Class Drug Formulary Exclusions

As noted earlier, over the course of the Part D benefit, a number of Part D sponsors and pharmacy benefit managers (PBMs) have asked CMS to address their limited ability to negotiate manufacturer rebates and achieve appreciable savings relative to drugs within the protected classes. In addition to Part D sponsors' limited ability to negotiate rebates for protected class drugs, internal CMS analysis has also shown price trends for brand drugs are consistently higher for drugs in protected classes than such drugs in non-protected classes. On the whole, protected class drug prices have increased more than other, non-protected drug classes between 2012 and 2017. More recently, the allowed cost per days' supply increased by 24 percent for protected class brand drugs between 2015 and 2016 and by 14 percent between 2016 and 2017. In contrast, the allowed cost per days' supply increased by 16 percent for non-protected class brand drugs from 2015 to 2016, and showed no growth at all for such drugs from 2016 to 2017. Accordingly, in developing exceptions to the protected class policy to obtain better pricing for drugs in these classes, CMS considered whether protected class drugs with price increases over a certain threshold during a particular look-back period should be required to be on all Part D formularies.

We propose, effective for plan years starting on or after January 1, 2020, to permit Part D sponsors to exclude from their formularies any single-source drug or biological product that is a protected class drug whose price increases, relative to the price in a baseline month and year, beyond the rate of inflation. The rate of inflation would be calculated using the Consumer Price Index for all Urban Consumers (CPI–U). Specifically, we propose to add an exception at § 423.120(b)(2)(vi)(E) to specify that a part D sponsor can exclude from its formulary protected class single-source drug or biological products subject to our other formulary requirements in § 423.120(b)(2), that the Part D sponsor identifies, for which wholesale acquisition cost between the baseline date and any point in the applicable period has increased more than the cumulative increase in the CPI–U over the same period. The baseline date would be—(1) September 1, 2018 for drugs on the market as of September 1, 2018; or (2) the first day of the first full quarter after the launch date for drugs that enter the market after September 1, 2018. We also propose to add to § 423.100 a definition for the ''applicable period'' that would mean with respect to exceptions in accordance with § 423.120(b)(2)(vi)(E)—

- For contract year 2020, September 1, 2018 through February 28, 2019; or
- For contract year 2021 and subsequent years, September 1 of the third year prior to the contract year in which the exception would apply, through August 31 of the second year prior to the contract year in which the exception would apply.

[1] The FDA, at 21 CFR 314.3 defines an active moiety to be ''the molecule or ion, excluding those appended portions of the molecule that cause the drug to be an ester, salt (including a salt with hydrogen or coordination bonds), or other noncovalent derivative (such as a complex, chelate, or clathrate) of the molecule, responsible for the physiological or pharmacological action of the drug substance.'' Such term could be used to describe different salts of the same drug, for example, metoprolol tartrate versus metoprolol succinate. Additionally, such term could be used to describe a given drug with two versions of itself that are identical in chemical structure, but are mirror images of each other, having left and right-handed versions, like a pair of gloves, and where one of those images (or ''gloves''), exerts stronger pharmacological activity than the other and could be isolated to achieve a greater clinical effect, for example, citalopram versus escitalopram, or omeprazole versus esomeprazole. In these two examples, citalopram and omeprazole contain equal mixtures of both the right and left-handed versions of the drug, whereas escitalopram and esomeprazole represent isolates of only the left-handed versions.

First, we seek comment on whether an alternative pricing threshold to the CPI–U should be considered for this exception. The CPI–U is a measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services. We proposed this pricing threshold for a variety of reasons. First, provided by the U.S. Department of Labor, Bureau of Labor Statistics, the CPI–U is a widely used and publicly available indicator of price inflation. There are also several examples of the CPI–U being used as an indicator of inflation in the administration of the Medicare and Medicaid programs. For example, the CPI–U is used as an integral part of the computation of the unit rebate amounts for innovator drugs in the Medicaid Drug Rebate Program. (The amount of rebate due for each unit of an innovator drug is based on statutory formulas of the greater of 23.1 percent of the Average Manufacturer Price (AMP) per unit or the difference between the AMP and the best price per unit and adjusted by the CPI–U based on launch date and current quarter AMP.) Moreover, several income and asset limits used to determine some aspects of Medicare eligibility are currently indexed to the CPI–U. Eligibility for Part D Low-Income Subsidies (LIS) depends on an applicant's assets falling below certain thresholds that are updated annually by the change in the CPI–U, and cost-sharing amounts paid by Part D LIS beneficiaries for Part D drugs are indexed to the CPI–U. The annual adjustment to the Part D catastrophic coverage threshold is also partially linked to the CPI–U. However, there are price indices that are more specific to health care inflation; there is a CPI specific to prescription drugs (CPI–PD), as well as a CPI specific to medical care more broadly (CPI–M). CMS would be open to considering one of these alternative measures for inflation, although these indices are not, to our knowledge, currently used in CMS programs as an indicator of inflation. While the fact that prices increase more quickly for protected class drugs may or may not have a greater impact on the CPI–PD, we note that one concern CMS considered with using the CPI–PD for this policy is that it would be ''self-fulfilling''—that is, the CPI–PD would just measure the existing increase in drug prices, which we believe is unsustainable and would defeat the purpose of this proposed exception. We solicit comment as to whether one of these more specific indices should serve as the pricing threshold for this policy as opposed to the more general CPI–U. For more information on the price indices referenced here, see the website for the Bureau of Labor Statistics at *https://www.bls.gov/cpi/*.

Next, we are soliciting comment on whether an increase in a price other than the drug's WAC, such as the negotiated price, or some other pricing standard (for example, the Average Wholesale Price (AWP) or the National Average Drug Acquisition Cost (NADAC)), should be used to determine whether the protected class drug could be excluded from a Part D formulary. We are proposing to use WAC as the pricing standard because it is a widely available, published list price, and thus verifiable by CMS. WAC is also widely used across the pharmacy supply chain, and commonly forms the basis of acquisition costs and pharmacy reimbursement (negotiated price). For more information on historical drug pricing trends, see National Health Expenditures information at *https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical.html*.

We also recognize that using the WAC (or any other public pricing standard) is mostly applicable to single-source drugs and biological products, given that payers typically use proprietary maximum allowable cost (MAC)—based pricing methodologies to pay for multisource generic drugs. Because MAC-based pricing methodologies are not generally public and transparent, we do not have a publicly available, reliable way to validate increases in MAC prices for generic drugs. Also, payers already pay a ''maximum'' cost for generic drugs, which makes changes in public list prices less relevant. Moreover, MAC price is the same for all generics related to the reference product, regardless of the list price. Per our discussion earlier in this preamble, we consider ''single-source drugs and biological products'' to be Part D drugs that are—(1) approved under a new drug application under section 505(b) of the FDCA; (2) an authorized generic drug as defined in section 505(t)(3) of the FDCA; or (3) in the case of a biological product, licensed under section 351 of the Public Health Service Act. We believe that limiting this exception policy to single-source drug and biological products is appropriate given the current lack of incentive to reduce prices as a result of the generally limited competition for such drugs. We also solicit comment on whether this exception policy should apply only to single-source drug and biological products, or whether a broader mix of drugs should be eligible for formulary exclusion in accordance with this proposed exception policy.

Further, because different medical conditions can warrant different routes of administration, multiple dosage forms may exist for a particular drug or biological product. Since drugs are available in multiple strengths and dosage forms, with each strength and form having its own, or even multiple, national drug code(s) (NDC), we propose to identify a protected class drug for purposes of this policy as all the NDCs assigned to the single-source drug or biological product name, including NDCs for all strengths, dosage forms, and routes of administration associated with a particular drug. Further, we propose that if the WAC for any NDC assigned to the drug increases faster than inflation (as described previously), that the Part D sponsor can exclude from its formulary all NDCs assigned to that drug. We solicit comment as to whether an increase in WAC beyond CPI–U for any NDC assigned to a particular brand drug or single-source generic drug should be grounds for allowing a sponsor to exclude all NDCs assigned to that drug from the formulary.

Moving into the operational components of the proposal, when determining the proposed baseline for drugs currently on the market, we wanted to select a date prior to the publication of this proposed rule and before the usual price increases that generally take place the first day of the last quarter of the year. That way, opportunities for price gaming would be decreased, and any price increases planned prior to the release of this proposed rule would not be incorporated and result in a higher baseline. For drugs not currently on the market, we believed choosing the WAC as of the beginning of a quarter would aid in operational ease and consistency. We therefore propose that the baseline WAC, which Part D sponsors would use to determine whether a protected class drug's price has increased faster than inflation, would be determined as follows: (1) For a single-source drug or biological product that was first marketed in the United States on or before September 1, 2018, the baseline WAC would be the WAC as of September 1, 2018; (2) for a single-source drug or biological product that is first marketed in the United States after September 1, 2018, the baseline WAC would be the WAC as of the date that is the first day of the first full quarter after the date the single-source drug or biological product was first marketed in the United States. For example, if a protected class drug is first marketed on

July 15, 2019, baseline WAC would be the WAC as of October 1, 2019. We propose that the increase in a drug's WAC would be determined by comparing the baseline WAC to the WAC at any point during the relevant applicable period (which we describe later in this section) for a contract year. We solicit comment on whether the WAC as of some date other than September 1, 2018 should be used as the baseline WAC for drugs that are on the market on or before September 1, 2018.

As previously noted, we propose that the increase in protected class drug's WAC would be compared to the corresponding cumulative increase in the CPI–U for the same period. To make this comparison, we propose that the baseline CPI–U for a protected class drug would be determined as follows: (1) For a single-source protected class drug or biological product that was first marketed in the United States on or before September 1, 2018, the baseline CPI–U would be the September 2018 CPI–U (which will be released in October 2018, but which we refer to as the September 2018 CPI–U in this proposed rule); and (2) for a single-source protected class drug or biological product that is first marketed in the United States after September 1, 2018, the baseline CPI–U would be the CPI–U for month in which the baseline WAC is established for the drug or biological product. To use our previous example, if a protected class drug is first marketed on July 15, 2019, the baseline CPI–U would be the CPI–U for October 2019.

We further propose that in making the comparison of the increase in a protected class drug's WAC to the corresponding increase in the CPI–U, the rate of change of CPI–U must be calculated on a cumulative basis for the same months for which the change in WAC is observed. For example, the change in WAC for a drug between September 1, 2018 and February 19, 2019 would be compared to the corresponding cumulative change in the CPI–U between September 2018 and February 2019. We also want to highlight that in the rare case that a CPI–U may be negative during the applicable period, note if the CPI–U goes down in a year that could lower the cumulative CPI–U for the applicable period.

We propose that in order for a protected class drug to be excluded from the formulary for a given plan year, the comparison of the WAC increase to the cumulative CPI–U increase would need to be measured for an ''applicable period,'' which we propose to define as described in this proposed rule. For contract year 2020, we propose that the applicable period is September 1, 2018 through February 28, 2019. The applicable period for contract years 2021 and thereafter would begin on September 1st, 3 years before the contract year in which the exception would apply, and end August 31st of the second year prior to the contract year in which the exception would apply (see Table 1). We note that the proposed applicable period for contract year 2020 is shorter given that the bids for contract year 2020 are due in June 2020, and in order for this policy to take effect in contract year 2020, a shorter applicable period is necessary to align with the Part D bid cycle, and for beneficiaries to start to benefit from this policy change, if finalized, as quickly as possible.

If a Part D sponsor determines that a protected class drug's WAC has increased faster than the corresponding cumulative increase in the CPI–U within the applicable period, we propose that the Part D sponsor could exclude the protected class drug from its formulary for the contract year associated with that applicable period. To effectuate such an exclusion, the Part D sponsor would be required to submit, along with its formulary submission, information sufficient to demonstrate that the drug or biological product meets the criteria for exclusion that we are proposing. CMS would review the information as part of its formulary review and approval process.

Please see Table 1 for an illustration of how we project the timeline for the implementation of this proposal.

We believe this timeline would allow Part D sponsors to take this policy into account as they negotiate pricing and rebates with manufacturers for the applicable contract year (that is, the contract year in which the exception from protected class status would apply). We understand that Part D sponsors begin negotiations with manufacturers for formulary status in early fall (October/November) of the year preceding the year in which bids are due for the upcoming plan year (that is, for contract year 2021, we believe that plans will begin negotiation with manufacturers in the fall of 2019, in advance of bids for contract year 2021 being due in June 2020). Ending the applicable period at the end of the third quarter annually allows the Part D sponsor to determine which protected class drugs (if any) could be excluded from the formulary in time to negotiate for their formulary inclusion and placement if desired.

We understand that the proposed applicable periods for contract year 2020 and contract year 2021 overlap from September 1, 2018 through February 28, 2019, such that if a manufacturer increases the WAC for a protected class drug during that time at a rate faster than the growth in CPI–U during that time, a Part D sponsor could exclude the drug from its formulary for both contract years 2020 and 2021. Part D sponsors should note that even if the exclusion policy is triggered for both plan years 2020 and 2021, our approval of formularies for each plan year would have to be obtained separately for the applicable formulary submission.

For additional clarity, we provide another example of how the proposed applicable periods would work. For contract year 2022, the applicable period would be September 1, 2019 through August 31, 2020. If during any month in the applicable period, the WAC for a protected class drug increases more than the cumulative change from the baseline CPI–U to the CPI–U at any time during the relevant applicable period, a Part D sponsor could exclude the drug from its formulary for contract year 2022.

TABLE 1—PROPOSED PRICING THRESHOLD POLICY TIMELINE FOR CALENDAR YEARS 2020 THROUGH 2023

Date	Activity(ies)
September 1, 2018	Baseline WAC established for drugs on the market as of 9/1/2018. Applicable period for Contract Year 2020 and Contract Year 2021 begins.
October 2018	Baseline September 2018 CPI–U released.
February 28, 2019	Applicable period for Contract Year 2020 ends.
June 3, 2019	Deadline for submission of Contract Year 2020 Bids, Formularies, Transition Attestations, Prior Authorization/Step Therapy (PA/ST) Attestations, and P&T Attestations due from all sponsors offering Part D including Medicare-Medicaid Plans (11:59 p.m. PDT).
August 31, 2019	Applicable period for Contract Year 2021 ends.
September 1, 2019	Applicable period for Contract Year 2022 begins.

TABLE 1—PROPOSED PRICING THRESHOLD POLICY TIMELINE FOR CALENDAR YEARS 2020 THROUGH 2023—Continued

Date	Activity(ies)
December 31, 2019	Contract Year 2019 ends.
January 1, 2020	Contract Year 2020 Begins. Approved formulary exclusions *begin* for drugs with increased price past the CPI–U in the applicable period for Contract Year 2020.
June 1, 2020	Deadline for submission of Contract Year 2021 Bids, Formularies, Transition Attestations, Prior Authorization/Step Therapy (PA/ST) Attestations, and P&T Attestations due from all sponsors offering Part D including Medicare-Medicaid Plans (11:59 p.m. PDT).
August 31, 2020	Applicable period for Contract Year 2022 ends.
September 1, 2020	Applicable period for Contract Year 2023 begins.
December 31, 2020	Contract Year 2020 ends. Approved formulary exclusions *end* for drugs who increased price past the CPI–U in the applicable period for Contract Year 2020.
January 1, 2021	Contract Year 2021 begins. Approved formulary exclusions *begin* for drugs who increased price past the CPI–U in the applicable period for Contract Year 2021.
June 7, 2021	Deadline for submission of Contract Year 2022 Bids, Formularies, Transition Attestations, Prior Authorization/Step Therapy (PA/ST) Attestations, and P&T Attestations due from all sponsors offering Part D including Medicare-Medicaid Plans (11:59 p.m. PDT).
August 31, 2021	Applicable period for Contract Year 2023 ends.
September 1, 2021	Applicable period for Contract Year 2024 begins.
December 31, 2021	Contract Year 2021 ends. Approved formulary exclusions *end* for drugs who increased price past the CPI–U in the applicable period for Contract Year 2021.
January 1, 2022	Contract Year 2022 begins. Approved formulary exclusions *begin* for drugs who increased price past the CPI–U in the applicable period for Contract Year 2022.
June 6, 2022	Deadline for submission of Contract Year 2023 Bids, Formularies, Transition Attestations, Prior Authorization/Step Therapy (PA/ST) Attestations, and P&T Attestations due from all sponsors offering Part D including Medicare-Medicaid Plans (11:59 p.m. PDT).
August 31, 2022	Applicable period for Contract Year 2024 ends.
September 1, 2022	Applicable period for Contract Year 2025 begins.
December 31, 2022	Contract Year 2022 ends. Approved formulary exclusions *end* for drugs who increased price past the CPI–U in the applicable period for Contract Year 2022.
January 1, 2023	Contract Year 2023 Begins. Approved formulary exclusions *begin* for drugs who increased price past the CPI–U in the applicable period for Contract Year 2023.
June 5, 2023	Deadline for submission of Contract Year 2024 Bids, Formularies, Transition Attestations, Prior Authorization/Step Therapy (PA/ST) Attestations, and P&T Attestations due from all sponsors offering Part D including Medicare-Medicaid Plans (11:59 p.m. PDT).
August 31, 2023	Applicable period for Contract Year 2025 ends.
September 1, 2023	Applicable period for Contract Year 2026 begins.
December 31, 2023	Contract Year 2023 ends. Approved formulary exclusions *end* for drugs who increased price past the CPI–U in the applicable period for Contract Year 2023.

For further clarity on this proposal, we provide an example of how we foresee calculations would take place to monitor changes in price to determine which protected class drugs could be excluded from the formulary on the basis of price increases.

Baseline WAC for Drug Y (as of September 1, 2018) = $100

Baseline CPI–U (for September 2018) = 100.0

February 15, 2019 WAC for Drug Y = $110

February 2019 CPI–U (released in March 2019) = 105.0

The rate of change of the WAC for Drug Y = (February 2019 WAC − Baseline WAC) ÷ 100 = ($110 − $100) ÷ 100 = 0.1 or 10 percent growth

The rate of change of the CPI–U = (February 2019 CPI–U − Baseline CPI–U) ÷ 100 = (105 − 100) ÷ 100 = 0.05 or 5 percent growth)

The WAC for Drug Y grew by 10 percent between September 2018 and February of 2019, whereas the CPI–U only grew by 5 percent cumulatively over the same time period. Therefore, the WAC for Drug Y grew faster than inflation in February 2019, which falls in the proposed applicable periods for both contract year 2020 and 2021. Thus, in this example, a Part D sponsor could exclude Drug Y from its formulary for both contract years 2020 and 2021.

Under our proposal, Part D sponsors would be responsible for monitoring price increases, determining the cumulative CPI–U increases for the corresponding applicable periods, and deciding whether they wish to submit for our approval a formulary that excludes protected class drugs with price increases that exceed the rate of inflation. As an alternative to this approach, we also considered an approach where each year, CMS would produce a list of protected class drugs a Part D sponsor could exclude from its formulary for a specified contract year as a result of the drug's WAC increasing, such that it exceeds the rate of inflation (that is, the CPI–U) as compared to the drug's baseline WAC. However, we declined to propose this approach, because we believe Part D sponsors will be better able to make these determinations more quickly, and we see merit and benefit in providing Part D sponsors with the flexibility to determine whether they would exclude the drug or negotiate with the manufacturer for formulary inclusion and placement. Having sponsors monitor price increases allows them immediate access to the information needed to inform bid submissions, particularly for contract year 2020. We solicit comment on the merits of our proposal to have Part D sponsors operationalize this exception policy by monitoring changes in WAC and CPI–U, or if a more effective approach would be for CMS to monitor these price changes and produce a list of drugs that could be excluded from Part D formularies for a given contract year. If commenters believe that CMS should be providing such a list, we solicit comment as to when that list should be released each year.

As noted previously, we propose that once a drug can be excluded from formularies as a result of a price increase described previously (that is, during any month of the applicable period), that the drug can be excluded

from formulary only for the contract year for which the applicable period applies (that is, a drug is excepted from protected class status in contract year 2020 if the price increases more than the CPI–U for any month in the contract year 2020 applicable period). Therefore, to exclude a protected class drug from its formulary for the next contract year, the Part D sponsor would need to monitor whether the WAC of the drug has increased faster than inflation for the next contract year's applicable period. If the WAC has increased beyond the applicable period CPI–U for the next contract year's applicable period, then it could be excluded from the formulary, but if the WAC has not increased beyond the applicable period CPI–U for the next contract year's applicable period, it could not be excluded from the formulary for that contract year. This would also mean that, for example, if the WAC for a protected class drug in February 2020 exceeded the rate of inflation, as of February 2020, the drug could be excluded from a Part D formulary for contract year 2022 even if the WAC were lowered below the rate of inflation in March 2020.

However, we note that just because a protected class drug *can* be excluded from formulary under this proposed policy, it does not mean that a Part D sponsor *must* exclude the drug from formulary. Rather, we believe that instead, manufacturers and Part D sponsors could negotiate rebate arrangements for formulary placement of these protected class drugs as they do for non-protected-class drugs, and in such an event Part D sponsors could continue to include drugs on formulary even if their WACs exceeded the rate of inflation in the applicable period. We also considered whether to propose that a Part D sponsor could exclude a protected class drug could from its formulary for *any* future contract year once its WAC increased more rapidly than the cumulative increase in inflation. We solicit comment on such a policy approach.

In order to maximize the impact this policy would have on addressing high-cost drugs in protected classes, we also considered whether we should apply this price threshold exception to *all* drugs in the protected classes of a given manufacturer if *any one* of those drugs' WAC, when compared to the baseline WAC, increases beyond the cumulative rate of inflation. For example, if a manufacturer makes three protected class drugs, but the WAC for only one of those drugs increases beyond the CPI–U from its baseline WAC, we contemplated proposing that all three of those drugs could be excluded from the formulary. We solicit comment on this iteration of the proposed exception policy.

To assuage any concerns that the proposed regulatory change would reduce access to protected class drugs, we again note that even if a protected class drug could be excluded from a Part D formulary under this proposed policy, Part D sponsors are not required to do so. Nothing in this proposal would prohibit the Part D sponsor from including the drug on its formulary. Moreover, it is our expectation that this exception policy would benefit the program and beneficiaries by encouraging manufacturers to work with Part D sponsors to ensure formulary inclusion and favorable access (for instance, better cost sharing, more competitive negotiated prices, etc.) for Part D enrollees, rather than a loss of formulary inclusion for drugs in the protected classes. Finally, we note that existing enrollee protections, namely the coverage determination and appeal process, and the Part D formulary requirements as discussed elsewhere in this preamble, provide safeguards to access to all prescription drugs. These safeguards would continue to be available to protect enrollees' access to their medically necessary medications. For instance, our annual formulary review and approval process includes extensive checks to ensure adequate representation of all necessary Part D drug categories or classes for the Medicare population. We remind stakeholders, in particular Part D sponsors, that even if a protected class drug could be excluded from the formulary for a contract year, on the basis of this proposed exception to the protected class requirements, the drug may be required to be included on the formulary for other reasons, for example, if the drug is needed to fulfill other applicable formulary requirements, such as the protected class drug in question is required to be on formulary because it is the only drug available in its category or class. CMS solicits comment on the impact of this policy proposal on Part D enrollees.

5. Solicitation of Comment for Special Considerations

In considering whether exceptions to the added protections afforded by the protected class policy are appropriate, we take other enrollee protections in the Part D program into account. There are five such enrollee protections, and these are formulary transparency, formulary requirements, reassignment formulary coverage notices, transition supplies and notices, and the expedited exception, coverage determination, and appeals processes. (For a detailed discussion of these protections, see the January 2014 proposed rule, 79 FR 1938.) Our formulary review and approval process includes a formulary tier review, and for prior authorization and step therapy, we also conduct restricted access, step therapy criteria, prior authorization outlier, and prior authorization criteria reviews. Additionally, our formulary review and approval process takes into consideration the applicable indication, proposed applicability to new or continuing therapy, and likelihood of comorbidities when reviewing PA/ST criteria submitted to CMS by Part D plans. We note that best practice utilization management practices would not require an enrollee who has been stabilized on an existing therapy of a protected class drug for a protected class indication to change to a different drug in order to progress through step therapy requirements, and we would not expect Part D sponsors to require, nor would CMS be likely to approve, this if our proposed exceptions to the protected class policy were finalized. Moreover, we believe our current approach that ensures at least one drug within the class is offered on a preferred tier and free of prior authorization and step therapy requirements are working well and should be maintained. Currently, Part D formularies frequently have more than one protected class drug at a preferred cost sharing level, especially in classes with significant generic availability, without any prior authorization or step therapy requirement, and we would not expect that this proposal would prompt Part D sponsors to stop including protected class drugs on tiers with preferred cost sharing. (For a detailed discussion of our formulary review processes, see the January 2014 proposed rule, 79 FR 1939.) Finally, our transition policy will continue to require Part D sponsors to provide all new enrollees that are currently taking a protected class drug with an approved month's supply if the Part D sponsor will be utilizing prior authorization to confirm if an enrollee is a taking a protected class drug for a protected class indication. (For a detailed discussion of our transition requirements, see the January 2014 proposed rule, 79 FR 1940, and regulations at § 423.120(b)(3).)

Nonetheless, we wish to make certain that our three proposed exceptions (that is, broader use of prior authorization, new formulations, and pricing thresholds) to the protected class policy would not introduce interruptions for

enrollees on existing therapy of protected class drugs for protected class indications.

We seek comment on whether there are additional considerations that would be necessary to minimize: (1) Interruptions in existing therapy of protected class drugs for protected class indications during prior authorization processes; and (2) increases in overall Medicare spending from increased utilization of services secondary to adverse events from interruptions in therapy. These could include, but are not limited to, for example, special transition considerations for on-formulary protected class drugs for which the Part D sponsor has established prior authorization requirements, or as another example, for transitioning some enrollees taking protected class drugs for protected class indications to alternative Part D drugs. If so, we seek comment on why our current requirements and protections are inadequate, or could be improved. In addition, we seek comment on what specific patient population(s), individual patient characteristic(s), specific protected class drugs or individual protected drug classes would require such additional special transition or other protections and how such population(s) can be consistently identified. Finally, we seek comment on other tools that could be used to minimize interruptions in existing therapy of protected class drugs for protected class indications during prior authorization processes, for example, wider use of diagnosis codes on prescriptions, e-PA during e-prescribing, targeting protected class drugs in Medication Therapy Management (MTM) programs, or, as another example, expanded use of a data-sharing tool to exchange information for enrollees transitioning from one plan to another.

B. Prohibition Against Gag Clauses in Pharmacy Contracts (§ 423.120(a)(8)(iii))

In October 2018, Congress enacted the ''Know the Lowest Price Act of 2018'' (Pub. L. 115–262). The measure, which amends section 1860D–4 of the Act by adding a paragraph (m), prohibits Medicare Part D plan sponsors from restricting their network pharmacies from informing their Part D plan enrollees of the availability of prescription drugs at a cash price that is below what that the enrollee would be charged (either the cost sharing amount or the negotiated price when it is less than the enrollee's cost sharing amount) for the same drug under the enrollee's Part D plan. In effect, the legislation prohibits Part D sponsors from including in their contracts with their network pharmacies ''gag clauses'', a term used within the prescription drug benefit industry that refers to provisions of drug plan pharmacy contracts that restrict the ability of pharmacies to discuss with plan enrollees the availability of prescriptions at a cash price that is less than the amount the enrollee would be charged when obtaining the prescription through their insurance. The measure becomes effective with the plan year starting January 1, 2020.

To make the Part D regulations consistent with the statute governing the Part D program, we propose to incorporate the new requirement into the Part D regulations. Specifically, we propose to amend the set of pharmacy contracting requirements at § 423.120(a)(8) by adding a paragraph (iii) that provides that a Part D sponsor may not prohibit a pharmacy from, nor penalize a pharmacy for, informing a Part D plan enrollee of the availability at that pharmacy of a prescribed medication at a cash price that is below the amount that the enrollee would be charged to obtain the same medication through the enrollee's Part D plan.

C. E-Prescribing and the Part D Prescription Drug Program; Updating Part D E-Prescribing Standards (§ 423.160)

1. Legislative Background

Section 101 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173) requires the adoption of Part D eRx standards. Prescription Drug Plan (PDP) sponsors and Medicare Advantage (MA) organizations offering Medicare Advantage Prescription Drug Plans (MA–PD) are required to establish electronic prescription drug programs that comply with the e-prescribing standards that are adopted under this authority. There is no requirement that prescribers or dispensers implement eRx. However, prescribers and dispensers who electronically transmit and receive prescription and certain other information for covered drugs prescribed for Medicare Part D eligible beneficiaries, directly or through an intermediary, are required to comply with any applicable standards that are in effect. For a further discussion of the statutory basis for this proposed rule and the statutory requirements at section 1860D–4(e) of the Act, please refer to section I. of the eRx and the Prescription Drug Program February 2005 proposed rule (70 FR 6256).

2. Regulatory History

Part D eRx standards are periodically updated to take new knowledge, technology, and other considerations into account. CMS currently requires providers and dispensers to utilize the National Council for Prescription Drug Programs (NCPDP) SCRIPT standard, Implementation Guide Version 10.6, which was approved November 12, 2008, to provide for the communication of a prescription or prescription-related information for certain named transactions. As of January 1, 2020, however, prescribers and dispensers will be required to use the NCPDP SCRIPT standard, Implementation Guide Version 2017071, which was approved July 28, 2017 to provide for the communication of prescription or prescription-related information between prescribers and dispensers for the old named transactions and a handful of new transactions named at § 423.160(b)(2)(iv). We also currently require (under § 423.160(b)(5)) Medicare Part D plan sponsors and prescribers to convey electronic formulary and benefits information amongst themselves using either Version 1, Release 1 (Version 1.0), from October 2005, or Version 3 Release 0 (Version 3.0), from April 2012 of the National Council for Prescription Drug Programs (NCPDP) Formulary and Benefits Standard Implementation Guides. (For a detailed discussion of the regulatory history of eRx standards see the November 2017 proposed rule (82 FR 56437 and 56438).

The NCPDP SCRIPT eRx standards (SCRIPT) and the NCPDP Formulary and Benefits standards (F&B) have become critical components of the Part D program. Thus far in 2018, 66 percent of Part D prescriptions were written electronically using the applicable SCRIPT standard, and all Part D plans implement electronic F&B using one of the adopted standards. However, based on industry feedback, we understand that while some prescribers rely on electronic F&B transactions to support prescribers during the eRx process, others do not. For example, vendors of electronic medical records (EMR) systems have stated that some of their clients find F&B data useful, but approximately half of their clients chose not to access F&B data at all. F&B is a batch mode transaction standard by definition, and therefore does not provide real-time information. A batch transaction allows plans to send the information nightly, weekly or even monthly. As plans make routine changes in their formularies, they may/may not be captured on the batch

formulary files. In addition, F&B provides information on a contract level, rather than a patient level, and consequently could not provide out-of-pocket costs for a given patient at a given point in time.

We are proposing to require a real-time benefit tool (RTBT) requirement on Part D sponsors to serve as a critical adjunct to the existing SCRIPT and F&B electronic standards. There is no requirement that prescribers or dispensers implement electronic prescribing but the existing SCRIPT standard allows prescribers means of conducting electronic prescribing, while the F&B standard allows a prescriber to see what is on the plan's formulary, but neither of those standards can convey patient-specific real-time cost or coverage information that includes formulary alternatives or utilization management data to the prescriber at the point of prescribing. If finalized, RTBT data would be layered on top of F&B data to gain a complete view of the beneficiary's prescription benefit information. It will augment the information available in F&B because, though F&B is useful, it is a batch mode transaction standard by definition and therefore does not provide real-time information. Further F&B provides information on a contract level, rather than a patient level, and consequently could not provide information about out-of-pocket costs for a given patient at a given point in time.

As described in more detail in the next section, we believe requiring plans to make one or more RTBT available to prescribers will lead to higher prescriber use of F&B information during the eRx process. To be eligible for selection by a Part D sponsor, we propose to require that the RTBT be capable of integrating with prescribers' eRx and EMR systems and providing patient-specific coverage information at the point of prescribing to enable the prescriber and patient to collaborate in selecting a medication based on clinical appropriateness and cost. We believe that furthering prescription price transparency is critical to lowering overall drug costs, and patients' out-of-pocket costs, and anticipate improved medication adherence, and supports for the MMA objectives of patient safety, quality of care, and efficiencies and cost savings in the delivery of care if our proposals are finalized.

3. Proposed Adoption of a Real-Time Benefit Tool

The Medicare Part D program allows contracted entities that offer coverage through the program latitude to design plan benefits, provided these benefits comply with all relevant program requirements. This flexibility results in variation in Part D plans' benefit design, cost-sharing amounts, utilization management tools (that is, prior authorization, quantity limits, and step therapy), and formularies (that is, covered drugs). We are aware of several Part D prescription drug plans that have begun to offer RTBT inquiry and response capabilities to some physicians to make beneficiary-specific drug coverage and cost data visible to prescribers who wish to use such data at the point-of-prescribing. We have reviewed multiple RTBT software solutions and have found that they are generally designed to provide patient-specific clinically appropriate information on lower-cost alternative therapies through the prescribers' eRx or EMR systems, if available, under the beneficiary's prescription drug benefit plan. However, for those software solutions that are capable of providing such decision support, based on our current experience, we understand that the prescribers will only embrace the technology if the prescriber finds the information to be readily useful. Thus, to ensure success, we believe that the Part D sponsor must present prescribers with formulary options that are all clinically appropriate and accurately reflect the costs of their patient's specific formulary and benefit options under their drug benefit plan. In addition, those who use plans' current RTBT technology report that prescribers are most likely to use the information available through RTBT transactions if the information is integrated into the eRx workflow and electronic medical record (EMR) system. This would allow the prescriber and patient, when appropriate, to choose among clinically acceptable alternatives while weighing costs. Since eRx can generally be performed within the provider's EMR system, integration of the RTBT function within the EMR generally, and the eRx workflow specifically appears to be critical for the successful implementation of the technology. However, we recognize that without a standard for RTBT, prescribers may be offered multiple technologies, which may overwhelm and create burden for EMR vendors. We also recognize that without a standard, the RTBT tool provided may not be integrated with a prescribers' EMR, thus limiting its utility.

We are interested in fostering the use of these real-time solutions in the Part D program, given their potential to lower prescription drug spending and minimize beneficiary out-of-pocket costs. Not only can program spending and beneficiary out-of-pocket costs be reduced, but evidence suggests that reducing medication cost also yields benefits in patients' medication adherence. In a 2012 review of studies investigating how patient out-of-pocket costs affects medication adherence and outcomes, researchers found that 85 percent of studies demonstrated that increasing patient cost-share for a medication was associated with a significant decrease in medication adherence.[2] This review also revealed that 86 percent of these studies demonstrated that increased medication adherence was associated with improved clinical outcomes. With respect to studies that directly measured the impact of out-of-pocket costs on outcomes, 76 percent found that increased medication out-of-pocket costs was associated with adverse non-medication related outcomes such as additional medical costs, office visits, hospitalizations, and other adverse events. Subsequently published studies continue to reflect similar findings.[3] [4]

Therefore, we are proposing that each Part D sponsor be required to implement a RTBT capable of integrating with prescribers' eRx and EMR systems to provide complete, accurate, timely, clinically appropriate and patient-specific real-time formulary and benefit information to the prescriber. While we recognize that there currently is no industry-established transaction standard for RTBTs for CMS to propose adopting, we believe it is appropriate to require implementation of solutions based on available technologies. There appear to be multiple existing technologies capable of interfacing with multiple EMR systems and providing to prescribers the patient-specific real-time coverage information we have described in this preamble, and, given that, that it would be inappropriate to wait any longer for an industry-wide standard to be developed given current concerns about drug prices. Under this proposed rule Part D plan sponsors would be required to select or develop an RTBT capable of integration with at least one prescriber's EMR and eRx systems; we

[2] Eaddy, M.T., Cook, C.L., O'Day, K., Burch, S.P., & Cantrell, C.R. (2012). How Patient Cost-Sharing Trends Affect Adherence and Outcomes: A Literature Review. Pharmacy and Therapeutics, 37(1), 45–55.

[3] Hershman, D.L., Tsui, J., Meyer, J., et al. (2014). The change from brand-name to generic aromatase inhibitors and hormone therapy adherence for early-stage breast cancer. Journal of the National Cancer Institute. 106(11), dju319.

[4] Chen SY, Shah SN, Lee YC, et al. (2014). Moving branded statins to lowest copay tier improves patient adherence. American Journal of Managed Care. 20, 34–42.

encourage EMR and eRx vendors to work with Part D plans to ensure that the information can be requested and viewed in real time by a user of their product at the point of prescribing. In order to meet this proposed requirement, each Part D plan sponsor will be required to implement an RTBT that is capable of integrating with at least one of prescribers' eRx and EMR systems to provide the prescriber with complete, accurate, timely, and clinically appropriate patient-specific real-time formulary and benefit information at the point of eRx. Each system response value would need to show an accurate reflection of how the prescription claim would be adjudicated given the information submitted and the claims history of the patient with that plan, including relevant indications that could impact coverage, at the time the prescriber query is made. Further, the system would be required to present real-time values for the patient's cost-sharing information and additional formulary alternatives. This requirement would include the formulary status of clinically appropriate formulary alternatives, including any utilization management requirements, such as step therapy, quantity limits and prior authorization, and indications-based restrictions, for each specific alternative presented.

We are interested in bringing RTBT's benefits to the Part D program as soon as feasible. In evaluating how quickly plans could choose and implement an RTBT functionality, we note that a number of firms have already developed the technology required to provide the information we describe through some eRx/EMR systems. Pharmacy benefit managers (PBMs) that service the majority of Part D plans, and a few plans themselves, have successfully implemented RTBTs for a small subsection of the plans' enrollment, which were capable of conveying the information described and interfacing with most EMR and eRx products. We believe that should RTBT systems continue to result in reduced drug costs, plans will expand the number of prescribers who have access to RTBT technologies over the next several years, ultimately paving the way for universal RTBT deployment within Part D in contract year 2020. As plans develop their formularies and benefit packages for 2020, we believe that they will be able to include RTBT implementation in the 2020 planning process. Because section 1860D–12(f)(2) of the Act prohibits the implementation of ''significant'' regulatory requirements on a prescription drug plan other than at the beginning of the calendar year, if finalized, we are proposing to implement the RTBT requirement on January 1, 2020.

We also encourage plans to use RTBTs to promote full drug cost transparency by showing each drug's full negotiated price (as defined in 42 CFR 423.100), in addition to the beneficiary's out-of-pocket cost information. Displaying both values would provide prescribers with additional decision support by providing visibility into both their patients' cost-sharing amounts as well as total cost to the Medicare program. Viewing negotiated price at the point of prescribing would be of particular interest when alternative drugs in a plan's formulary have comparable out-of-pocket costs and clinical value; in those cases a prescriber may consider negotiated prices as well, which would be of value to the Medicare program. For this reason we encourage plans to include negotiated price with their RTBT solution, although we are not proposing to make it a requirement at this time.

We believe that beneficiaries will benefit from their prescribers' use of RTBT. However, we would caution that RTBT should not be used by providers to evaluate alternatives for drugs prior to discussing whether the patient intends to self-pay for the prescribed drug. Such practices will preserve the patient's ability to exercise their right under the privacy regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) [5] and modified pursuant to, among other laws, the Health Information Technology for Economic and Clinical Health (HITECH) Act of 2009.[6] If requested by the individual, the HIPAA Privacy Rule at 45 CFR 164.522 requires covered entities to agree to a restriction of the disclosure of PHI to a health plan for payment and health care operations when an individual pays for the item or service out-of-pocket in full.

Therefore covered health care providers using the RTBT should ensure that individuals are aware that information about services or treatment, such as a future prescription, may be disclosed to the plan by the tool and effectuate the individual's disclosure restriction request by refraining to use the tool in instances in which the patient intends to self-pay in full. Covered health care providers should discuss with the individual whether the individual desires the prescriber to use the RTBT as doing so would generally eliminate the beneficiary's ability to request disclosure restrictions as the plan would already be in possession of the query data regarding the desire to prescribe something for a specified condition.

We considered building upon the existing F&B standard to provide prescribers with decision support. Under this scenario, we would require that plans use the existing NCDP Formulary and Benefit (F&B) Standard (version 1.0 or 3.0) but modify our requirement for Part D so that plans would be required to populate certain optional fields such as copay tier, dollar copay value, and utilization management criteria for each drug. We considered this option as a solution because it would be built upon an existing transaction standard and allow interface with all EMR systems to deliver the information to the prescriber within the normal workflow. However, we believe that a prescriber tool that relied on the F&B would fail to provide the real-time information currently used by many plans. Many prescribers have chosen not to include F&B information in their EMRs because they view the information presented as unreliable as the data is not specific to the patient's benefit plan. Given the inherent complexities associated with Part D formularies and benefits, we concluded that under this option, the patient information available to the practitioner at the time of prescribing would often lack sufficient and current detail necessary for clinical decision-making, which could lead to confusion for prescribers and patients. For example, we understand that a plan that had a prior authorization in place for a targeted portion of its population conveyed the prior authorization requirement for all patients. The plan's rationale was that they would not know which patient was accessing the F&B data, so the plan chose to include the requirement for all enrollees rather than the reverse which would be to omit the requirement for some of their enrollees. Similarly the F&B standard could convey a step therapy requirement for the population at large, but could not discern whether or not an individual patient had fulfilled the requirement.

However, in spite of these shortcomings, including the inherent lack of beneficiary-specific formulary information or its batch-only

[5] *See* the Administrative Simplification provisions of title II, subtitle F, of the HIPAA (Pub. L. 104–191), which added a new part C to title XI of the Social Security Act (sections 1171–1179 of the Social Security Act, 42 U.S.C. 1320d–1320d–8).

[6] The HITECH Act was enacted as title XIII of division A and title IV of division B of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111–5).

functionality, we continue to believe that the NCPDP F&B 1.0 and 3.0 continue to provide value to the Part D program, and, as a result, we are not proposing to retire those standards. This value is evidenced by the fact that, as previously noted, many EMRs convey F&B data to their prescribers. Even strong proponents of adopting RTBT state that the standards work best when used with F&B. They state that F&B can provide a general view of the plan's formulary while RTBT aids the prescriber in choosing between the formulary alternatives offered.[7] We also note that where a prescriber has limited formulary choices due to the patient's specific clinical condition, F&B may provide all the information needed. Finally many EMRs use the F&B and RTBT transactions in different places within in the eRx work-flow. Therefore, we believe that both the F&B and RTBT transactions add value to the eRx process and are not interchangeable and should be used in tandem.

Prior to proposing that each Part D plan choose an RTBT tool to support, we sought to identify an industry standard that could be used throughout the Part D program. We prefer industry-wide standards when they are available due to their significance in promoting collaboration and interoperability across industry partners. Unfortunately, we were unable to identify a suitable RTBT standard that has been balloted and approved by an accredited standard setting body to ensure interoperability. However, we are aware that efforts are underway to develop RTBT standards, and are hopeful that they will come to fruition in the near future. We are interested in, and solicit comments on, assessments from knowledgeable parties about whether any of the standards that are currently under development may be suitable to meet our intended purposes described herein. Based on these considerations, we are proposing to amend § 423.160(b) by adding the requirement that all Part D plan sponsors implement one or more RTBT by January 1, 2020 to be used with the patient's consent. This would require that each Part D plan carefully review the drugs that exist on the formulary and determine which, if any, formulary alternatives exist. The plan's RTBT system would integrate with automated prescriber systems (eRx or EMR) to present a list of the formulary alternatives to the prescriber along with any applicable utilization management requirements and patient's cost sharing for each one. This would allow, with the patient's consent, a prescriber to consider both the clinical appropriateness and patient copayment of a drug during the prescribing process. If finalized, this tool could provide complete, accurate, timely and clinically appropriate patient-specific real-time formulary and benefit information that could be capable of integrating with prescriber's eRx and EMR systems. Formulary and Benefits information delivered through the RTBT would be required to include patient-specific adjudication and out-of-pocket cost information, and would be required to provide decision support reflecting clinically appropriate formulary alternatives and utilization management requirements such as step therapy, quantity limits and prior authorization requirements.

We welcome comments on this proposal, including the feasibility for plans to meet the proposed January 1, 2020 deadline. We understand that should this proposal be finalized some Part D plans may need to invest considerable resources in order to execute effective RTBT solutions. At a minimum, each plan will need to scrutinize individual formulary drugs to see whether lower cost alternatives exist, and evaluate how these alternatives can be presented in such a way that will be helpful to clinicians who make prescribing decisions for patients who may have multiple co-morbidities and conditions. We also realize that RTBT can only achieve the desired cost savings if plans can partner with medical records and eRx vendors to support these efforts by transmitting accurate the information to the prescriber in an easily actionable format. We welcome comments on how this proposal may or may not, expedite our goal of giving each Part D enrollee and the clinicians who serve them, access to meaningful decision support through RTBT. We also seek relevant feedback about RTBT standardization efforts; this includes the planned fulfillment of any milestones that standardization bodies have already met, or are likely to meet in advance of the proposed January 1, 2020 deadline. We would consider retraction of this proposed rule if we receive feedback indicating that the rule would be contrary to advancing RTBT within Part D, or if a standard has been voted upon by an accredited Standard Setting Organization or there are other indications that a standard will be available before the 2020 effective date of this proposed provision. In such case, we would review such standard, and if we find it suitable for our program consider proposal of that standard as a requirement for implementation in our 2021 rulemaking, effective January 1, 2021. We are also soliciting comments regarding the impact of this proposal on plans and providers, including overall interoperability and the impact on medical record systems. Finally, we are soliciting comments regarding the impact of the proposed effective date on the industry and other interested stakeholders.

D. Part D Explanation of Benefits (§ 423.128)

Section 1860D–4(a)(1)(A)(4) of the Act requires Part D sponsors to furnish to each of their enrollees a written explanation of benefits (EOB) and, when the prescription drug benefits are provided, a notice of the benefits in relation to the initial coverage limit and the out-of-pocket threshold for the current year. We codified this EOB and notice requirement at § 423.128(e) by requiring the Part D EOB to include all of the following information written in a form easily understandable to enrollees:

- The item or service for which payment was made and the amount of said payment.
- Notice of an individual's right to an itemized statement.
- Cumulative, year-to-date total amount of benefits provided (including the deductible, initial coverage limit, and the annual out-of-pocket threshold for the current benefit year).
- The cumulative, year-to-date total of incurred costs.
- Any applicable formulary changes.

Part D sponsors must provide enrollees with EOB no later than the end of the month following any month in which the enrollee utilized their prescription drug benefit.

Lowering prescription drug costs is of critical and immediate concern to beneficiaries, CMS and the Administration. ''The Trump Administration Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs,'' released in May 2018 [8] specifically solicited comment on improving the usefulness of the Part D Explanation of Benefits statement by including information about drug price changes and lower cost alternatives. As expected, many beneficiary advocacy groups submitted supportive comments regarding amending the Part D EOB. Many groups commended the Administration's desire to further

[7] *https://www.pocp.com/hit-drug-price-transparency-opportunities.*

[8] ''The Trump Administration Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs,'' HHS (May 2018). Please see: *https://www.hhs.gov/sites/default/files/AmericanPatientsFirst.pdf.*

transparency efforts through improvements in beneficiary education materials, such as the Part D EOB. Requiring sponsors to include additional information about negotiated drug price changes and lower cost therapeutic alternatives in the EOB would help improve cost transparency of Part D prescriptions and mitigate drug price increases in the Part D program.

The items required to be included in the EOB under the current regulation do not include information about negotiated price changes for each of the prescription drugs covered for a beneficiary, nor do they specify including information about lower cost therapeutic alternatives. Because we do not require this information under the regulation as currently written, for contract year 2019 as specified in the July 24, 2018, HPMS Memorandum, ''Model Notice and Policy Updates,'' we added an option for sponsors to use the existing notes field in the EOB for information on drug price increases and more affordable formulary alternatives.[9]

We propose to redesignate paragraphs (e)(5) and (e)(6) of § 423.128(e) as paragraphs (e)(6) and (e)(7) to add a new paragraph (e)(5) to require sponsors to include information about negotiated price changes and lower-cost therapeutic alternatives in the Part D EOBs. First, as to information about negotiated drug price increases, we propose to require that Part D sponsors include the cumulative percentage change in the negotiated price since the 1st day of the current benefit year for each prescription drug claim in the EOB. For example, when a beneficiary fills a prescription under his or her Part D plan in April of the current benefit year that begins on January 1, the cumulative percentage by which the negotiated price has changed since January 1 of that year would display in the EOB. To illustrate, if the negotiated price of the beneficiary's medication was $100 in January, $102 in February, $103.50 in March, and $104 in April, the April EOB would display a 4 percent increase in the drug's negotiated price. Thus, this information would provide drug price trend information for the beneficiary for all their covered Part D drugs. We specifically request stakeholder feedback on operationalizing this in the EOB to best serve beneficiaries which could include, for instance, including information in the EOB on the percent change in negotiated price since the close of open enrollment in addition to the percent change in price since the 1st day of the benefit year.

Second, as to information about lower-cost therapeutic alternatives, CMS proposes to require that Part D sponsors provide information about drugs that are therapeutic alternatives with lower cost-sharing, when available as determined by the plan, from the applicable approved plan formulary for each prescription drug claim. Also, the plan may include therapeutic alternatives with the same copayments if the negotiated price is lower.

Lower-cost therapeutic alternatives (meaning drugs with lower cost-sharing or lower negotiated prices) would not be limited to therapeutically equivalent generics if the original prescription fill is for a brand drug. It could also include a different drug, not within the same category or class, but one that has a medically-accepted indication to treat the same condition. Additionally, we would not require information about formulary therapeutic alternatives available at lower cost sharing to be beneficiary-specific, and we acknowledge that alternatives may not always be available. However, Part D sponsors would be permitted and encouraged by CMS to include relevant beneficiary-specific information, such as diagnosis, the indication for the prescription and complete step therapy or exception requests, when providing formulary therapeutic alternatives in the EOB that have lower cost-sharing. As with including the negotiated price changes on EOBs, this mechanism would provide even greater transparency for beneficiaries when reviewing their annual out-of-pocket costs for prescriptions.

These two proposed requirements would help improve cost transparency of Part D prescriptions. Updating the Part D EOB requirements as we propose would provide greater information to beneficiaries by displaying the fluctuations in their prescription drug prices, so that they can become more educated concerning their drug costs and about potential lower cost alternative drugs. This in turn should spark dialogue between the Part D beneficiaries and their providers about possible lower cost therapeutic alternatives, and empower them to make more informed decisions when choosing a prescription.

The Part D EOB is one of the principal documents that beneficiaries can rely on to understand where they are in the benefit phases and their changing out-of-pocket costs throughout the year. This document is provided to beneficiaries every month for the immediately preceding month that the Part D benefit is used. As a retroactive monthly report, the EOB is the means by which beneficiaries can monitor their benefit utilization and prescription costs on a regular and frequent basis.

Given the frequency of EOB issuance, the proposed policy would help call beneficiaries' attention to drug prices and more affordable options on an ongoing, regular basis. The current structure of the model EOB is well-suited to include additional information on individual prescription drug claims. Other beneficiary materials are delivered on an annual basis. These documents are geared toward assisting Part D beneficiaries make enrollment decisions whether to remain with their current prescription drug plan or switch to another. By viewing these costs on a monthly basis in EOBs, beneficiaries would be much more up-to-date with regard the impact of drug prices and whether there are less expensive options available. We solicit comment on these proposed changes to the Part D explanation of benefits, including impact on the beneficiary.

F. Medicare Advantage and Step Therapy for Part B Drugs (§§ 422.136, 422.568, 422.570, 422.572, 422.584, 422.590, 422.618, 422.619)

In a HPMS memo released August 7, 2018,[10] CMS announced that under certain conditions beginning in contract year 2019, MA plans may use utilization management tools such as step therapy for Part B drugs; such utilization management tools, including prior authorization, can be used by MA organizations to both prevent overutilization of medically unnecessary health services and control costs. This rule proposes requirements under which MA plans may apply step therapy as a utilization management tool for Part B drugs. In this proposal, we confirm MA plans' existing authority to implement appropriate utilization management tools, including prior authorization, for managing Part B drugs in a manner to reduce costs for both enrollees and the Medicare program. Under Part B, traditional Medicare generally pays based on a statutory formula—average sales price plus a 6-percent add-on—for drugs and biological products that are not usually self-administered, such as injections and infusions. We believe there is minimal negotiation between MA plans

[9] See Part D Model Materials at: *https://www.cms.gov/Medicare/Prescription-Drug-Coverage/PrescriptionDrugCovContra/Part-D-Model-Marketing-Materials.html.*

[10] Prior Authorization and Step Therapy for Part B Drugs in Medicare Advantage (August 2018). Retrieved from *https://www.cms.gov/Medicare/Health-Plans/HealthPlansGenInfo/Downloads/MA_Step_Therapy_HPMS_Memo_8_7_2018.pdf.*

and drug manufacturers to reduce the price of these drugs. Prior to the August 7, 2018 HPMS memo and subsequent FAQs,[11] CMS guidance [12] interpreted existing law to prohibit MA plans from using step therapy for Part B drugs because such a utilization management tool would create an unreasonable barrier to coverage of and access to Part B benefits that MA plans must provide under the law. However, CMS recognizes that utilization management tools, such as step therapy, can provide the means for MA plans to better manage and negotiate the costs of providing Part B drugs. As a result, we are proposing to allow MA plans to use step therapy, which we believe would considerably assist MA plans in negotiating on behalf of enrollees to get better value for Part B drug therapies, which constitute around $12 billion in CY 2016 [13] in spending by MA plans.

We believe that these tools will better enable MA organizations to take steps to ensure that MA plans and MA enrollees pay less overall or per unit for Part B drugs which could result in lower MA capitation payments by the government to MA organizations and lower average sales prices for Part B drugs, on which Medicare FFS payments for such drugs are based, while also maintaining access to medically necessary Medicare-covered drugs and services. These goals—reducing costs across the Medicare program while ensuring access to medically-necessary Medicare-covered benefits—underlie this proposal. In the regulatory text, we propose adding a new regulation, at § 422.136, entitled ''Medicare Advantage and Step Therapy for Part B Drugs.''

Sections 1852(c)(1)(G) and (c)(2)(B) of the Act, and the MA regulations at § 422.4(a)(1)(ii) expressly, reference a MA plan's application of utilization management tools, like prior authorization and other ''procedures used by the organization to control utilization of services and expenditures;'' this indicates that MA plans are not prohibited by the statute from implementing utilization management tools such as step therapy. Therefore, we are proposing requirements under which MA plans may apply step therapy as a utilization management tool for Part B drugs. We are also proposing to define step therapy in § 422.2. We solicit comments concerning the impact that allowing step therapy for Part B drugs would have on MA plans and enrollees. For contract year 2020 and subsequent years, coupling drug management coordination with rewards and incentives remains an option for MA plans to pass back savings to beneficiaries. Anticipated savings not passed on to beneficiaries through rewards and incentives must be reflected in the plan's bid. Additional Part C rebate dollars associated with the lower bid, as with all Part C rebate dollars, must be used to provide supplemental benefits and/or lower premiums for the plans' enrollees.

We acknowledge the potential for utilization management tools like step therapy to create administrative burden and process challenges for network providers. In light of that, we expect MA plans to work closely with the provider community and to adopt best practices that streamline requirements and minimize burden. We also encourage continued development and advancement of electronic prior authorization processes to more efficiently administer this process. We note that existing requirements in §§ 422.112(b) and 422.152 already require care coordination activities that are sufficient to promote positive health outcomes for both drugs and services, so we are not proposing text at § 422.136 that an MA plan must offer a drug management program. We solicit comment whether our proposed regulation text imposing education and information responsibilities in combination with existing regulations on care coordination are sufficient to ensure that MA organizations specifically address step therapy programs for Part B drugs as part of those care coordination responsibilities and if we should finalize a provision in § 422.136 that addresses the administrative burden imposed on network providers by MA plans.

This proposed rule would impose a number of safeguards that ensure enrollees have timely access to all medically necessary Medicare Part B medications. MA plans would be required to administer the existing organization determination and appeals processes under new proposed time frames that are similar to the timeframes applicable in Part D for coverage determinations; enrollees can request an organization determination if they believe that they need direct access to a Part B drug that would otherwise only be available after trying an alternative drug. MA plans would adjudicate these organization determinations based on medical necessity criteria. If an enrollee is dissatisfied with the plan's organization determination, the enrollee has the right to appeal. CMS monitors organization determination and appeals activity through the audit process to ensure enrollee requests are appropriately evaluated and processed within applicable timeframes.

Consistent with our existing disclosure requirements at § 422.111, when applying step therapy to Part B drugs, MA plans must disclose that Part B drugs may be subject to step therapy requirements in the plan's Annual Notice of Change (ANOC) (when initially adopted or subsequently changed) and Evidence of Coverage (EOC) documents. In the ANOC, this information must be included under the Changes to Benefits and Costs for Medical Services. In the EOC, this information must be included in the Medical Benefits Chart under ''Medicare Part B prescription drugs.'' Under existing requirements at § 422.202(b), MA plans must establish policies and procedures to educate and fully inform contracted health care providers concerning plan policies on utilization management, which would include the plan's step therapy policies. We propose to also include a requirement at § 422.136(a)(2) for plans to establish policies and procedures to educate and inform health care providers and enrollees specifically concerning its step therapy policies. We note that preferred provider organization plans (PPOs) are required, as part of the definition of PPO at section 1852(e)(3)(iv)(II) of the Act and under the MA regulation at § 422.4(a)(1)(v)(B) to reimburse or cover benefits provided out of network; while higher cost sharing is permitted, PPOs are prohibited from using prior authorization or preferred items restrictions in connection with out of network coverage. As such, preferred provider organization plans (PPOs) must provide reimbursement for all plan-covered medically necessary services received from non-contracted providers without prior authorization or step therapy requirements. We solicit comment whether the final rule should include a specific regulatory provision clarifying this issue.

Under proposed paragraph (a)(3), MA plans would be required to use a Pharmacy and Therapeutics (P&T) committee to review and approve step

[11] *https://dpapportal.lmi.org/DPAPMailbox/Documents/Part%20B%20Step%20Therapy%20Questions%20FAQs_8-29-18.pdf.*

[12] Prohibition on Imposing Mandatory Step Therapy for Access to Part B Drugs and Services. (September 2012). Retrieved from *https://www.asrs.org/content/documents/cms_step_therapy_memo_091712-2.pdf.*

[13] Medicare Part B Drug. CMS Enterprise Portal. Retrieved at *https://portal.cms.gov/wps/portal/unauthportal/unauthmicrostrategyreports link?evt=2048001&src=mstrWeb.2048001&documentID=AEC7511A11E817EF2FBA0080EFC5E3D8&visMode=0&currentViewMedia=1&Server=E48V126P&Project=OIPDA-BI_Prod&Port=0&connmode=8&ru=1&share=1&hiddensections=header,path,dockTop,dockLeft,footer.*

therapy programs (meaning policies and procedures); we believe that this is necessary to ensure medically appropriate implementation of step therapy for Part B drugs. We believe the burden of this requirement would be limited because we are proposing to allow MA–PD plans to utilize any existing Part D P&T committees established by the MA–PD plan to comply with part 423 requirements for the Part D benefit and to allow MA-only plans to use existing P&T committees when there is a Part D or MA–PD plan under the same contract. The Paperwork Reduction Act listing for P&T committee record keeping is OMB Control Number 0938–0964. We note that P&T committee decisions are not public information. The introductory text of proposed paragraph (b) provides that a MA organization must establish or utilize an existing P&T committee prior to implementation of a step therapy program. The P&T committee would review step therapy programs under our proposal. We are actively considering expanding the role of MA P&T committees and are therefore soliciting comments on our proposal that MA plans with step therapy programs would be required to have P&T committees, and in addition whether the requirement for this MA P&T committee should be expanded to all MA plans that have any utilization management policy (such as prior authorization or dosage limits) applicable to Part B drugs, and whether there are other options that would meet the policy goal of ensuring that step therapy programs are medically appropriate underlying the P&T committee proposal. We propose to codify P&T committee requirements for MA plans in § 422.136(b).

Our proposal for the P&T committee mirrors the Part D requirements for such committees currently codified at § 423.120(b) with regard to membership, scope, and responsibilities. We believe existing Part D P&T requirements at § 423.120(b) are adequate to ensure MA plans implement step therapy for Part B drugs that is medically appropriate. We note that if necessary we may release subregulatory guidance concerning application of the P&T committee requirements in the context of Part B drugs.

The proposed requirements in § 422.136(b) are consistent with Part D requirements for a P&T committee. Specifically, we propose that the majority of members comprising the P&T committee would be required to be practicing physicians and/or practicing pharmacists. The committee would be required to include at least one practicing physician member and at least one practicing pharmacist; these specific individuals would be required to be independent and free of conflict with the MA organization, the MA organization's plans, and the pharmaceutical manufacturers. In addition, the plan would be required to include at least one practicing physician member and one practicing pharmacist who are experts in the care of elderly and disabled persons. We also encourage MA plans to select P&T committee members representing various clinical specialties (for example, geriatrics, behavioral health) to ensure that all conditions are adequately considered in the development of step therapy programs. We are proposing to include provisions for the responsibilities and scope of the P&T Committee at proposed § 422.136(b)(4) through (11) that mirror the current regulation text applicable to Part D P&T Committees under § 423.120(b)(1)(iv) through (xi), with minor revisions to tailor proposed § 422.136(b) to the Part B drug step therapy programs offered by MA plans. These proposed provisions include requirements applicable to P&T committee membership, to the standards and considerations used in reviewing step therapy programs and to documenting its reviews. We reiterate here that we are proposing to substantially align the requirements of a P&T committee reviewing Part B drugs with Part D requirements because CMS has found that Part D requirements for administrative efficiency between the Part C and Part D programs and because the Part D requirements have proved sufficient in ensuring that plans implement medically appropriate step therapy and utilization management protocols in Part D.

Under § 422.136(a)(1) of the proposed rule, step therapy would not be permitted to disrupt enrollees' ongoing Part B drug therapies. We are proposing that step therapy only be applied to new prescriptions or administrations of Part B drugs for enrollees who are not actively receiving the affected medication. MA plans would be required to have a look-back period of 108 days, consistent with Part D policy with respect to transition requirements for new prescriptions, to determine if the enrollee is actively taking a Part B medication. The Part D look back period was created with clinical and pharmaceutical input and CMS believes the same criteria is appropriate for Part B drugs. Further, when an enrollee elects a new MA plan (regardless of whether previously enrolled in a MA plan, traditional Medicare, or new to Medicare), our proposal would require the MA plan to determine whether the enrollee has taken the Part B drug (that would otherwise be subject to step therapy) within the past 108 days. We propose this time period to align with applicable Part D subregulatory guidance on this topic. If the enrollee is actively taking the Part B drug, such enrollee would be exempted from the plan's step therapy requirement concerning that drug. Under our proposal, we would allow MA plans flexibility in implementing step therapy for Part B drugs within specific parameters. Specifically, MA plans would be able to ensure that an enrollee who is newly diagnosed with a particular condition would begin treatment with a cost-effective biological product approved under section 351(k) of the Public Health Service Act or generic medication before progressing to a more costly drug therapy if the initial treatment is ineffective or if there are adverse effects. While proposed § 422.136 does not specifically address the standard for exemptions or movement within a step therapy program, we rely on the MA plan's responsibility to provide all medically necessary covered services and items under the original Medicare program as meaning that cases raising ineffectiveness or adverse effects of treatment as being sufficient basis to grant an exemption or move an enrollee to a higher step in the protocol. However, we propose limits on flexibility in paragraphs (c) and (d).

Consistent with existing Part D guidelines, at § 422.136(c) we are proposing to permit MA plans to require an enrollee to try and fail an off-label medically-accepted indication (that is, an indication supported by one or more citations in the statutory compendia) before providing access to a drug for an FDA-approved indication (on-label indication). Using off-label drugs in step therapy would only be permitted in cases where the off-label indication is supported by widely used treatment guidelines or clinical literature that CMS considers best practices. We are soliciting comments on our proposal to permit MA plans to use off-label drugs only when such drugs are supported by widely used treatment guidelines or clinical literature that CMS considers to represent best practices in a step therapy program.

Additionally, we propose to prohibit an MA organization from using a non-covered drug as a step in the step therapy program (that is, as a condition to coverage). Each step in a step therapy program should be another drug covered under Part B by the MA plan or Part D

by the MA–PD plan to ensure that step therapy programs are not, intentionally or unintentionally, barriers to services that must be covered by the MA plan pursuant to section 1852 of the Act. Therefore, at § 422.136(d) we clarify that only Medicare covered Part B (and for MA–PD plans, Part D drugs) may be used in a step therapy program. In addition to requiring one Part B drug be used before a different Part B drug, MA plans that also offer prescription drug coverage (also known as ''MA–PD plans'') may use step therapy to require a Part D drug therapy prior to allowing a Part B drug therapy because the Part D drug would be covered by the plan. MA–PD plans may also apply step therapy to require a Part B drug therapy prior to allowing a Part D drug therapy as part of a Part D step therapy program or utilization management program; however, MA–PD plans must ensure that these requirements are clearly outlined in the Part D prior authorization criteria for the affected Part D drugs and are otherwise consistent with Part D requirements. Additionally, as noted section II.A.2 of this proposed rule (Broader Use of Prior Authorization for Protected Class Drugs), the August 2018 HPMS memorandum entitled, ''Prior Authorization and Step Therapy for Part B Drugs in Medicare Advantage'' and section II.F (this proposal, Medicare Advantage and Step Therapy for Part B Drugs) would allow MA–PD plans to require step therapy of a Part B drug before a Part D drug. If both proposals II.A.2 and II.F are finalized, the result would be to allow MA–PD plans, starting in 2020, to require step therapy of Part B drugs before Part D drugs for the protected classes as well. Again, as is required for all other drug categories and classes, these particular step therapy requirements would be subject to CMS review and approval, as part of our annual formulary review and approval process, which includes formulary tier review, and relative to prior authorization and step therapy, restricted access, step therapy criteria, prior authorization outlier, and prior authorization criteria reviews.

Section 1852(g)(1) of the Act prescribes that MA organizations must have a procedure for making determinations regarding whether an enrollee is entitled to receive a health service under the MA program and the amount (if any) that the enrollee is required to pay with respect to such service. Such procedures must provide for organization determinations to be made on a timely basis, as required by section 1852(g)(3) of the Act, which prescribes what constitutes timely notice to an enrollee of an expedited organization determination and reconsideration. With respect to expedited organization determinations and reconsiderations, the MA organization must notify the enrollee (and the physician involved, as appropriate) of the decision under time limitations established by the Secretary, but no later than 72 hours from the receipt of the request for the organization determination or reconsideration (or receipt of the information necessary to make the decision) or such longer period as the Secretary may permit in specified cases. For standard reconsiderations, section 1852(g)(2) of the Act states that a reconsideration shall be within a time period specified by the Secretary but shall be made (subject to the expedited provision in section 1852(g)(3)) no later than 60 days after the date the reconsideration request is received.

We are proposing that requests for Part B drugs, including Part B drugs subject to step therapy, be processed under the same adjudication timeframes as used in the Part D drug program, such as in § 423.568(b). While the proposed timeframes for processing organization determinations and appeals for Part B drugs are a departure from the current adjudication timeframes that apply to organization determinations and appeals for medical items and services under the MA program, we believe the clinical circumstances that typically accompany requests for Part B drugs warrant application of the shorter adjudication timeframes that apply in Part D. In keeping with this rationale, we are not proposing that the adjudication timeframes for Part B drugs could be extended, as is allowed for other Part B organization determinations and appeals. This proposed approach not only creates greater consistency in how requests for drugs are handled throughout the initial coverage decision and appeals processes under Part B and Part D, but we believe that adopting the Part D adjudication timeframes for Part B drugs would allow MA–PD plans to better coordinate their drug benefits, specifically in cases where there is uncertainty about coverage under Part B or Part D. These proposed changes would affect the adjudication timeframes through the Part C IRE level of review. We are not proposing to change how Part C appeals, whether for Part A, Part B or supplemental benefits, are processed by the Office of Medicare Hearings and Appeals (OMHA) and the Medicare Appeals Council (Council) which is housed within the Departmental Appeals Board (DAB).

The rules related to organization determinations and appeals under Part 422, subpart M apply to all benefits an enrollee is entitled to receive under an MA plan, including basic benefits as described under § 422.100(c)(1) and mandatory and optional supplemental benefits as described under § 422.102, and the amount, if any, that the enrollee is required to pay for covered benefits. A request for covered medical items or services (including Part B drugs) is currently adjudicated under the timeframes set forth at §§ 422.568, 422.572, and 422.590, with specific requirements related to expediting determinations at §§ 422.570 and 422.584. Requirements for effectuating standard and expedited reconsidered determinations (that is, reversals by the MA organization itself, the independent review entity, or other adjudicator on appeal of an initial denial of coverage), are identified in §§ 422.618 and 422.619.

We are proposing to do all of the following:

- Add adjudication timeframes at §§ 422.568, 422.572(a), and 422.590(c) and (e)(2) for, respectively, standard organization determinations, expedited organization determinations, standard reconsiderations, and expedited reconsiderations related to coverage of Part B drugs that are the same as the timeframes for these appeal stages for Part D drugs under §§ 423.568, 423.572, and 423.590.
- Add references to determinations regarding Part B drugs to §§ 422.568(d) and (e)(4), 422.584(d), 422. 618(a) and (b), and 422.619(a), (b) and (c).
- Specify in §§ 422.568(b)(2), 422.572(a), and 422.590(c) and (e)(2) that the rules related to extending the adjudication timeframe related to requests for medical services and items (at §§ 422.568(b)(1)(i), 422.572(b) and redesignated § 422.590(f)) do not apply to the timeframes for resolving standard organization determinations, expedited organization determinations, standard reconsiderations, and expedited reconsiderations for Part B drugs.
- Make conforming changes that reference the applicable proposed timeframes and deadlines for determinations regarding Part B drugs and update cross-references in §§ 422.570(d)(1), 422.584(d)(1), and 422.618(a).
- Add a reference to an ''item'' to regulation text to clarify that the scope covers services and items at §§ 422.568(b), (d), and (e); 422.572(a) and (b), 422.590(a), (e), and (f); and 422.619(a) and (b).

• Redesignate existing regulatory paragraphs at § 422.568(b)(1) and (2) to § 422.568(b)(1)(i) and (ii), at § 422.590(c)–(f) to § 422.590(d)–(f), and at § 422.619(c)(2) to § 422.619(c)(3), without substantive change.

We discuss our proposal in more detail later in this section.

Under the regulations at § 422.572(a), an MA organization must notify an enrollee (and the physician involved, as appropriate) of an expedited organization determination as expeditiously as the enrollee's health requires, but no later than 72 hours after receiving the request. For expedited organization determination requests for a Part B drug, we are proposing at new paragraph (a)(2) of § 422.572 that an MA organization must make its determination and notify the enrollee (and the physician or prescriber involved, as appropriate) of its decision no later than 24 hours after receipt of the request. This proposed 24-hour timeframe for expedited organization determinations involving a Part B drug is permissible by statute, as section 1852 (g)(3)(B)(iii) of the Act requires that the enrollee be notified of an expedited decision under time limitations established by the Secretary, but not later than 72 hours from the time the request is received. With respect to pre-service standard organization determinations, the regulations at § 422.568(b) state that the MA organization must notify the enrollee of its decision as expeditiously as the enrollee's health condition requires, but no later than 14 calendar days after the MA organization receives the request for a standard determination. For consistency with the timeframe for standard Part D coverage determinations, we are proposing at § 422.568(b)(2) that, for a request for a Part B drug, an MA organization must notify the enrollee (and the prescribing physician or other prescriber involved, as appropriate) of its determination no later than 72 hours after receipt of the request. Section 422.568(b)(1) relates to standard requests for services and sets forth the existing timeframe of 14 calendar days, while proposed new paragraph (b)(2) would establish the 72-hour timeframe for standard organization determination requests for Part B drugs. We are proposing to redesignate existing paragraphs (b)(1) and (b)(2) with respect to extensions and notice of extensions for requests for service to § 422.568(b)(1)(i) and (ii), respectively. We are also proposing corresponding changes to § 422.568(d) and (e)(4) related to notice requirements to specifically reference Part B drug requests, to distinguish these requests from requests for medical services.

In all circumstances, the MA organization must notify the enrollee, and the physician or other prescriber involved, as appropriate of its decision as expeditiously as the enrollee's health condition requires, but no later than the proposed timeframes of 24 hours for expedited organization determination requests and 72 hours for standard organization determination requests for a Part B drug. As noted previously, we believe the nature of drug benefits supports shorter adjudication timeframes so enrollees have timely access to necessary prescription drugs. To that end, we are not proposing to permit MA organizations to extend the proposed timeframes for requests for Part B drugs under current rules at §§ 422.568(b)(1) and 422.572(b), and are proposing specific prohibitions on such extensions for Part B drugs in new text at §§ 422.568(b)(1), 422.572(b), and 422.590(c) and (e). Extending adjudication timeframes is not permitted under the Part D program and we do not believe extensions are warranted in the case of a request for a Part B drug due to the clinical circumstances typically involved in a request for a drug. The overall goal of these proposals is to ensure that MA enrollees have timely access to Part B drugs and to establish more consistency in the adjudication timeframes applicable to requests for Medicare drug benefits. At proposed §§ 422.568(b)(1)(i), 422.572(b), and redesignated § 422.590(f), we are specifying that the rules related to extending the adjudication timeframe relate to requests for medical services and items, but not requests for Part B drugs.

We recognize that there may be circumstances under which an enrollee would not be able to satisfy a Part B drug step therapy requirement due to the enrollee's medical condition and believe these issues can be resolved under the organization determination process. Further, under current regulation at § 422.111, MA organizations must disclose to enrollees the benefits under a plan, including applicable conditions and limitations, premiums and cost-sharing (such as copayments, deductibles, and coinsurance) and any other conditions associated with receipt or use of benefits. Therefore, MA organizations must disclose prior authorization rules and other review requirements (for example, step therapy) that condition or limit coverage and must be met in order to ensure payment for services. In addition, the rules at § 422.112 require MA organizations to have policies and procedures (coverage rules, practice guidelines, payment policies, and utilization management) that allow for individual medical necessity determinations. We believe the rules on disclosure of utilization management requirements and individualized medical necessity determinations, coupled with the right to request an organization determination, ensure that an enrollee is informed about applicable step therapy requirements and has an opportunity for an individualized medical necessity determination related to a Part B drug step therapy requirement. An MA plan can determine through the organization determination process that a particular enrollee should be exempted from step therapy requirements for reasons of medical necessity; as with other organization determinations under existing regulations, the enrollee would be notified that he/she has been determined eligible for such exemption. Although not required under our proposal, an MA organization may establish an evaluation process for the appropriateness of enforcing its step therapy protocols on an enrollee when the enrollee's healthcare provider's assessment of medical necessity for the Part B drug indicates that the lower or earlier steps in the step therapy protocol are not clinically appropriate for that enrollee (such as in cases of allergy or a prior unsuccessful use of the preferred drug). MA organizations may work with their network providers to develop processes that eliminate the necessity for an enrollee to file a request for an organization determination in such cases. We are not proposing to require such additional policies or processes but we are similarly not prohibiting them.

At § 422.590, we are proposing at redesignated paragraph (e)(2) that if an MA organization approves a request for an expedited reconsideration, it must complete its reconsideration and give the enrollee and the physician or other prescriber involved, as appropriate notice of its decision as expeditiously as the enrollee's health condition requires but no later than 72 hours after receiving the request. At redesignated paragraph (e)(3), we are proposing to add the term ''orally'' to existing regulation text to clarify that if the MA organization first notifies an enrollee of a completely favorable expedited reconsideration orally, it must also mail written confirmation to the enrollee within 3 calendar days.

With respect to the independent review entity (IRE) level of review, the current contract with the Part C IRE

requires enrollees to be notified of an expedited reconsideration decision no later than 72 hours from the IRE's receipt of the case. This 72-hour timeframe is consistent with the current adjudication timeframe for expedited Part D IRE reconsiderations. If this proposal is finalized, we would modify our contract with the Part C IRE to require that enrollees be notified of a standard reconsideration related to a Part B drug no later than 7 calendar days from receipt of the case.

We are proposing a conforming change to § 422.584(d)(1) to reference the proposed 7-day timeframe for standard Part B drug requests at § 422.590(c). If a MA organization denies a request for expedited reconsideration of a Part B drug, it must automatically transfer the request to the standard timeframe and make the determination within the 7 calendar day timeframe in proposed § 422.590(c). The timeframe begins the day the MA organization receives the request for expedited reconsideration.

We are also proposing conforming changes at § 422.570(d). At paragraph (d), with respect to actions following a denial of a request for an expedited determination, we are proposing to add a reference to the proposed 72-hour timeframe for standard Part B drug requests to existing text that specifies automatic transfer to the 14-calendar day timeframe for standard determinations regarding services. So, if an MA organization denies a request for an expedited determination, it must automatically transfer a request to the standard timeframe and make the determination within the proposed 72-hour timeframe at § 422.568(b)(2) for standard determinations regarding Part B drugs. The timeframe begins when the MA organization receives the request for expedited determination.

As a corollary to the proposed changes to the adjudication timeframes, we are proposing changes to the effectuation timeframes at §§ 422.618 and 422.619. As with the proposals related to the adjudication timeframes, the proposed changes to the effectuation timeframes are intended to ensure that MA organization enrollees receive necessary Part B drugs in a timely manner and are consistent with the Part D timeframes. Specifically, we are proposing a new § 422.618(a)(3) to state that if, on a standard reconsideration of a request for a Part B drug, the MA organization reverses its organization determination, the MA organization must authorize or provide the Part B drug under dispute as expeditiously as the enrollee's health condition requires, but no later than 7 calendar days after the date the MA organization receives the request for reconsideration. We are also proposing a new § 422.618(b)(3) to state that if, on a standard reconsideration of a request for a Part B drug, the MA organization's determination is reversed in whole or in part by the independent outside entity, the MA organization must authorize or provide the Part B drug under dispute within 72 hours from the date it receives notice reversing the determination and, further, that the MA organization must inform the independent outside entity that the organization has effectuated the decision.

We are proposing to add § 422.619(a)(1) and (2) whereby paragraph (a)(1) would include the existing regulation text at § 422.619(a) related to reversals by the MA organization for expedited requests for a service. Proposed paragraph (a)(2) of § 422.619 would account for reversals by the MA organization for expedited reconsideration requests for a Part B drug. We are proposing that paragraph (a)(2) state that if the MA organization reverses its organization determination on an expedited reconsideration request for a Part B drug, the MA organization must authorize or provide the Part B drug under dispute as expeditiously as the enrollee's health condition requires, but no later than 72 hours after the date the MA organization receives the request for reconsideration. At § 422.619, we are proposing to add paragraphs (b)(1) and (2). Proposed § 422.619(b)(1) would include the existing regulation text at § 422.619(b) related to reversals by the independent outside entity for expedited reconsideration requests for a service and proposed § 422.619(b)(2) would account for reversals by the independent outside entity for expedited reconsideration requests for a Part B drug. We are proposing that paragraph (b)(2) state that if, on expedited reconsideration, the MA organization's determination is reversed in whole or in part by the independent outside entity, the MA organization must authorize or provide the Part B drug under dispute as expeditiously as the enrollee's health condition requires but no later than 24 hours from the date it receives notice reversing the determination. The MA organization must inform the outside entity that the organization has effectuated the decision. At § 422.619(c)(2) we are proposing to redesignate paragraph (c)(2) as new paragraph (c)(3) and propose that new paragraph (c)(2) address reversals of decisions related to Part B drugs by other than the MA organization or the independent outside entity. Specifically, we are proposing that paragraph (c)(2) state that if the independent outside entity's expedited determination is reversed in whole or in part by an ALJ/attorney adjudicator or at a higher level of appeal, the MA organization must authorize or provide the Part B drug under dispute as expeditiously as the enrollee's health condition requires but no later than 24 hours from the date it receives notice reversing the determination. The MA organization must inform the outside entity that the organization has effectuated the decision. Finally, we are proposing a change to § 422.619(a) to update a cross-reference to § 422.590 affected by these proposed changes.

Finally, we are also proposing to add a reference to an ''item'' as it relates to regulatory requirements applicable to medical items and services, rather than just a reference to ''services'' as some of the regulatory text currently reads. At §§ 422.568(b), (d) and (e), 422.572(a) and (b), 422.590(a), (e), and (f), and 422.619(a) and (b) we have revised the language to include a reference to ''items'' to more clearly distinguish requests for medical services and items from requests for Part B drugs and requests for payment, to clarify the regulation text and have it conform to how items and services may be covered benefits.

We solicit comments on these proposals for various requirements, described in this preamble, under which MA plans could apply step therapy as a utilization management tool for Part B drugs in 2020 and subsequent years. Through these proposals to permit use of step therapy for Part B drugs and the application of shorter adjudication timeframes for Part B drug requests, we are seeking to balance the goals of cost savings and efficiencies with enrollee access, enhanced quality of care and due process protections. We are expressly soliciting comment on the following aspects of our proposal and whether there are additional considerations that would further these goals:

- The restriction to new starts.
- The new requirement for a P&T committee for MA plans that implement step therapy and the use of that P&T committee.
- The prohibition on using non-covered drugs, and in certain circumstances, off-label drugs, in the step therapy programs.
- The organization determination and appeals timelines and processes that would be applicable to Part B drugs, particularly our proposal to not permit MA organizations to extend the

proposed timeframes for requests for Part B drugs and whether we have overlooked an appeal procedure or timeframe that should also be addressed in order to meet our goal of aligning organization determinations and appeals related to Part B drugs with the procedures and timeframes currently applicable to coverage determinations and appeals for Part D drugs under part 423.

Finally, we note that in a recent proposed rule, CMS–4185–P, entitled ''Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Program of All-inclusive Care for the Elderly (PACE), Medicaid Fee-For-Service, and Medicaid Managed Care Programs for Years 2020 and 2021'' and published in the **Federal Register** on November 1, 2018 (83 FR 54982), we proposed integrated grievance and appeal provisions for certain D–SNPs with aligned enrollment with Medicaid managed care plans. We are actively considering whether, if those proposed revisions to part 422, subpart M are finalized, these proposed changes in the timeframes applicable to organization determinations and appeals of coverage of Part B drugs should be incorporated into the integrated appeals processes. We solicit comment on that and whether including these specific, shorter timeframes for determinations related to Part B drugs are consistent with the goals and rationale of our proposal for integrated appeals procedures for certain D–SNPs in that proposed rule.

E. Pharmacy Price Concessions in the Negotiated Price (§ 423.100)

1. Introduction

Part D sponsors and their contracted PBMs have been increasingly successful in recent years at negotiating price concessions from network pharmacies. The data Part D sponsors submit to CMS as part of the annual required reporting of direct or indirect remuneration (DIR) show that pharmacy price concessions, net of all pharmacy incentive payments, have grown faster than any other category of DIR received by sponsors and PBMs. This means that pharmacy price concessions now account for a larger share than ever before of reported DIR and thus a larger share of total gross drug costs in the Part D program.

The data show that pharmacy price concessions, net of all pharmacy incentive payments, grew more than 45,000 percent between 2010 and 2017. The data also show that much of this growth occurred after 2012, when the use by Part D sponsors of performance-based payment arrangements with pharmacies became increasingly prevalent. Performance-based pharmacy price concessions, net of all pharmacy incentive payments, increased, on average, nearly 225 percent per year between 2012 and 2017 and now comprise the second largest category of DIR received by sponsors and PBMs, behind only manufacturer rebates.

Such price concessions are negotiated between pharmacies and sponsors or their PBMs, independent of CMS, and are often tied to the pharmacy's performance on various measures defined by the sponsor or its PBM. Under the current definition of ''negotiated prices'' at § 423.100, negotiated prices must include all price concessions from network pharmacies except those that cannot reasonably be determined at the point of sale. However, because these performance adjustments typically occur after the point of sale, they are not included in the price of a drug at the point of sale. We further understand, through comments received from the pharmacy industry in response to our Request for Information on pharmacy price concessions (included in the November 2017 proposed rule (82 FR 56419 through 56428)), that the share of pharmacies' reimbursements that are contingent upon their performance under such arrangements has grown steadily each year. (We discuss the comments received in response to this Request for Information in more detail later in this section.) As a result, sponsors and PBMs have been recouping increasing sums from network pharmacies after the point of sale (pharmacy price concessions) for ''poor performance,'' sums that are far greater than those paid to network pharmacies after the point of sale (pharmacy incentive payments) for ''high performance.''

When pharmacy price concessions are not reflected in the price of a drug at the point of sale, beneficiaries might see lower premiums, but they do not benefit through a reduction in the amount they must pay in cost-sharing, and thus, end up paying a larger share of the actual cost of a drug. Moreover, given the increase in pharmacy price concessions in recent years, when the point-of-sale price of a drug that a Part D sponsor reports on a PDE record as the negotiated price does not include such discount, the negotiated price is rendered less transparent at the individual prescription level and less representative of the actual cost of the drug for the sponsor. Finally, variation in the treatment of these price concessions by Part D sponsors may have a negative effect on the competitive balance under the Medicare Part D program. These issues are discussed in more detail later in this section.

At the time the Part D program was established, we believed, as discussed in the January 2005 final rule (70 FR 4244), that market competition would encourage Part D sponsors to pass through to beneficiaries at the point of sale a high percentage of the price concessions they received, and that establishing a minimum threshold for the price concessions to be applied at the point of sale would only serve to undercut these market forces. However, actual Part D program experience has not matched expectations in this regard. In recent years, less than 1 percent of plans have passed through any price concessions to beneficiaries at the point of sale, and the amount that is passed through is less than 1 percent of the total price concessions those plans receive. Instead, because of the advantages that accrue to sponsors in terms of lower premiums (also an advantage for beneficiaries), the shifting of costs, and increases in plan revenues (given the treatment of price concessions under the Part D payment methodology), sponsors may face distorted incentives as compared to what we anticipated in 2005.

For this reason, as part of the November 2017 proposed rule, we published a ''Request for Information Regarding the Application of Manufacturer Rebates and Pharmacy Price Concessions to Drug Prices at the Point of Sale,'' (82 FR 56419 through 56428). We solicited comment on whether CMS should require that the point-of-sale price for a covered Part D drug must include all price concessions that the Part D sponsor could potentially collect from a network pharmacy for any individual claim for that drug. Of the many timely comments received, the majority were from pharmacies, pharmacy associations, and beneficiary advocacy groups that supported the adoption of such a requirement because it would: (1) Lower beneficiary out-of-pocket costs (especially critical for beneficiaries who utilize high cost drugs); (2) stabilize the operating environment for pharmacies (because of greater transparency and predictability of the minimum reimbursement on a per-claim level, thus allowing more accurate budgeting and improved ability to evaluate proposed contracts from PBMs); and (3) standardize the way in which plan sponsors and their PBMs treat pharmacy price concessions. Some commenters—mostly Part D sponsors

and PBMs—were against such a policy, in particular because it would limit their ability to incentivize quality improvement from pharmacies. We address the issue of incentivizing quality improvement by pharmacies in the discussion of lowest possible reimbursement later in this section.

In this rule we are considering for a future year, which could be as soon as 2020, adopting a new definition of ''negotiated price'' to include all pharmacy price concessions received by the plan sponsor for a covered Part D drug, and to reflect the lowest possible reimbursement a network pharmacy will receive, in total, for a particular drug. As part of the policy being considered, we would first delete the current definition of ''negotiated prices'' (in the plural) and add a definition of ''negotiated price'' (in the singular) to make clear that a negotiated price can be set for each covered Part D drug, and the amount of the pharmacy price concessions may differ on a drug by drug basis. Then, we would implement a definition of ''negotiated price'' that is intended to ensure that the prices available to Part D enrollees at the point of sale are inclusive of all pharmacy price concessions. We believe such an approach would be more reflective of current pharmacy payment arrangements.

2. Background

Section 1860D–2(d)(1) of the Act requires that a Part D sponsor provide beneficiaries with access to negotiated prices for covered Part D drugs. Under the definition of ''negotiated prices'' at § 423.100, the negotiated price is the price paid to the network pharmacy or other network dispensing provider for a covered Part D drug dispensed to a plan enrollee that is reported to CMS at the point of sale by the Part D sponsor. This point-of-sale price is used to calculate beneficiary cost-sharing. More broadly, the negotiated price is the primary basis by which the Part D benefit is adjudicated, as it is used to determine plan, beneficiary, manufacturer (in the coverage gap), and government liability during the course of the payment year, subject to final reconciliation following the end of the coverage year.

Under current law, Part D sponsors can generally choose whether to reflect in the negotiated price the various price concessions they or their intermediaries receive. Specifically, section 1860D–2(d)(1)(B) of the Act requires that negotiated prices ''shall take into account negotiated price concessions, such as discounts, direct or indirect subsidies, rebates, and direct or indirect remunerations, for covered part D drugs. . . .'' Currently, Part D sponsors are allowed, but generally not required, to apply rebates and other price concessions at the point of sale to lower the price upon which beneficiary cost-sharing is calculated. The only exception is the requirement under the existing definition of negotiated prices at § 423.100 that negotiated prices must include all price concessions from network pharmacies that can reasonably be determined at the point of sale.

To date, very few pharmacy price concessions have been included in the negotiated price at the point of sale. All pharmacy and other price concessions that are not included in the negotiated price must be reported to CMS as DIR at the end of the coverage year using the form required by CMS for reporting Summary and Detailed DIR (OMB control number 0938–0964). These data on price concessions are used in our calculation of final plan payments, which, under the statute, are required to be based on costs actually incurred by Part D sponsors, net of all applicable DIR.

When price concessions are applied to reduce the negotiated price at the point of sale, some of the concession amount is apportioned to reduce beneficiary cost-sharing. In contrast, when price concessions are applied after the point of sale, as DIR, the majority of the concession amount accrues to the plan, and the remainder accrues to the government. For further discussion on this matter, please see the CMS Fact Sheet from January 19, 2017 ''*Medicare Part D Direct and Indirect Remuneration,*'' found on the CMS website at *https://www.cms.gov/newsroom/fact-sheets/medicare-part-d-direct-and-indirect-remuneration-dir.* As described later in this section of this proposed rule, pharmacy price concessions applied as DIR can lower plan premiums and increase plan revenues, result in cost-shifting to beneficiaries and the government, and reduce consumer and government knowledge about the true costs of prescription drugs.

a. Premiums and Plan Revenues

The main benefit to a Part D beneficiary of price concessions applied as DIR at the end of the coverage year (and not to the negotiated price at the point of sale) is a lower plan premium. A sponsor must factor into its plan bid an estimate of the expected DIR for the upcoming payment year. That is, in the bid the sponsor must lower its estimate of plan liability by a share of the projected DIR, which has the effect of reducing the price of coverage under the plan. Under the current Part D benefit design, applying price concessions after the point of sale as DIR reduces plan liability (and thus premiums), more than applying price concessions at the point of sale.

Therefore, to the extent that plan bids reflect accurate DIR estimates, the pharmacy and other price concessions that Part D sponsors and their PBMs negotiate, but do not include in the negotiated price at the point of sale, put downward pressure on plan premiums, as well as the government's subsidies of those premiums. The average Part D basic beneficiary premium grew at an average rate of only about 1 percent per year between 2010 and 2017, and the average premium has declined each year since 2017 due in part to sponsors' projecting in their bids that DIR growth would outpace the growth in projected gross drug costs each year. The average Medicare direct subsidy paid by the government to cover a share of the cost of coverage under a Part D plan has also declined, by an average of 9.4 percent per year between 2010 and 2017, partly for the same reason.

However, any DIR a sponsor receives that is above the projected amount factored into its plan bids contributes primarily to plan profits, not lower premiums. The risk-sharing construct established under the Part D statute at section 1860D–15(e) of the Act allows sponsors to retain as plan profit the majority of all plan revenues above the bid-projected amount. Given that plan bids, and, thus, plan revenues, are based on cost *projections,* the plan's *actual experience* may yield unexpected losses (when bid-based payments to plans—plan revenues— fall short of actual plan costs) or unexpected savings (when plan revenues exceed actual plan costs) for Part D plan sponsors. In order to limit Part D sponsors' exposure to unexpected drug expenses and the government's exposure to overpayments, Medicare shares risk with sponsors on the drug costs covered by their plan bids, using symmetrical risk corridors to cover or recoup a share of unexpected losses or savings.

Under the Part D risk corridors, if a plan's actual drug costs are within +/−5 percent of the drug costs estimated in its bid, the plan assumes all of the losses or savings. If its costs are more than 5 percent above or below its bid, the government assumes a growing share of the losses or savings, and the plan assumes the remainder. Any unexpected losses or savings that a plan assumes affect its final profit margin. Thus, when a plan underestimates the amount of DIR that it will receive, any additional amount of DIR constitutes additional plan revenues. In the event that overall

plan revenues exceed the amount projected in the plan sponsor's bid, the sponsor is permitted to retain most, if not all, of the excess amount. Our analysis of Part D plan payment and cost data indicates that in recent years, DIR amounts that Part D sponsors and their PBMs actually received have consistently exceeded bid-projected amounts, by as much as three percent as a share of gross drug costs.

To capture the relative premium and other advantages that price concessions, including pharmacy price concessions, applied as DIR offer sponsors over lower point-of-sale prices, sponsors sometimes opt for higher negotiated prices in exchange for higher DIR and, in some cases, even prefer a higher net cost drug over a cheaper alternative. This may put upward pressure on Part D program costs and, as explained in this proposed rule, shift costs from the Part D sponsor to beneficiaries who utilize drugs in the form of higher cost-sharing and to the government through higher reinsurance and low-income cost-sharing subsidies.

b. Cost-Shifting

Beneficiary cost-sharing is generally calculated as a percentage of the negotiated price. When pharmacy price concessions and other price concessions are not reflected in the negotiated price at the point of sale (that is, are applied instead as DIR at the end of the coverage year), beneficiary cost-sharing increases, covering a larger share of the actual cost of a drug. Although this is especially true when a Part D drug is subject to coinsurance, it is also true when a drug is subject to a copayment because Part D rules require that the copayment amount be at least actuarially equivalent to the coinsurance required under the defined standard benefit design. For many Part D beneficiaries who utilize drugs and thus incur cost-sharing expenses, this means, on average, higher overall out-of-pocket costs. Higher costs to beneficiaries have occurred even after accounting for the premium savings tied to higher DIR. For the millions of low-income beneficiaries whose out-of-pocket costs are subsidized by Medicare through the low-income cost-sharing subsidy, those higher costs are borne by the government. See the lowest possible reimbursement example later in this section of the rule for a specific example of the effect the change to the definition of negotiated price being considered would have on the determination of beneficiary cost-sharing.

This potential for cost shifting to beneficiaries grows increasingly pronounced as pharmacy price concessions increase as a percentage of gross drug costs and continue to be applied outside of the negotiated price. Numerous research studies suggest that higher cost-sharing can impede beneficiary access to necessary medications, which leads to poorer health outcomes and higher medical care costs for beneficiaries and Medicare. [14] [15] [16] Based upon this research, we believe it is important to weigh the effects of current Part D policies on beneficiaries' access to affordable prescription drugs—higher cost-sharing per prescription versus lower plan premiums.

Finally, beneficiaries progress through the four phases of the Part D benefit as their total gross drug costs and cost-sharing obligations increase. Because both of these values are calculated based on the negotiated prices reported at the point of sale, when pharmacy price concessions are not applied at the point of sale, the higher negotiated prices result in more rapid movement of Part D beneficiaries through the Part D benefit phases. This, in turn, shifts more of the total drug spend into the catastrophic phase, where Medicare liability is highest (80 percent, paid as reinsurance) and plan liability is at its lowest (except with respect to applicable drugs in coverage gap) (15 percent). With such cost-shifting to the government under current rules, Part D sponsors may have weak incentives, and, in some cases no incentive, to lower prices at the point of sale. See the Regulatory Impact Statement in this proposed rule for a discussion of cost impacts to beneficiaries, the government, and plan sponsors.

c. Transparency and Competition

Given the significant growth in pharmacy price concessions in recent years, when such amounts are not reflected in the negotiated price, it has become increasingly difficult for consumers to know at the point of sale what share, or approximate share, they are paying of the costs of their prescription drugs to the plan; nor are negotiated costs reflected on the Medicare Prescription Drug Plan Finder (Plan Finder) tool. Consequently, consumers cannot efficiently minimize both their costs and costs to the taxpayers by seeking and finding the lowest-cost drug or a plan that offers them the lowest-cost drug and pharmacy combinations.

The quality of information available to consumers is even less conducive to producing efficient choices when pharmacy price concessions are treated differently by different Part D sponsors; that is, when they are applied to the point-of-sale price to differing degrees and/or estimated and factored into plan bids with varying degrees of accuracy. First, when some sponsors include pharmacy price concessions in negotiated prices while others treat them as DIR, the concept of negotiated price no longer has a consistent meaning across the Part D program, undermining meaningful price comparisons and efficient choices by consumers. Second, if a sponsor's bid is based on an estimate of net plan liability that is understated because the sponsor has been applying pharmacy price concessions as DIR at the end of the coverage year rather than using them to reduce the negotiated price at the point of sale, it follows that the sponsor may be able to submit a lower bid than a competitor that applies pharmacy price concessions at the point of sale. This lower bid results in a lower plan premium, which could allow the sponsor to capture additional market share. The resulting competitive advantage accruing to one sponsor over another in this scenario stems only from a technical difference in how plan costs are reported to CMS. Therefore, the opportunity for differential treatment of pharmacy price concessions could result in bids that are not comparable and in premiums that are not valid indicators of relative plan efficiency.

Finally, the one-sided nature of the pharmacy payment arrangements that currently exist also creates competition concerns by discouraging independent pharmacies from participating in a plan's network and thereby increasing market share for the sponsors' or PBMs' own pharmacies. Part D is a market-based approach to delivery of prescription drug benefits, and relies on healthy market competition. Thus, adopting policies that promote competition is an important and relevant consideration in protecting Medicare beneficiaries and the Medicare trust fund from unwarranted costs. Market competition is best achieved when a wide variety of pharmacies are able to compete in the market for selective contracting with plan sponsors and PBMs.

[14] Michele Heisler et al., ''The Health Effects of Restricting Prescription Medication Use Because of Cost,'' Medical Care, 626–634 (2004) available at *https://www.ncbi.nlm.nih.gov/pubmed/15213486.*

[15] Peter Bach, ''Limits on Medicare's Ability to Control Rising Spending on Cancer Drugs,'' The New England Journal of Medicine, 360, 626–633 (2009) available at *https://www.nejm.org/doi/full/10.1056/NEJMhpr0807774.*

[16] Sonya Blesser Streeter et al., ''Patient and Plan Characteristics Affecting Abandonment of Oral Oncolytic Prescriptions,'' Journal of Oncology Practice, 7, no. 3S, 46S–51S (2011) available at *http://ascopubs.org/doi/full/10.1200/jop.2011.000316.*

3. Considered Regulatory Changes to the Definition of Negotiated Price (§ 423.100)

As previously discussed, Part D sponsors and PBMs have been recouping increasing sums from network pharmacies after the point of sale in the form of pharmacy price concessions. We addressed concerns about these pharmacy payment adjustments when we established the existing requirements for negotiated price reporting in the May 2014 final rule (79 FR 29844). In that rule, we amended the definition of ''negotiated prices'' at § 423.100 to require Part D sponsors to include in the negotiated price at the point of sale all pharmacy price concessions and incentive payments to pharmacies—with an exception, intended to be narrow, that allowed the exclusion of contingent pharmacy payment adjustments that cannot reasonably be determined at the point of sale (the reasonably determined exception). However, when we formulated these requirements in 2014, the most recent year for which DIR data was available was 2012, and we did not anticipate the growth of performance-based pharmacy payment arrangements that we have observed in subsequent years.

We now understand that the reasonably determined exception we currently allow applies more broadly than we had initially envisioned because of the shift by Part D sponsors and their PBMs towards contingent pharmacy payment arrangements. As suggested by numerous stakeholders in response to CMS's November 2017 Request for Information (82 FR 56419 through 56428), nearly all performance-based pharmacy payment adjustments may be excluded from the negotiated price on the grounds that they cannot reasonably be determined at the point of sale. Specifically, several stakeholders have suggested to us that sponsors apply the reasonably determined exception to all performance-based pharmacy payment adjustments. These stakeholders assert that the amount of these adjustments, by definition, is contingent upon performance measured over a period of time that extends beyond the point of sale and, thus, cannot be known in full at the point of sale. Therefore, performance-based pharmacy payment adjustments cannot ''reasonably be determined'' at the point of sale as they cannot be known in full at the point of sale. These assertions are supported by the information plan sponsors report to CMS as part of the annual DIR reports. As a result, the reasonably determined exception prevents the current policy from having the intended effect on price transparency, consistency (by reducing differential reporting of pharmacy payment adjustments by sponsors), and beneficiary costs.

Given the predominance of the use of performance-contingent pharmacy payment arrangements by plan sponsors, we do not believe that the existing requirement that pharmacy price concessions be included in the negotiated price can be implemented in a manner that achieves the goals previously discussed: Meaningful price transparency, consistent application of all pharmacy payment concessions by all Part D sponsors, and prevention of cost-shifting to beneficiaries and taxpayers. Therefore, to establish a requirement that accomplishes these goals while better reflecting current pharmacy payment arrangements, we are considering adding a definition of the term ''Negotiated price'' at § 423.100 to mean the lowest amount a pharmacy could receive as reimbursement for a covered Part D drug under its contract with the Part D sponsor or the sponsor's intermediary (that is, the amount the pharmacy would receive net of the maximum possible negative adjustment that could result from any contingent pharmacy payment arrangement). First, we are considering deleting the current definition of ''Negotiated prices'' (in the plural) and adding a new definition of ''Negotiated price'' (in the singular) in order to make clear that a negotiated price can be set for each covered Part D drug, and the amount of pharmacy price concessions may differ on a drug–by-drug basis. Next, we are considering the policy that the negotiated price for a covered Part D drug must include all pharmacy price concessions and any dispensing fees, and exclude additional contingent amounts, such as incentive fees, if these amounts increase prices. Finally, we are considering continuing to permit Part D sponsors to elect whether to pass-through non-pharmacy price concessions and other direct or indirect remuneration amounts (for example, manufacturer rebates, legal settlement amounts, and risk-sharing adjustments) to enrollees at the point of sale. These considered provisions are discussed in the following sections.

Requiring that all pharmacy price concessions be included in the negotiated price, as we have described, would lead to more accurate comparability of drug prices, Part D bid pricing, and plan premiums. When negotiated prices reflect relative plan efficiencies, there would not be unfair competitive advantages accruing to one sponsor over another based on a technical difference in how costs are reported. In short, because Part D is a market-based approach to delivering prescription drug benefits, and relies on healthy market competition, we believe the policy being considered could make the Part D market more competitive and efficient.

a. All Pharmacy Price Concessions

We are considering the policy that the new definition of ''Negotiated price'' omit the reasonably determined exception. That is, we would require that all price concessions from network pharmacies, negotiated by Part D sponsors and their contracted PBMs, be reflected in the negotiated price that is made available at the point of sale and reported to CMS on a PDE record, even when such price concessions are contingent upon performance by the pharmacy.

Section 1860D–2(d)(1)(B) of the Act requires that negotiated prices ''shall take into account negotiated price concessions, such as discounts, direct or indirect subsidies, rebates, and direct or indirect remunerations, for covered part D drugs . . .'' We have previously interpreted this language to mean that some, but not all, price concessions must be applied to the negotiated price (see, for example, 70 FR 4244 and 74 FR 1511). However, we now believe that our initial interpretation may have been overly definitive with respect to the intended meaning of ''take into account.'' Requiring that all pharmacy price concessions be applied at the point of sale would ensure that negotiated prices ''take into account'' at least some price concessions and, therefore, would be consistent with the plain language of section 1860D–2(d)(1)(B) of the Act.

b. Lowest Possible Reimbursement

To effectively capture all pharmacy price concessions at the point of sale consistently across sponsors, we are considering requiring the negotiated price to reflect the lowest possible reimbursement that a network pharmacy could receive from a particular Part D sponsor for a covered Part D drug. Under this approach, the price reported at the point of sale would need to include all price concessions that could potentially flow from network pharmacies, as well as any dispensing fees, but exclude any additional contingent amounts that could flow to network pharmacies and thus increase prices over the lowest reimbursement level, such as incentive fees. That is, if a performance-based payment arrangement exists between a sponsor and a network pharmacy, the point-of-

sale price of a drug reported to CMS would need to equal the final reimbursement that the network pharmacy would receive for that prescription under the arrangement if the pharmacy's performance score were the lowest possible. If a pharmacy is ultimately paid an amount above the lowest possible contingent incentive reimbursement (such as in situations where a pharmacy's performance under a performance-based arrangement triggers a bonus payment or a smaller penalty than that assessed for the lowest level of performance), the difference between the negotiated price reported to CMS on the PDE record and the final payment to the pharmacy would need to be reported as negative DIR as part of the annual report on DIR following the end of the year. For an illustration of how negotiated prices would be reported under such an approach, see the example provided later in this section.

By requiring that sponsors assume the lowest possible pharmacy performance when reporting the negotiated price, we would be prescribing a standardized way for Part D sponsors to treat the unknown (final pharmacy performance) at the point of sale under a performance-based payment arrangement, which many Part D sponsors and PBMs have identified as the most substantial operational barrier to including such concessions at the point of sale. We believe, based on the overwhelming support received from commenters on our November 2017 Request for Information, that this is the best approach to achieve our goals, as noted previously, of—(1) consistency (standardized reporting of negotiated prices and DIR); (2) preventing cost-shifting to beneficiaries; and (3) price transparency for beneficiaries, the government, and other stakeholders.

Regarding consistency in reporting, we believe that the approach we are considering would be clearer for Part D sponsors to follow than the requirements in place today, which require Part D sponsors to assess which types of pharmacy payment adjustments fall under the reasonably determined exception. We expect this increased clarity would reduce sponsor burden in terms of the resources necessary to ensure compliance in the absence of a clear standard. Finally, we believe that the change we are considering would improve the quality of drug pricing information available across Part D plans and thus improve market competition and cost efficiency under Part D.

Requiring the negotiated price to reflect the lowest possible pharmacy reimbursement, would move the negotiated price closer to the final reimbursement for most network pharmacies under current pharmacy payment arrangements, and thus closer to the actual cost of the drug for the Part D sponsor. We have learned from the DIR data reported to CMS and feedback from numerous stakeholders that pharmacies rarely receive an incentive payment above the original reimbursement rate for a covered claim. We gather that performance under most arrangements dictates only the magnitude of the amount by which the original reimbursement is reduced, and most pharmacies do not achieve performance scores high enough to qualify for a substantial, if any, reduction in penalties.

Finally, we are considering requiring that all contingent incentive payments be excluded from the negotiated price. As noted previously, we understand that such incentive payments are quite rare. Furthermore, even in those instances in which a pharmacy may qualify for such a payment, including the amount of any contingent incentive payments to pharmacies in the negotiated price would make drug prices appear higher at a ''high performing'' pharmacy, which receives an incentive payment, than at a ''poor performing'' pharmacy, which is assessed a penalty, and would also reduce price transparency. This pricing differential could also potentially create a perverse incentive for beneficiaries to choose a lower performing pharmacy for the advantage of a lower price. We believe the approach we are considering would prevent these unintended consequences and thus avoid reducing the competitiveness of high performing pharmacies by increasing the negotiated price charged to the beneficiary at those pharmacies. Additionally, Part D sponsors and their intermediaries have argued in the past that network pharmacies lose motivation to improve performance when all performance-based adjustments are required to be reported up-front. Revising the negotiated price definition as we are considering doing would mitigate this concern by allowing sponsors and their intermediaries to motivate network pharmacies to improve their performance with the promise of future incentive payments that would increase pharmacy reimbursement from the level of the lowest possible reimbursement per claim. Further, we emphasize that the policy being considered would not require pharmacies to be paid in a certain way; rather we would be requiring standardized reporting to CMS of drug prices at the point of sale.

c. Lowest Possible Reimbursement Example

To illustrate how Part D sponsors and their intermediaries would report costs under the approach we are considering, we provide the following example. Suppose that under a performance-based payment arrangement between a Part D sponsor and its network pharmacy, the sponsor will implement one of three scenarios: (1) Recoup 5 percent of its total Part D-related payments to the pharmacy at the end of the contract year for the pharmacy's failure to meet performance standards; (2) recoup no payments for average performance; or (3) provide a bonus equal to 1 percent of total payments to the pharmacy for high performance. For a drug that the sponsor has agreed to pay the pharmacy $100 at the point of sale, the pharmacy's final reimbursement under this arrangement would be: (1) $95 for poor performance; (2) $100 for average performance; or (3) $101 for high performance. Under the current definition of negotiated prices, the reported negotiated price is likely to be $100, given the reasonably determined exception for contingent pharmacy payment adjustments. However, under the approach we are considering here, for all three performance scenarios the negotiated price reported to CMS on the PDE record at the point of sale for this drug would be $95, or the lowest reimbursement possible under the arrangement. Thus, if a plan enrollee were required to pay 25 percent coinsurance for this drug, then the enrollee's costs under all scenarios would be 25 percent of $95, or $23.75, which is less than the $25 the enrollee would pay today (when the negotiated price is likely to be reported as $100). Finally, any difference between the reported negotiated price and the pharmacy's final reimbursement for this drug would be reported as DIR at the end of the coverage year. Under this requirement, the sponsor would report $0 as DIR under the poor performance scenario ($95 minus $95), –$5 as DIR under the average performance scenario ($95 minus $100), and –$6 as DIR under the high performance scenario ($95 minus $101), for every covered claim for this drug purchased at this pharmacy.

d. Additional Considerations

In order to implement the change being considered, we would leverage existing reporting mechanisms to confirm that sponsors are appropriately applying pharmacy price concessions at

the point of sale, as we do with other cost data required to be reported. Specifically, we would likely use the estimated rebates at point of sale field on the PDE record to also collect the amount of point-of-sale pharmacy price concessions. We also would likely use fields on the Summary and Detailed DIR Reports to collect final pharmacy price concession data at the plan and NDC levels. Differences between the amounts applied at the point of sale and amounts actually received, therefore, would become apparent when comparing the data collected through those means at the end of the coverage year. To implement the change being considered to the definition of negotiated price at the point of sale, Part D sponsors and their PBMs would load revised drug pricing tables that reflect the lowest possible reimbursement into their claims processing systems that interface with contracted pharmacies.

Additionally, we note that the negotiated price is also the basis by which manufacturer liability for discounts in the coverage gap is determined. We are considering whether to require sponsors to include pharmacy price concessions in the negotiated price in the coverage gap, for purposes of determining manufacturer coverage gap discounts, as would be required of sponsors in all other phases of the Part D benefit under approach being considered. We request comment on the alternate approaches.

Under section 1860D–14A(g)(6) of the Act, the term ''negotiated price'' has the meaning it was given in § 423.100 as in effect as of the enactment of the Patient Protection and Affordable Care Act, except that it excludes any dispensing fee. This definition is codified in the coverage gap discount program regulations at § 423.2305. Because the statutory definition of negotiated price for purposes of the coverage gap discount program references price concessions that the Part D sponsor has *elected to* pass through at the point of sale, we do not believe it would appropriate to require sponsors to include all price concessions in the negotiated price for purposes of the coverage gap discount program. However, we believe there would be authority under the statute to require sponsors to include all *pharmacy* price concessions in the negotiated price for purposes of the coverage gap discount program because such concessions necessarily affect the amount that the pharmacy receives in total for a particular drug. We also note that pharmacy price concessions account for only a share of all price concessions a sponsor might receive. Thus, even if a plan sponsor is required to include all pharmacy price concessions in the negotiated price at the point of sale, the plan sponsor must still make an election as to how much of the overall price concessions (including manufacturer rebates and other non-pharmacy price concessions) it receives will be passed through at the point of sale. Under this approach, Part D sponsors would be required to include all pharmacy price concessions in the negotiated price during the coverage gap, and the same negotiated price could be used to adjudicate claims during all phases of the Part D benefit.

If we do not require sponsors to include pharmacy price concessions in the negotiated price in the coverage gap, we would need to operationalize different definitions of ''negotiated price'' for the coverage gap versus the non-coverage gap phases of the Part D benefit. Under this alternative approach, during the non-coverage gap phases, claims would be adjudicated using the negotiated price determined as described in the lowest possible reimbursement example above. In contrast, during the coverage gap, plans would have the flexibility to determine how much of the pharmacy price concessions to pass through at the point of sale, and beneficiary, plan, and manufacturer liability in the coverage gap would be calculated using this alternate negotiated price.

We also request comment on a considered alternative to the lowest possible reimbursement approach that would require Part D sponsors to apply less than 100 percent, *e.g.,* 95 percent or more, of pharmacy price concessions at the point of sale. This alternative might grant sponsors additional flexibilities in regards to the application of price concessions, thus potentially limiting the beneficiary premium impact, while still improving price transparency in a meaningful way. We believe that requiring less than 100 percent of pharmacy price concessions be applied at the point of sale would have a proportionately smaller impact on beneficiary, government, and manufacturer costs than the impacts we outline in the Regulatory Impact Statement in this proposed rule for requiring the point-of-sale application of 100 percent of pharmacy price concessions.

In addition, we are considering an option to develop a standard set of metrics from which plans and pharmacies would base their contractual agreements. We request commenter feedback on whether these metrics could be designed to provide pharmacies with more predictability in their reimbursements while maintaining plan's ability to negotiate terms. Additionally, we seek comment on the most appropriate agency or organization to develop these standards, or whether this a matter better left to private negotiations.

Finally, given the many considerations outlined above, we have not concluded, at this time and without the benefit of public comment, that we should move forward with changing the definition of negotiated price for contract year 2020 or otherwise. However, we seek comment on whether we should do so, including whether to adopt in the final rule the approach considered above or a logical outgrowth of it, whether to make such a change for the contract year 2020, and on the contours and contentment of the policy considered and outlined above. If such a change is adopted, we anticipate the regulation text at § 423.100 would read as follows:

Negotiated price means the price for a covered Part D drug that—

(1) The Part D sponsor (or other intermediary contracting organization) and the network dispensing pharmacy or other network dispensing provider have negotiated as the lowest possible reimbursement such network entity will receive, in total, for a particular drug and

(2) Meets all of the following:

(i) Includes all price concessions (as defined at § 423.100) from network pharmacies or other network providers;

(ii) Includes any dispensing fees; and

(iii) Excludes additional contingent amounts, such as incentive fees, if these amounts increase prices.

(3) Is reduced by non-pharmacy price concessions and other direct or indirect remuneration that the Part D sponsor has elected to pass through to Part D enrollees at the point of sale.

4. Pharmacy Administrative Service Fees

We are aware that some sponsors and their intermediaries believe certain fees charged to network pharmacies—such as ''network access fees,'' ''administrative fees,'' ''technical fees,'' or ''service fees''—represent valid administrative costs and, thus, do not believe such fees should be treated as price concessions. However, pharmacies and pharmacy organizations report that they do not receive anything of value for such administrative service fees other than the ability to participate in the Part D plan's pharmacy network.

Thus, we are restating the conclusion we provided in the May 2014 final rule (79 FR 29877): When pharmacy administrative service fees take the form

of deductions from payments to pharmacies for Part D drugs dispensed to Part D beneficiaries, they clearly represent charges that offset the sponsor's or its intermediary's operating costs under Part D. We believe that if the sponsor or its intermediary contracting organization wishes to be compensated for these services and have those costs treated as administrative costs, such costs should be accounted for in the administrative costs of the Part D bid. If instead these costs are deducted from payments made to pharmacies for purchases of Part D drugs, such costs are price concessions and must be treated as such in Part D cost reporting. This is the case regardless of whether the deductions are calculated on a per-claim basis or not.

The regulations governing the Part D program require that price concessions be fully disclosed. If not reported at all, these amounts would result in another form of so-called PBM spread in which inflated prices contain a portion of costs that should be treated as administrative costs. That is, even if these costs did represent services rendered by an intermediary organization for the sponsor, then these costs would be administrative service costs, not drug costs, and should be treated as such. Failure to report these costs as administrative costs in the bid would allow a sponsor to misrepresent the actual costs necessary to provide the benefit and thus to submit a lower bid than necessary to reflect its revenue requirements (as required at section 1860D–11(e)(2)(C) of the Act and at § 423.272(b)(1) of the regulations) relative to another sponsor that accurately reports administrative costs consistent with CMS instructions.

5. Defining Price Concession (§ 423.100)

Section 1860D–2(d)(1)(B) of the Act stipulates that the negotiated price shall take into account negotiated price concessions, such as discounts, direct or indirect subsidies, rebates, and direct or indirect remunerations, for covered Part D drugs. Section 1860D–2(d)(2) of the Act further requires that Part D sponsors disclose to CMS the aggregate negotiated price concessions by manufacturers that are passed through in the form of lower subsidies, lower monthly beneficiary premiums, and lower prices through pharmacies and other dispensers. While ''price concession'' is a term important to the adjudication of the Part D program, it has not yet been defined in the Part D statute or in Part D regulations and subregulatory guidance. Therefore, to avoid confusion among Part D sponsors and other stakeholders of the Part D program resulting from inconsistent terminology, we are considering providing a definition for the term ''price concession'' at § 423.100. We would consider implementing, for 2020 or another future year, a provision that defines price concession in a broad manner, to include all forms of discounts, direct or indirect subsidies, or rebates that serve to reduce the costs incurred under Part D plans by Part D sponsors.

In considering how to define price concession, we believe it is important to define the term in a broadly applicable manner, while maintaining clarity. We believe the approach we are considering would be consistent with the statute, would support consistent accounting by plan sponsors of amounts that are price concessions, and would ensure that certain forms of discounts are not inappropriately excluded from being considered price concessions.

An alternative would be not to define price concession at all. However, this option would not support consistent accounting of amounts that are price concessions among Part D sponsors, which is particularly important in light of the change being considered for the definition of negotiated price.

If such a change is adopted, we anticipate the regulation text at § 423.100 would read as follows:

Price concession means any form of discount, direct or indirect subsidy, or rebate received by the Part D sponsor or its intermediary contracting organization from any source, that serves to decrease the costs incurred under the Part D plan by the Part D sponsor. Examples of price concessions include but are not limited to: Discounts, chargebacks, rebates, cash discounts, free goods contingent on a purchase agreement, coupons, free or reduced-price services, and goods in kind.

We note that the change we are considering for the definition of price concession would not affect the way in which price concessions must be accounted for by Part D sponsors in calculating costs under a Part D plan. Defining price concessions as we are considering doing also would not require the renegotiation of any contractual arrangements between a sponsor and its contracted entities. Therefore, this definition we are considering for price concession has no impact under the federal requirements for Regulatory Impact Analyses.

III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

In this proposed rule, we are soliciting public comment on each of these issues for the following sections of this rule that contain proposed ''collection of information'' requirements as defined under 5 CFR 1320.3 of the PRA's implementing regulations.

A. Wage Data

To derive average costs for the private sector, we used data from the U.S. Bureau of Labor Statistics' (BLS's) May 2017 National Occupational Employment and Wage Estimates for all salary estimates (*http://www.bls.gov/oes/current/oes_nat.htm*). In this regard, Table 2 presents the mean hourly wage, the cost of fringe benefits and overhead (calculated at 100 percent of salary), and the adjusted hourly wage.

TABLE 2—NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES

Occupation title	Occupation code	Mean hourly wage ($/hr)	Fringe benefits and overhead ($/hr)	Adjusted hourly wage ($/hr)
Business Operation Specialist	13–1000	34.54	34.54	69.08

TABLE 2—NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES—Continued

Occupation title	Occupation code	Mean hourly wage ($/hr)	Fringe benefits and overhead ($/hr)	Adjusted hourly wage ($/hr)
Pharmacist	29–1051	58.52	58.52	117.04
Software Developers and Programmers	15–1130	49.27	49.27	98.54

As indicated, we are adjusting our employee hourly wage estimates by a factor of 100 percent. This is necessarily a rough adjustment, both because fringe benefits and overhead costs vary significantly from employer to employer, and because methods of estimating these costs vary widely from study to study. We believe that doubling the hourly wage to estimate total cost is a reasonably accurate estimation method.

B. Proposed Information Collection Requirements (ICRs)

1. ICRs Regarding the Provision of Plan Flexibility To Manage Protected Classes (§ 423.120(b)(2)(vi))

The requirements and burden related to the proposed justification under § 423.120(b)(2)(vi)(E) will be submitted to OMB for approval under control number 0938–0763 (CMS–R–262).

As described in section III.B. of this rule, the proposed new paragraph at § 423.120(b)(2)(vi) would implement the authority granted to CMS by section 1860D–4(b)(3)(G) of the Act to establish exceptions that would permit a Part D sponsor to exclude from its formulary (or to otherwise limit access to such a drug, including through prior authorization or utilization management) a particular Part D drug that is otherwise required to be included in the formulary. For the proposed exceptions that expand the use of prior authorization and step therapy for protected class drugs at § 423.120(b)(2)(vi)(C) and the exceptions for protected class drugs that are new formulations at § 423.120(b)(2)(vi)(D), the burden would consist of the time and effort for Part D sponsors to submit their formularies to CMS under the existing annual submission process. The annual submission requirements and burden are currently approved by OMB under control number 0938–0763 (CMS–R–262). The proposed provisions would not impose any new or revised information collection requirements or burden. Consequently, the provisions are not subject to the PRA.

For the proposed exceptions related to § 423.120(b)(2)(vi)(E), for protected class drugs for which a Part D sponsor chooses to exclude from their formulary due to a price increase beyond a certain threshold, Part D sponsors would be required to submit an additional justification to CMS during the annual formulary submission process. The justification must explain why the Part D sponsor is excluding such drug from their formulary. The burden associated with this exception would consist of the time and effort put forth by Part D sponsors to prepare and submit their formularies to CMS along with the justification.

While the annual formulary preparation and submission process and burden are currently approved by OMB without the need for change, we estimate that it would take an average of 10 minutes (0.167 hours) at $117.04/hr for a pharmacist to prepare and submit each justification. Because Part D sponsors already research list prices to inform the existing formulary negotiation process, we only consider the time necessary to prepare and submit the justification to CMS. We estimate that all 218 Part D plan sponsors (32 PDP parent organizations and 186 MA–PD parent organizations, based on plan year 2018 plan participation) would be subject to this requirement. In aggregate, we estimate an annual burden of 36 hours (0.167 hr × 218 sponsors) at a cost of $4,213 (36 hr × $117.04/hr).

2. ICRs Regarding the Prohibition Against Gag Clauses in Pharmacy Contracts (§ 423.120(a)(8)(iii))

This proposed change would codify in Part D regulation a ban on contract provisions that prohibit network pharmacies from informing Part D enrollees about instances where the pharmacy has a cash price for a prescribed drug that is lower than the out-of-pocket cost that would be charged to the enrollee. Since this would not change any existing practice and the provisions do not have any information collection implications, the provisions are not subject to the PRA.

3. ICRs Regarding E-Prescribing and the Part D Prescription Drug Program; Updating Part D E-Prescribing Standards (§ 423.160)

This provision proposes that each Part D plan sponsor adopt one or more Real Time Benefit Tool (RTBT) tools that are capable of integrating with e-prescribing (eRx) and electronic medical record (EMR) systems for use in part D E-Prescribing (eRx) transactions beginning on or before January 1, 2020. We are advancing a provision with unclear costs and impacts to reflect the direction that the industry is moving in, and we want to ensure that protections and guidance are given before it becomes too widespread. Because of a desire to address the high costs of drugs and the potential savings that could be realized through RTBT we do not wish to delay such a proposal. This provision also supports the MMA objectives of patient safety, quality of care, and efficiencies and cost savings in the delivery of care if our proposals are finalized.

Because of our inability to quantitatively score this provision, we are soliciting comments on potential information collection implications.

4. ICRs Regarding Part D Explanation of Benefits (§ 423.128)

Section 1860D–4(a)(1)(A)(4) of the Act requires that Part D sponsors furnish to each of their enrollees a written explanation of benefits (EOB) and, when the prescription drug benefits are provided, a notice of the benefits in relation to the initial coverage limit and the out-of-pocket threshold for the current year.

In this rule we are proposing to require that sponsors include the cumulative percentage change in the negotiated price since the first day of the current benefit year for each prescription drug claim in the EOB. Sponsors would also be required to include information about drugs that are therapeutic alternatives with lower cost-sharing. The intent is to provide enrollees with greater transparency, thereby encouraging lower costs. Since plans use formularies we believe it is reasonable to assume that all plans already have the negotiated drug price

and the lower cost alternatives in an existing system. Nonetheless, we seek comment on the availability and feasibility of this information. If our assumption is correct, the sole cost of this proposal to plans would be placing this information in the Part D EOB model, a model which all impacted plans have and use for their enrollees.

We assume that half a day of programming work (4 hours) per contract at $98.54 an hour is needed to link alternative prices to EOB Model. Therefore, the aggregate first year impact is 2,240 hours (560 Part D contracts * 4 hours per contract) at an aggregate cost of $0.2 million (560 Part D Sponsors and PDPs * 4 hours * $98.54/hr). Since this is a first time impact only, the annualized impact over 3 years is 747 hours (2,240/3) at a cost of $73,609 (747 hours * $98.54/hr).

5. ICRs Regarding Medicare Advantage and Step Therapy for Part B Drugs (§§ 422.136, 422.568, 422.570, 422.572, 422.584, 422.590, 422.618, and 422.619)

This rule proposes protections that ensure beneficiaries maintain access to medically necessary Part B drugs while permitting MA plans to implement step therapy protocols that support stronger price negotiation and cost and utilization controls. In order to implement a step therapy program for one or more Part B drugs, we are proposing that an MA plan must establish and use a P&T Committee to review and approve step therapy programs used in connection with Part B drugs. The proposed P&T Committee requirements are the same as the requirements applicable to Part D plans under § 423.120(b). We propose to allow MA–PD plans to use the Part D P&T Committee to satisfy the new requirements proposed in this rule related to MA plans and Part B drugs. For MA plans that do not cover Part D benefits already, they may use the Part D P&T committee of another plan under the same contract. Under § 422.4(c), every MA contract must have at least one plan offering Part D. Because of the small amount of work needed annually (and estimated in this rule) we believe it is reasonable to assume that no new committees will be formed and that the added work will be performed by the existing P&T Committees. We estimate it would take 1 hour at $69.08/hr for a P&T Committee business specialist to perform certain tasks and review and retain documentation and information as described in § 422.136(b)(4) and (9). The one hour estimate reflects half the Part D P&T Committee burden (or two hours) that is currently approved by OMB under control number 0938–0964 (CMS–10141). We believe that the added hour is reasonable since the P&T Committee requires significantly less work for Part B than for Part D. In aggregate we estimate an annual burden of 634 hours (1 hour × [697 plans—63 Prescription Drug plans which don't offer Part B]) at a cost of $43,797 (634 hr × $69.08/hr).

Another proposed beneficiary protection measure is related to organization determinations and reconsiderations for Part B drugs. The proposal only changes the adjudication timeframes for an MA plan (including an MA–PD plan). We are not proposing to change any other requirements (for example, notice requirements, content, standards for decision making, etc.). Consequently, the provision is not subject to the PRA.

6. ICRs Regarding Pharmacy Price Concessions in the Negotiated Price (§ 423.100)

We are considering redefining ''negotiated price'' as the baseline, or lowest possible, payment to a pharmacy and adding a definition of ''price concession.'' The definitions being considered would not impose any new or revised information collection requirements or burden on sponsors, pharmacies, or any other stakeholders. Consequently, the provisions would not be subject to the PRA.

C. Summary of Proposed Information Collection Requirements and Burden

TABLE 3—ANNUAL RECORDKEEPING AND REPORTING REQUIREMENTS

Regulatory reference	Provision brief title	OMB and CMS control Nos.	Item	Respondents	Total responses	Hours per respondent	Total hours	Labor cost ($/hr)	Total annual cost ($)
§§ 423.120(b) and 422.136(b)	Step Therapy Part B	0938–0964 (CMS 10141).	Documentation Requirements.	634	634	1	634	69.08	43,797
§ 423.120(b)(2)(vi)	Plan Flexibility to Manage Protected Classes.	0938–0763 (CMS R 262).	Additional Justification ..	218	218	0.167	36	117.04	4,213
§ 423.128	Part D Explanation of Benefits.	N/A	Part D Explanation of Benefits.	560	560	4	[1]747	98.54	73,609
Subtotal (Private Sector)	.....	.....	.....	*1,412*	.....	*Varies*	*1,417*	*Varies*	*121,619*
Total	.....	.....	.....	1,412	.....	Varies	1,417	Varies	*121,619*

Note: The 747 reflects an annualization of a first year cost over 3 years: 560 * 4/3 − 747.

D. Submission of PRA-Related Comments

We have submitted a copy of this proposed rule to the Office of Management and Budget (OMB) for its review of the rule's information collection and recordkeeping requirements. These requirements are not effective until they have been approved by OMB.

To obtain copies of the supporting statement and any related forms for the proposed collections previously discussed, please visit CMS's website at: *https://www.cms.gov/Regulations-andGuidance/Legislation/PaperworkReductionActof1995/PRAListing.html,* or call the Reports Clearance Office at (410) 786–1326.

We invite public comments on these proposed information collection requirements. If you wish to comment, please submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule and identify the rule (CMS–4180–P) and where applicable: the ICR's CFR citation, CMS ID number, and OMB control number.

See the **DATES** and **ADDRESSES** sections of this proposed rule for further information.

IV. Regulatory Impact Analysis

A. Statement of Need

This rule proposes to support Medicare health and drug plans' negotiation for lower drug prices and reduce out-of-pocket costs for Part C and D enrollees. Although satisfaction with the MA and Part D programs remains high, these proposals are responsive to input we received from stakeholders while administering the programs, as well as through our requests for comment.

HHS Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs (May

16, 2018, 83 FR 22692) sought to find out more information about lowering drug pricing using these four strategies: Improved competition, better negotiation, incentives for lower list prices, and lowering out-of-pocket costs. We are proposing a number of provisions that implement these four strategies in an attempt to lower out-of-pocket costs. There is also a particular focus in this proposed rule on strengthening negotiation for Part D plans and increasing competition in the market for prescription drugs. We propose to offer more tools to MA and Part D plans that negotiate with drug companies on behalf of beneficiaries, so these plans are equipped with similar negotiation capabilities as group health plans and issuers have in the commercial market. We seek to drive robust competition among health plans and pharmacies, so consumers can shop based on quality and value. These proposed provisions align with the Administration's focus on the interests and needs of beneficiaries, providers, MA plans, and Part D sponsors.

B. Overall Impact

We examined the impact of this proposed rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act (the Act), section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)), and Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).

The RFA, as amended, requires agencies to analyze options for regulatory relief of small businesses, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions.

This proposed rule affects MA plans and Part D sponsors (NAICS category 524114) with a minimum threshold for small business size of $38.5 million (*http://www.sba.gov/content/small-business-size-standards*). This proposed rule additionally affects hospitals (NAICS subsector 622) and a variety of provider categories, including physicians, specialists, and laboratories (subsector 621).

To clarify the flow of payments between these entities and the federal government, note that MA organizations submit bids (that is, proposed plan designs and projections of the revenue needed to provide those benefits, divided into three categories—basic benefits, supplemental benefits, and Part D drug benefits) in June 2019 for operation in contract year 2020. These bids project payments to hospitals, providers, and staff as well as the cost of administration and profits. These bids in turn determine the payments from the Medicare Trust Fund to the MA organizations that pay providers and other stakeholders for their provision of covered benefits to enrollees. Consequently, our analysis will focus on MA organizations.

There are various types of Medicare health plans, including MA plans, Part D sponsors, demonstrations, section 1876 cost plans, prescription drug plans (PDPs), and Program of All-Inclusive Care for the Elderly (PACE) plans. Forty-three percent of all Medicare health plan organizations are not-for-profit, and 31 percent of all MA plans and Part D sponsors are not-for-profit. (These figures were determined by examining records from the most recent year for which we have complete data, 2016.)

There are varieties of ways to assess whether MA organizations meet the $38.5 million threshold for small businesses. The assessment can be done by examining net worth, net income, cash flow from operations, and projected claims as indicated in their bids. Using projected monetary requirements and projected enrollment for 2018 from submitted bids, 32 percent of the MA organizations fell below the $38.5 million threshold for small businesses. Additionally, an analysis of 2016 data—the most recent year for which we have actual data on MA organization net worth—shows that 32 percent of all MA organizations fall below the minimum threshold for small businesses.

If a proposed rule may have a significant impact on a substantial number of small entities, the proposed rule must discuss steps taken, including alternatives, to minimize burden on small entities. While a significant number (more than 5 percent) of not-for-profit organizations and small businesses are affected by this proposed rule, the impact is not significant. To assess impact, we use the data in Table 14, which show that the raw (not discounted) net effect of this proposed rule over 5 years is $1.2 billion. Comparing this number to the total monetary amounts projected to be needed just for 2020, based on plan submitted bids, we find that the impact of this proposed rule is significantly below the 3 to 5 percent threshold for significant impact. Had we compared the 2020 impact of the proposed rule to projected 2020 monetary need, the impact would be still less.

Consequently, the Secretary has determined that this proposed rule will not have a significant economic impact on a substantial number of small entities, and we have met the requirements of the RFA. In addition, section 1102(b) of the Act requires us to prepare a regulatory analysis for any final rule under title XVIII, title XIX, or Part B of Title XI of the Act that may have significant impact on the operations of a substantial number of small rural hospitals. We are not preparing an analysis for section 1102(b) of the Act because the Secretary certifies that this proposed rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of UMRA also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2018, that threshold is approximately $150 million. This proposed rule is not anticipated to have an effect on state, local, or tribal governments, in the aggregate, or on the private sector of $150 million or more.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. Since this proposed rule does not impose any substantial costs on state or local governments, the requirements of Executive Order 13132 are not applicable.

If regulations impose administrative costs on reviewers, such as the time needed to read and interpret this proposed rule, then we should estimate the cost associated with regulatory review. There are currently 750 MA contracts (which also includes PDPs), 50 State Medicaid Agencies, and 200 Medicaid Managed Care Organizations (1,000 reviewers total). We assume each entity will have one designated staff member who will review the entire rule. Other assumptions are possible and will be reviewed after the calculations.

Using the wage information from the Bureau of Labor Statistics (BLS) for medical and health service managers (code 11–9111), we estimate that the cost of reviewing this rule is $107.38 per

hour, including fringe benefits and overhead costs (*http://www.bls.gov/oes/current/oes_nat.htm*). Assuming an average reading speed, we estimate that it will take approximately 7.6 hours for each person to review this proposed rule. For each entity that reviews the rule, the estimated cost is therefore, $816 (7.6 hours * $107.38). Therefore, we estimate that the total cost of reviewing this regulation is $816,000 ($816 * 1,000 reviewers).

Note that this analysis assumed one reader per contract. Some alternatives include assuming one reader per parent entity or assuming (major) pharmacy benefit managers (PBMs) will read this rule. Using parent organizations instead of contracts would reduce the number of reviewers to approximately 500 (assuming approximately 250 parent organizations), and this would cut the total cost of reviewing in half. However, we believe it is likely that reviewing will be performed by contract. The argument for this is that a parent organization might have local reviewers; even if that parent organization has several contracts that might have a reader for each distinct geographic region, to be on the lookout for effects of provisions specific to that region.

As for PBMs, it is reasonable that only the major PBMs would review this rule. There are 30–50 major PBMs, and this would increase the estimate by 0.3 to 0.5 percent. Using these alternate estimates, we can safely say that the cost of reviewing is between half a million (50 percent * $816,000) and a million (1.005 percent * $816,000). Thus, we consider the $816,000 a reasonable midpoint figure to estimate review cost.

In accordance with the provisions of Executive Order 12866, this rule was reviewed by the Office of Management and Budget (OMB).

C. Anticipated Effects

1. Providing Plan Flexibility To Manage Protected Classes (§ 423.120(b)(2)(vi))

CMS is proposing three exceptions to the protected class policy that would allow Part D sponsors to: (1) Implement broader use of prior authorization and step therapy for protected class drugs, including to determine use for protected class indications; (2) exclude a protected class drug from a formulary if the drug represents only a new formulation of an existing single-source drug or biological product, regardless of whether the older formulation remains on the market; and (3) exclude a protected class single-source drug or biological product from a formulary if the price of the drug increased beyond a certain threshold over a specified look-back period.

Under this proposal, we reviewed the total expenditure, the rebate amounts, expected patent expirations, and the generic availability for all drugs in the six protected classes and determined that the proposal will have meaningful impact on three classes, which are the anticonvulsants, antidepressants, and antipsychotics. For the remaining three classes, antineoplastics, antiretrovirals, and immunosuppressants, the narrower indications and complicating clinical criteria would limit Part D sponsors' ability to do significant management. Due to restrictions on disclosure of rebate data, CMS is not able to release this analysis to the public.

Granting Part D sponsors additional management flexibility provides them with greater negotiating power in determining manufacturer rebate levels. Additionally, utilization management will promote generic substitution when appropriate and reduce wasteful or inappropriate prescriptions. For example, if an antipsychotic drug is prescribed to a beneficiary and the beneficiary does not have a diagnosis for a condition that requires such a drug, these additional tools will allow Part D sponsors to better manage utilization of that drug. We did not assume any interactions with Part D sponsors' ability to use indication-based coverage, as no experience on that coverage is currently available.

Since manufacturers have been paying relatively high rebates for some drugs, we assume that the rebates would not increase for those drugs whose manufacturers pay for 25 percent or more of their costs. However, there are different market forces behind those drugs whose manufacturers pay lower rebates. Therefore, we assume the rebates will increase by a modest 5 percent for most of those drugs currently with rebates less than 25 percent of their costs. Further, for those drugs with generic versions available, we assume that 5 percent of the brand-name prescriptions will be shifted to generic versions. Since there were no data readily available, we relied upon pharmacy benefit management experience and actuarial judgment to arrive at these 5 percent estimates. Lastly, in the absence of data, and using actuarial judgment, we estimate an overall 0.5 percent of cost reduction due to a reduction in wasteful or inappropriate prescriptions when Part D sponsors implement broader use of prior authorization (for the reasons discussed previously and in section III.B.2. of this proposed rule). We considered studies such as the 2014 NIH study [17] on prior authorization, but based on the focus on a more limited set of drugs, the fact that participants were Medicaid beneficiaries, and the inconclusive nature of the results, we determined it would not be applicable to this provision.

Because the current rebates concentrate on a handful of drugs for which manufacturers already pay relatively high rebates, the further rebate increases are projected to be only about $11 million in 2020. The projected increase in generic substitution affects more than the highly rebated drugs in those three classes (antidepressants, anticonvulsants, and antipsychotics) because most of them have generic competition. Estimated savings to the Medicare Trust Fund for these generic substitutions are $104 million in 2020. The projected savings to the Medicare Trust Fund from reduced overall prescriptions are $77 million in 2020 with 0.5 percent being applied to the total cost adjusted for the projected impact from the generic substitution. Table 4 presents the projected yearly total savings to the Medicare Trust Fund for 2020–2029, carving out the effects of ordinary inflation. The annual savings to the Medicare Trust Fund for 2020–2029 is projected to be $192 to $320 million. The annual savings for Part D enrollees, comprising both lower premiums and lower cost sharing, for 2020–2029 is projected to be $51 to $88 million.

Factors entering into the trend considerations were based on internal CMS data and assumptions on Part D expenditures. We also carved out ordinary inflation of 2.6 percent.

At this time, we do not anticipate any adverse effects upon enrollee access to drugs in the protected classes. The reasons for this are two-fold. First, we are not proposing to change or remove any of the protected classes identified in section 1860D–4(3)(G)(iv) of the Act. Second, in considering whether exceptions to the added protections afforded by the protected class policy are appropriate, we took into account the many other enrollee protections in the Part D program, which are mature and have proven workable. These protections include: Formulary transparency, formulary requirements, reassignment formulary coverage notices, transition supplies and notices, and the expedited exception, coverage determination, and appeals processes.

Out of an abundance of caution to make certain that our three proposed

[17] *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3980661.*

exceptions to the protected class policy would not introduce interruptions for enrollees on existing therapy of protected class drugs for protected class indications, we seek comment on whether there are additional considerations that would be necessary to consider before we would effectuate these exceptions.

TABLE 4—PROJECTED MEDICARE TRUST FUND AND PART D ENROLLEE SAVINGS FOR PROVIDING PLANS FLEXIBILITY TO MANAGE PROTECTED CLASSES

[In millions of dollars]

Year	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029
Medicare Trust Fund Savings	141	151	161	170	180	188	199	209	220	232
Part D Enrollee Share of Savings	51	56	59	63	67	70	75	79	84	88

These projected dollar savings to the Medicare Trust Fund are classified as transfers because the money on brand drugs would instead be spent on generic drugs. While brand drugs are more expensive, the primary driver of this expense is the research and development (R&D) that went into them,[18] and for drugs that are already on the market, R&D has already been done and would not change. In other words, although this proposed regulatory provision would reduce the return on drug development because enrollees who are expected to purchase the brand and thus pay for the initial R&D would instead purchase generics, this reduced return would be experienced after the initial R&D has been completed; consequently, any immediate reduction in R&D services *would not impact the availability of new drugs until later.* There would be also no immediate reduction in production of drugs, since generic manufacturers would produce the drugs consumed by enrollees rather than brand manufacturers. However, the cost to the enrollee and the Medicare Trust Fund would be significantly less because the enrollee and Trust Fund would no longer pay for the initial R&D. In conclusion, this provision would not reduce activities of production but rather transfers the performance of those services from brand manufacturers to generic manufacturers; however, as a consequence, the enrollees and Trust Fund would experience reduced dollars spent.

We solicit comment on these estimates.

2. Prohibition Against Gag Clauses in Pharmacy Contracts (§ 423.120(a)(8)(iii))

This provision proposes to codify existing practice and therefore is expected to produce neither savings nor cost.

[18] ''Why do generic medicines cost less than brand name medicines,'' *https://www.fda.gov/drugs/resourcesforyou/consumers/questionsanswers/ucm100100.htm.*

3. E-Prescribing and the Part D Prescription Drug Program; Updating Part D E-Prescribing Standards (§ 423.160)

This provision proposes that each Part D plan sponsor adopt one or more Real Time Benefit Tool (RTBT) tools that are capable of integrating with e-prescribing (eRx) and electronic medical record (EMR) systems for use in part D E-Prescribing (eRx) transactions beginning on or before January 1, 2020. CMS believes that requiring Part D sponsors to implement real-time benefits (RTB) information may improve the cost effectiveness of the Part D benefit, as required by section 1860D–4(e)(2)(D) of the Act. As discussed earlier in this preamble, we understand that some PBMs and a few prescription drug plans have already begun to use RTBT tools capable of meeting the specifications listed in our preamble discussion, which includes providing beneficiary-specific drug coverage and out-of-pocket cost information at the point-of-prescribing. CMS seeks to accelerate the use of such real time solutions in the Part D program so as to realize their potential to improve adherence, lower prescription drug costs, and minimize beneficiary out-of-pocket cost sharing. These tools have the capability to inform prescribers when lower-cost alternative therapies are available under the beneficiary's prescription drug benefit. We are interested in fostering the use of these real-time solutions in the Part D program, given their potential to lower prescription drug spending and minimize beneficiary out-of-pocket costs. Not only can program spending and beneficiary out-of-pocket costs be reduced, but (as discussed above) evidence suggests that reducing medication cost also yields benefits in patients' medication adherence.

We first give a high-level description of impact. The major savings of this provision would be use of RTBT to encourage prescribing of lower tier cost sharing drugs. This would result in a dollar savings to the Medicare Trust Fund. However, we are unable to fully quantify the impact of this provision due to lack of adequate data. Because of lack of data we are not scoring this provision. We however, provide below a list of data items needed and solicit comments on any of these factors.

To illustrate the potential both for costs and savings we present below some estimates on costs below. We hope commenters can help provide us with information so we can have a more concrete estimate at the time of the final rule.

The list of items for which we do not have adequate data are the following:

- *Current usage:* Some plans are already using some form of RTBT. We do not know how many plans are using RTBT nor do we know to what extent the plans that are using the RTBT are meeting the specifications listed in our preamble discussion.
- *Use of intermediaries for software:* There is a wide range of charges from intermediaries for RTBT. Cost is reduced for large volume which might help large plans but hurt small plans. There is industry concern that if a requirement of RTBT is finalized, intermediaries might raise rates because of increased demand. There is also concern that if a requirement is finalized, Part D plans may struggle to use PBM information with another intermediary, therefore further raising costs for software.
- *Software costs:* Although we are not fully cognizant of all requirements for a plan to program its own software for RTBT, several scenarios discussed in more detail below show a high cost, in fact a cost that could offset the savings.
- *Lower tier cost sharing substitution:* CMS believes the primary source of RTBT savings to arise from the ability of providers to prescribe lower tier cost sharing drugs. While there are also savings from substitutions of generics for brands, these substitutions already are done by pharmacies and providers. We solicit comment on this perspective. We are particularly interested in those stakeholders already using some form of RTBT to ascertain where savings comes

from. We have not found a unique definitive answer to this.

• *Cost after implementation:* If any cost would be incurred from some plans having to make changes once NCPDP develops a universal standard.

• *Cost to providers:* We also believe there could be a cost to providers as they may need training on multiple RTBT tools and time would be taken away from clinical work to consult this tool.

• *Number of impacted beneficiaries:* Due to the limited scope of the current implementation efforts, we are unsure of the number of beneficiaries that would be impacted by this change. The number of impacted beneficiaries could be informed by how aggressively the plans trained prescribers, how many EHRs each RTBT integrated with, and knowledge from the beneficiary to ask for such information.

Prior to stating estimates we outline how they are used. We estimate cost at the parent organization level since software available from a parent organization would suffice for all its contracts. Thus each per parent-organization estimate is multiplied by 240 (the number of parent organizations). This figure is based on all parent organizations creating software is used as a factor in scenarios. For example—

• If we assume 50 percent of parent organizations have adequate software (or cheap intermediaries) then our estimate for cost would be 50 percent * 240 (parent organizations) * Cost per parent organization.

• If we assume 25 percent of parent organizations have adequate software or cheap intermediaries) then our estimate for cost would 25 percent * 240 * Cost per parent organization.

In other words the calculation of cost per parent organization is simply a factor that is to be used in computations of impact by scenario.

Rather than include an assumption about how many parent organizations need to program software, we did not calculate the cumulative impact of the potential costs for software implementation across parent organizations. As discussed below, we are seeking comment on how many plans are already doing RTBT (and conversely, how many would incur costs for software implementation).

We now estimate separately the following:

• Savings from RTBT.

• Cost for software implementation per parent organization.

Cost for intermediaries is not estimated since we have no basis and there is concern that rates might go up.

Savings from RTBT: CMS believes that the primary source of savings of RTBT is the prescription of lower-tier cost sharing drugs. There may also be some savings from substitutions of generics for brands but we currently believe that substitutions of generics for brands is adequately addressed by providers themselves and pharmacies. We solicit stakeholder comment on this perspective of savings as well as stakeholder experience.

Any such savings would be classified as a transfer since there is no reduction in consumption of goods (prescription drugs) but rather a transfer of expense from one drug to another. However, this transfer (between manufacturers of drugs) would result in reduced dollar spending by Part D Sponsors and enrollees and would result in reduced spending by the Medicare Truest Fund.

Cost of plans writing their own software: We are not aware of all software requirements. Therefore, we estimate a minimum requirement and show that even that is prohibitive. We obtain hourly wages from the BLS website. Minimum daily costs are summarized in Table 5.

TABLE 5—COST TO PRODUCE SOFTWARE IMPLEMENTING RTBT

Occupation code	Occupation title	Mean wages per hour	Fringe benefits and overtime	Wage per person	Number of people	Wage per occupation	Hours per day	Wage per day
29–1051	Pharmacists	$58.52	$58.52	$117.04	2	$234.08	8	$1,873
29–1060	Physicians	101.63	101.63	203.26	2	406.52	8	3,252
15–1133	Software developers system software.	53.74	53.74	107.48	2	214.96	8	1,720
15–1131	Programmers	42.08	42.08	84.16	2	168.32	8	1,347
Total cost per day								8,192

We assume that minimally a plan would need a unit of two software developers, two programmers, two physicians and two pharmacists. The total cost per day for this minimal unit is $8,192. The needs for each of these occupations should be clear: Programmers to write the code and software developers for business requirements. Both physicians and pharmacists would be needed to identify clinically equivalent drugs. The use of ''two'' is simply a minimum number. We again emphasize that this minimal unit is a factor not a statement of actual need. The following examples of impacts of scenarios are illustrative:

• If we assume a year of work we would need $2.1 million (52 weeks * 5 days a week * $8,192 cost per day = $2.1 million).

• If we further assume that four of each occupation is needed we would double this (2 (twice as many staff) * 52 weeks * 5 days a week * $8,192 cost per day) = 2 * $2.1 million = $4.2 million).

• If we assume only 6 months are needed then half would be needed ($1.05 million or $2.1 million/2).

Similarly, maintenance costs could be obtained by multiplying number of days needed for maintenance by daily costs. For example if a week each month is needed, maintenance costs would be $0.7 million ($8192 * 12 months * 5 days). If more or less are needed then the maintenance numbers would go up or down.

• *Transaction costs:* We obtained information from only one stakeholder who advised us of a three cent cost per transaction if the volume of requests exceeds 100,000 per month. Since CMS internal data shows 1.5 billion prescription drug events per year, we estimate a $45 million maximum cost (0.03 cost per transaction * 1.5 billion PDE). It follows that transaction cost can be prohibitive. We solicit comments, particularly from stakeholders already using some form of RTBT on the number of PDE involved as well as their experience with cost per transaction.

We are soliciting input from stakeholders on the following questions in order to inform the impact analysis and to help us develop an estimate of the impacts of this proposal across plans:

• How many plans are already doing RTBT?

• What were the costs?

• Are there further costs in going from a trial run to a full run if that is applicable?

• Are the cost estimates for creating software realistic and consistent with plan experience?
• Are plans using intermediaries to provide this service?
• What are the costs for high volume usage?
• What training is provided to prescribers when RTBT is implemented, and how much does that training cost?
• Are providers actively using the RTBT software? What specific provider patterns of usage of RTBT are relevant to this proposal.
• What will the extra cost be to imposing this requirement and then implementing the NCPDP standard?
• Was there a change in prescribing patterns once RTBT was implemented? Did it lead to reduce spending on drugs?

We are also interested in comments that would help us to understand whether the potential benefits or cost savings associated with this proposal outweigh the potential costs of this proposal.

4. Part D Explanation of Benefits (§ 423.128)

In the Collection of Information portion of this document we have detailed the $0.2 million cost to Part D sponsors to update their EOB templates. Additionally, CMS Central Office staff will have to develop the model language to be used by the Part D sponsors.

Significant effort goes into developing a model, including developing instructions and obtaining clearance. We therefore estimate that it would take two GS–13–Step 5 employees a month, each working a half a day, or 160 hours (2 employees * 4 hours a day * 5 days a week * 4 weeks) to develop the templates. It would additionally take a supervisory GS–15 staff, five hours to give approval.

Wages for 2018 for CMS staff may be obtained from the OPM website at *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2018/DCB_h.pdf*. We estimate a total burden of $17,583 (160 hours * $52.66/hr for GS–13, Step 5 staff * 2 (for overtime and fringe benefits) + 5 hours * $73.20/hr for GS–15, Step 5 staff * 2 (for overtime and fringe benefits)).

5. Medicare Advantage and Step Therapy for Part B Drugs (§§ 422.136, 422.568, 422.570, 422.572, 422.584, 422.590, 422.618, and 422.619)

Step therapy is a type of utilization management (for example, prior authorization) for drugs that begin medication for a medical condition with the most preferred drug therapy and progress to other therapies only if necessary, promoting more cost effective therapies, potentially better clinical decisions, and lower costs for treatment. The lower costs of treatment primarily benefit MA enrollees and plans and are transferred to the government as savings.

A further source of savings is negotiations. If a plan offers all drugs, then it typically will purchase drugs at market price. There could be a pair of drugs that have the same effect on a medical condition but differ significantly in price and the plan is allowed to use step therapy. This creates an incentive for drug manufacturers to lower further the cost of the less expensive drug of the drug pair and then incentivize drug manufacturers to negotiate with MA plans so that their drugs become the drug selected by the plan as the first step in a therapy.

However, it is difficult to numerically estimate the savings from increased negotiations because, unlike other impact events, negotiations vary. Furthermore, we do not have access to negotiation data as this is proprietary information between MA plans and manufacturers and is not submitted in the MA bid. For these two reasons (lack of data and volatility) we are leaving the negotiation of increased savings as a qualitative, rather than a quantitative event. We believe that the potential savings from negotiations is significant, but have no way of quantifying the effect.

We note that although we are not estimating the savings from front-end negotiations, we do estimate the savings from back-end negotiations, more specifically, from the rebates manufacturers give plans with favorable drug management practices. Such rebates also occur on the Part D side and we have the data to estimate their effect. This is done in this section of this proposed rule when discussing the impact on the Medicare Trust Fund and beneficiary cost sharing due to step therapy.

Despite the rationale just stated, there are various studies suggesting that step therapy may be costly either economically or health-wise. There are two primary reasons for this.[19]

• *Discontinuation:* Several studies show that enrollees become discouraged when step therapy is used. This is called discontinuation. Discontinuation means a portion of members with a claim rejection at the point of service go on to not have claims in that class of medications. In other words, an unwanted effect of step therapy is ''giving up'' and not seeking medical treatment. One article cites eight studies, four with data, each showing a discontinuation rate of about 10 percent. There are several studies of discontinuation.[21] While discontinuation produces savings, it does so at the expense of enrollee health, an undesirable consequence. On the other hand, higher drug costs might lead to a reduction in medication adherence. The studies cited do not account for this side-effect and other risk-risk tradeoffs.

• *Effects of delay:* The idea of step therapy is that if the initial drug ''fails first'' then a provider will prescribe the drug they may have originally wanted to prescribe. But then there is a delay in the patient receiving this drug. That delay may cause a worsening of conditions leading to increased medical costs. Several studies show this. For example, a study comparing spending in Georgia's Medicaid program found that while there were savings in the cost of medications when step therapy was used, the program spent more money on outpatient services because less-effective medications often led to higher health costs later.[20] Similar studies have been done on—(1) Maine Medicaid residents; [21] and (2) on people with cardiovascular disease.[22] One state enacted legislation to protect people from certain harms of step therapy.[23]

[19] Article 1: Patrick P Gleason, PharmD, FCCP, BCPS, ''Assessing Step Therapy Programs: A step in the right direction,'' Journal of Managed Care Pharmacy,13(3), 2007. Article 2: Adams AS, Zhang F, LeCates RF, et al. Prior authorization for antidepressants in Medicaid: Effects among disabled dual enrollees. Arch Intern Med. 2009; 169(8):750–756. Article 3: Zhang Y, Adams AS, Ross-Degnan D, Zhang F, Soumerai SB. Effects of prior authorization on medication discontinuation among Medicaid beneficiaries with bipolar disorder. Psychiatr Serv. 2009;60(4):520–527.

[20] Retrospective assessment of Medicaid step therapy prior authorization antipsychotic medications. Clin Ther. 2008; 30(8):1524–39; discussion 1506–7. doi: 10.1016/j.clinthera.2008.08.009.

[21] Step therapy in Maine's Medicaid program was linked with higher risks of hospitalization. See Soumerai et al., ''Use of atypical antipsychotic drugs for schizophrenia in Maine Medicaid following a policy change''. Health Aff (Millwood). 2008; 27(3): W185–95. DOI: 10.1377/hlthaff.27.3.w185.

[22] The National Center for Biotechnology Information at NIH published a study showing that people with cardiovascular conditions who had restrictive prescription drug access had a statistically significant increase in hospital visits. *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2496984/*.

[23] Iowa passed a rule restricting the use of Step Therapy in Medicaid after patients encountered medical complications such as stomach ulcers and increased pain in cases where past efforts to find more cost-effective drugs or to try lower priced drugs were not considered by the plans. See *https://www.thegazette.com/subject/news/health/iowa-bill-would-allow-exemptions-from-fail-first-insurance-*

Continued

Summary: Step therapy can result in both savings and costs. While at the time of initiation of the step therapy there is initial savings, this savings may end up costing more in the aggregate because of worsening conditions and increased medical costs. Furthermore, some of the savings arises from negotiations which are difficult to quantify. We can estimate the effect on the Medicare Trust Fund and on enrollee cost sharing.

The estimate of the impact on the Medicare Trust Fund includes the effects of—(1) back-end negotiations, rebates from manufacturers to plans; (2) less expensive biological products approved under section 351(k) of the Public Health Service Act (*e.g.,* biosimilars); and (3) the choice of less expensive drugs with therapeutically equivalent effect. However, we do not discuss other quantitative effects of step therapy. The articles cited previously lay out many pros and cons of step therapy as well as the need for more studies to ascertain the true impact of step therapy.

CMS acknowledges that step therapy is a widely accepted tool for utilization management. Sixty percent of commercial insurers were using step therapy in 2010; in 2014, 75 percent of large employers offered enrollees plans with step therapy. Furthermore, the concerns expressed in this RIA section are not unique to Federal insurance programs such as Medicare Parts C and D. Eighteen states have enacted laws on the use of step therapy.[24] These laws vary widely and typically provide protections to beneficiaries against the misuse of step therapy.

TABLE 6—ESTIMATED SAVINGS TO MEDICARE TRUST FUND AND BENEFICARIES FROM STEP THERAPY

Year	Enrollment (thousands)	Part B Rx allowed pmpm with growth by medical inflation	Number of months per year	Adjustment for plans for proposed step therapy (%)	Assumed rebate percentage	Backing out of Part B premium (%)	Savings to Medicare Trust Funds [1] (in millions)	Cost sharing percentage	Adjustment for enrollees for proposed step therapy (%)	Savings to beneficiaries [2] (in millions)
	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
2020	23,181	$58.72	12	1.6	66	86	$145	13	0.2	$5
2021	24,062	60.21	12	1.6	66	86	154	13	0.2	5
2022	24,972	61.73	12	1.6	66	86	164	13	0.2	5
2023	25,858	63.30	12	1.6	66	86	174	13	0.2	6
2024	26,708	64.90	12	1.6	66	86	185	13	0.2	6
2025	27,549	66.55	12	1.6	66	86	195	13	0.2	6
2026	28,375	68.23	12	1.6	67	85	207	13	0.2	7
2027	29,161	69.96	12	1.6	67	85	218	13	0.2	7
2028	29,913	71.74	12	1.6	67	85	229	13	0.2	7
2029	30,590	73.55	12	1.6	67	85	240	13	0.2	8

[1] (G) = (A) * (B) * (C) * (D) * (E) * (F).
[2] (J) = (A) * (B) * (C) * (H) * (I).

This provision will allow MA plans to use this utilization management tool for Part B drugs and examine the most effective ways to use step therapy to achieve savings while also ensuring access to medically necessary treatment options.

In the remainder of this section we estimate the impact on the Medicare Trust Fund and enrollee cost sharing. We now explain the calculations which are summarized in Table 6.

We obtain projected MA enrollment from the 2018 Medicare Trust Fund report. This is presented in Column (A) of Table 6.

- 2016 is the most recent year for which we have Part B drug spending and utilization from the CMS data systems. Column (B) presents the average amount that MA enrollees pay per month on Part B drugs. This amount is trended (from 2016) to reflect medical inflation (5.2 percent a year) with ordinary inflation (2.6 percent) carved out. The inflation factors are obtained from the Medicare Trust Fund report. The product of MA enrollment and average Part B spending per month provides the aggregate MA Part B spending per month.
- The Part B spending per month is multiplied by 12 (Column (C)) to obtain the aggregate spending on Part B drugs annually.
- We estimate that, because of this step therapy provision, plans will save 1.6 percent (Column (D)) on the aggregate annual cost of Part B drugs. There are several points about this 1.6 percent. First, it represents the effect of the proposed provision (proposed § 422.136) in this proposed rule. An HPMS memo was issued by CMS rescinding an earlier memo prohibiting step therapy. This proposal surpasses this memo and it is the effects of this provision that the 1.6 percent captures. The 1.6 percent represents three factors contributing to savings from Step Therapy:
- Drugs for which there will be a less expensive biological product approved under section 351(k) of the Public Health Service Act in 2020.
- Pairs of drugs which are clinically comparable but differ significantly in price. For example, Avastin®, Eylea®, and Lucentis® for the treatment of macular degeneration.
- Drugs for which the manufacturer gives a rebate to MA plans with favorable management patterns. This happens in drugs with sufficient competition, particularly in the treatment of rheumatoid arthritis. Using our experience on manufacturers providing rebates on Part D drugs, we are able to estimate the savings effects of similar rebates on Part B drugs. As mentioned previously, this corresponds to a savings in step-therapy from back-end negotiations.
- The multiplication of enrollment, average Part B cost per member per month, number of months per year and 1.6 percent represents the total dollar savings from this provision.
- We use this total dollar savings to estimate separately savings to the Medicare Trust Fund and savings to enrollees in cost sharing.
- To obtain savings to the Medicare Trust Fund we multiply the aggregate savings from step therapy by the average rebate percentage and the average backing out of part B premium

drug-practices-20170318. In the absence of safeguards, such as requiring consideration of what works for patients, a grandfathering policy on existing therapies is advisable.

[24] *https://www.aad.org/advocacy/state-policy/step-therapy-legislation.*

representing the expected percentage reduction to Part B premium arising from savings. These percentages are found in columns (E) and (F). The numbers in these columns are obtained by trending our experience with plan submitted bids over the next ten years. Column (G), the product of all previous columns, represents the dollar savings to the Medicare Trust Fund.

- To obtain savings to beneficiaries, we used the 2019 projected bid data submitted by MA plans to CMS in June 2018. These data show that on average 13 cents of every dollar paying for Part B drugs goes to cost sharing. We obtained this number by dividing the cost sharing for Part B drugs by the total cost of Part B drugs. This percentage is found in Column (H).
- We next have to adjust the savings due to step therapy. Recall that column (D) indicates that step therapy will save 1.6 percent, the 1.6 percent arising from three factors listed previously. Of those three factors, enrollees do not benefit from manufacturer rebates. To illustrate this, consider a $20 drug for which the beneficiary pays a 20 percent copay ($4). At the end of the year, manufacturers and pharmacists give a rebate to plans that have used their products. Let us suppose (for purposes of illustration) that the rebate is $3. Theoretically the enrollee should get 60 cents of this $3 (20 percent copay * $3). However, the enrollee does not get a portion of the rebate. We estimate that 1.6 percent savings has a 1.4 percent component from manufacturer rebates and a 0.2 percent rebate from the other factors listed previously. It follows that for the enrollee, the savings from step therapy are 0.2 percent, not 1.6 percent. This is listed in column (I).
- To obtain aggregate annual beneficiary savings we multiply MA enrollment (column (A)), average cost of prescription drugs per month (column (B)), number of months per year (column (C)) and the 0.2 percent, the savings to enrollees from this step therapy provision (Column (I)). This gives the total dollar savings, of which enrollees pay 13 percent (column (H)). The result is presented in column (J).

The results of our calculations are summarized for 2020–2029 in Columns (G) and (J) of Table 6. The savings to enrollees are between $5 and $8 million; the savings to the Medicare Trust Fund are between $145 and $240 million.

These projected dollar savings to the Medicare Trust Fund are classified as transfers because the money on brand drugs would instead be spent on generic drugs. While brand drugs are more expensive, the primary driver of this expense is the research and development (R&D) that went into them, and for drugs that are already on the market R&D has already been done and would not change. In other words, although this proposed regulatory provision would reduce the return on drug development because enrollees who are expected to purchase the brand and thus pay for the initial R&D would instead purchase generics, this reduced return would be experienced after the initial R&D has been completed; consequently, any immediate reduction in R&D services would not impact the availability of new drugs until later. There would be also no reduction in production of drugs, since generic manufacturers would produce the drugs consumed by enrollees rather than brand manufacturers. However, the cost to the enrollee and the Medicare Trust Fund would be significantly less because the enrollee and Trust Fund would no longer pay for the initial R&D. In conclusion, this provision would not reduce activities of production but rather transfers the performance of those services from brand manufacturers to generic manufacturers; however, as a consequence, the enrollees and Trust Fund would experience reduced dollars spent.

The allowance of step therapy could result in a higher appeal rate. We estimate the aggregate increase in cost in 2016 due to expected increased appeals as $0.8 million. Details are presented in Table 7. The following narrative explains this table.

TABLE 7—ESTIMATED INCREASE IN APPEALS ALL LEVELS DUE TO STEP THERAPY

	Total number of appeals in 2016	Estimated number of appeals involving Step Therapy (1)	Hours per appeal (2)	Hourly wages of physicians (3)	Total Cost (1) × (2) × (3)
Reconsiderations	328,857	3913	0.8	$203.26	$636,350
IRE	58,023	690	0.8	203.26	112,277
Administrative Law Judge (ALJ)	3,481	41	0.8	203.26	6,737
Estimated Cost for 2016					755,363

Data for appeals are plan reported. It typically takes 2 years for CMS to validate these data. Hence the latest year for which we have complete data is 2016. Appeals can happen at various levels. The first level is reconsiderations where an appeal is made for a plan to reconsider a decision. If this is denied it goes on to the IRE (a CMS contractor) to be reviewed. If this is also denied it can be appealed to an administrative law judge (ALJ) if the amount in controversy is met.

For 2016, we have 328,857 and 58,023 reconsiderations and IRE cases respectively in the MA program. We estimate that in general 6 percent of cases reaching the IRE go on to an ALJ.

Based on data pulled from the Medicare Appeals System for part D appeals, 1.19 percent of plan level appeals involving step therapy were denied. We use this as a proxy for the percent of cases involving part B drugs subject to step therapy that we expect to be appealed since we have no other basis. We believe it is reasonable to consider Part D appeals data related to cases that involve drugs subject to step therapy in developing these estimates. We also use the 1.19 percent as a proxy for the percent of reconsiderations and ALJ cases that involve step therapy. We acknowledge that percentages might be different at different appeal levels but the 1.19 percent is the only proportion we have.

Having derived the expected number of appeals involving step therapy we note that section 1852(g)(2) requires a reconsideration by a MA plan to deny coverage on the basis of medical necessity to be reviewed by a physician with the appropriate expertise; CMS has adopted a MA regulation (§ 422.566(d)) that implements this requirement for denials based on medical necessity determinations. We believe it is

reasonable to assume that a decision to deny coverage for a drug subject to step therapy will typically involve a medical determination regarding the enrollee's ability to take the drug required in the step therapy criteria and whether the drug would be ineffective or cause adverse effects for the enrollee. A decision on a drug subject to step therapy is also likely to involve evaluation of a healthcare provider's assessment of medical necessity for the Part B drug; for example, the health care provider may indicate that the lower or earlier steps in the step therapy protocol are not clinically appropriate for that enrollee (such as in cases of allergy or a prior unsuccessful use of the preferred drug). Therefore, this estimate accounts for physician review of reconsiderations. Based on the BLS website at *https://www.bls.gov/oes/current/oes_nat.htm,* the mean hourly wage of physicians is $203.26. Our contractor experience with appeals suggests that the average time to process an appeal is 48 minutes, or, 0.8 hour.

Multiplying the number of appeals * 0.8 hour per appeal * $203.26 cost per hour we arrive at total cost for each appeal level. Adding these together we obtain the $0.8 million estimate, based on 2016 data.

Factors that enter into appeal rates include enrollment rates and changes in plan benefit packages. Appeal rates change from year to year. One major factor in appeal rates is enrollment. If enrollment increases by 10 or 20 percent then it is very reasonable that the number of appeals will approximately increase by that amount.

Thus to obtain estimates of cost for 2018 we would multiply the $0.8 million by the ratio of enrollment in 2018 to 2016. Similarly to obtain estimates for 2020–2024 we multiply by ratios of enrollment.

The ratio of 2018 to 2016 is 1.1585 based on enrollment figures from the CMS website. Projected enrollment for 2020–2029 may be obtained from Table IV.C1 in the 2018 Trustee report. Using these numbers we obtain the estimated cost of increased appeals for 2020–2029, presented in Table 8, as $1.0–$1.3 million.

TABLE 8—EXPECTED INCREASE IN APPEAL COSTS DUE TO STEP THERAPY

Year	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029
Cost of appeals (in millions)	1.0	1.0	1.0	1.1	1.1	1.1	1.2	1.2	1.2	1.3

6. Pharmacy Price Concessions in the Negotiated Price (§ 423.100)

In this rule, we include an extensive discussion of the consideration of a new definition of ''negotiated price'' that includes all pharmacy price concessions received by the plan sponsor for a covered Part D drug, and reflects the lowest possible reimbursement a network pharmacy will receive, in total, for a particular drug. As we are not proposing to move forward with such a policy for 2020, there is no impact in this regard. As moving forward with the policy is an alternative that is under consideration, we provide and seek comment on the following regulatory impact analysis.

As part of the approach being considered, we would first delete the current definition of ''negotiated prices'' (in the plural) and add a definition of ''negotiated price'' (in the singular) to make clear that a negotiated price can be set for each covered Part D drug, and the amount of the pharmacy price concessions may differ on a drug by drug basis. Then, we would implement a definition of ''negotiated price'' that is intended to ensure that the prices available to Part D enrollees at the point of sale are inclusive of all pharmacy price concessions. We believe such an approach would be more reflective of current pharmacy payment arrangements.

We note Part D sponsors and their contracted PBMs have been increasingly successful in recent years at negotiating price concessions from network pharmacies. Performance-based pharmacy price concessions, net of all pharmacy incentive payments, increased, on average, nearly 225 percent per year between 2012 and 2017 and now comprise the second largest category of DIR received by sponsors and PBMs, behind only manufacturer rebates.

Pharmacy price concessions are negotiated between pharmacies and sponsors or their PBMs, independent of CMS, and are often tied to the pharmacy's performance on various measures defined by the sponsor or its PBM. Under the current definition of ''negotiated prices'' at § 423.100, negotiated prices must include all price concessions from network pharmacies except those that cannot reasonably be determined at the point of sale. However, because these performance adjustments typically occur after the point of sale, they are not included in the price of a drug at the point of sale.

We further understand, through comments received from the pharmacy industry in response to our Request for Information on pharmacy price concessions (included in the November 2017 proposed rule (82 FR 56419 through 56428) and evaluation of the DIR data submitted by Part D sponsors, that the share of pharmacies' reimbursements that are contingent upon their performance under such arrangements has grown steadily each year. As a result, sponsors and PBMs have been recouping increasing sums from network pharmacies after the point of sale (pharmacy price concessions) for ''poor performance,'' sums that, in some instances, are far greater than those paid to network pharmacies after the point of sale (pharmacy incentive payments) for ''high performance.''

When pharmacy price concessions are not reflected in the price of a drug at the point of sale, beneficiaries might see lower premiums, but the following negative effects occur:

- *Beneficiary Cost-Sharing:* Beneficiaries do not benefit from pharmacy price concessions through a reduction in the amount they must pay in cost-sharing, and thus, end up paying a larger share of the actual cost of a drug.
- *Transparency:* When the point-of-sale price of a drug that a Part D sponsor reports on a PDE record as the negotiated price does not include pharmacy price concessions, the negotiated price is rendered less transparent at the individual prescription level and less representative of the actual cost of the drug for the sponsor.
- *Competition:* Variation in the treatment of these price concessions by Part D sponsors may have a negative effect on the competitive balance under the Medicare Part D program.

For this reason, as part of the November 2017 proposed rule, we published a ''Request for Information Regarding the Application of Manufacturer Rebates and Pharmacy Price Concessions to Drug Prices at the Point of Sale,'' (82 FR 56419 through 56428). The majority of commenters, representing pharmacies, pharmacy associations, and beneficiary advocacy groups, supported the adoption of a requirement that pharmacy price

concessions be applied at the point of sale because it would—

- Lower beneficiary out-of-pocket costs (especially critical for beneficiaries who utilize high cost drugs);
- Stabilize the operating environment for pharmacies (because of greater transparency and predictability of the minimum reimbursement on a per-claim level, thus allowing more accurate budgeting and improved ability to evaluate proposed contracts from PBMs); and
- Standardize the way in which plan sponsors and their PBMs treat pharmacy price concessions.

The proposal would have several impacts on a variety of stakeholders:

I. Impacts on prescription drug costs for beneficiaries and manufacturers.

II. One time administrative costs for Part D sponsors.

These impacts are summarized in the following tables and further discussed in narratives. These tables reflect two possible approaches to this concession provision:

- *All-Phase Assumption:* Assume the application of pharmacy price concessions to the point-of-sale occurs at all phases of the Part D Benefit including the gap.
- *Gap-Excluded Assumption:* Assume the application of pharmacy price concessions to the point-of-sale occurs at all phases of the Part D benefit except the when the purchasing enrollee is in the gap.
- Tables 9 and 10 summarize impacts on prescription drug costs for beneficiaries, Part D sponsors and manufacturers, under the all-phase assumption.
- Table 11 summarizes one-time administrative costs for Part D sponsors. This is independent of which approach is taken.

Table 10 summarizes the ten-year impacts we have modeled for requiring that sponsors move all pharmacy price concessions to the point of sale in all phases of the Part D benefit, including the coverage gap. Table 10 reflects ten year raw sums of the figures in Table 9. For example, the second row of Table 10 lists a $14.8 billion savings to beneficiaries. The row header references row (I) in Table 9. The sum of the numbers in row (I) of Table 9, is in fact $14.8 (0.8 + 0. 9 + . . . + 2.3 = 14.8). Throughout this narrative, the quantitative aspects of the discussion may be found in the corresponding labeled rows of Table 10. There are several key assumptions involved in the development of these estimates, particularly the expected growth of pharmacy price concessions in future years. Actual pharmacy price concessions have increased from $229 million in 2013 to $4 billion in 2017. The use of preferred pharmacy networks is now widespread, with over 85% of standalone prescription drug plans using a preferred network in 2017. Because the rate of growth has been volatile in recent years, and because so many plan sponsors have incorporated preferred networks into their plan design, we estimate that the growth rate for pharmacy price concessions will slow in future years. Our best estimate is that the average growth of pharmacy price concessions will be approximately 10% per year going forward. This still represents a significant increase in the price concessions as a percentage of gross drug cost, from 2.6% in 2017 to 3.5% in 2029, and is a reasonable estimate in our judgment. We note that this assumption has a high degree of uncertainty given the changes in price concessions over the past five years. If the actual growth rate emerges differently, it could materially change the results in tables 9, 10, 12, 13, and 14.

Under the policy to require the negotiated price reflect the lowest possible amount the pharmacy could receive for a covered Part D drug, beneficiaries would see lower prices at the point of sale at the pharmacy and on Plan Finder, beginning immediately in the year the policy takes effect. (This is summarized in Table 10 in the row ''beneficiary costs'' which reflects the sum of the rows ''cost sharing'' and ''premiums''; these three rows correspond, as indicated in Table 10, to sums of rows K, I, and J, respectively in Table 9.) Lower point-of-sale prices would result directly in lower cost-sharing for non-low income beneficiaries. For low income beneficiaries, whose out-of-pocket costs are subsidized through Medicare's low-income cost-sharing subsidy, cost-sharing savings resulting from lower point-of-sale prices would accrue to the government. Plan premiums would likely increase as a result of the change to the definition of negotiated prices being considered—if all pharmacy price concessions are required to be passed through to beneficiaries at the point of sale, fewer such concessions could be apportioned to reduce plan liability in the bid, which would have the effect of increasing the cost of coverage under the plan. At the same time, the reduction in cost-sharing obligations for the average beneficiary would be large enough to lower their overall out-of-pocket costs. The increasing cost of coverage under Part D plans as a result of requiring pharmacy price concessions to be applied at the point of sale would likely have a more significant impact on government costs, which would increase overall due to the significant growth in Medicare's direct subsidies of plan premiums and low income premium subsidies.

The increase in direct subsidy and low-income premium subsidy costs for the government are partially offset by decreases in Medicare's reinsurance and low income cost-sharing subsidies. Decreases in Medicare's reinsurance subsidy result when lower negotiated prices slow down the progression of beneficiaries through the Part D benefit and into the catastrophic phase, and when the government's reinsurance payments, which reflect 80 percent of allowable drug costs incurred in the catastrophic phase less a share of the overall price concessions received by the plan sponsor, are based on lower negotiated prices. Similarly, low income cost-sharing subsidies would decrease as beneficiary cost-sharing obligations decline due to the reduction in prices at the point of sale. Finally, the slower progression of beneficiaries through the Part D benefit would also have the effect of reducing manufacturer coverage gap discount payments as fewer beneficiaries would enter the coverage gap phase or progress entirely through it.

TABLE 9—IMPACT (Billions) OF REQUIRING APPLICATION OF PHARMACY PRICE CONCESSIONS AT POINT OF SALE INCLUDES APPLICATION TO COVERAGE GAP

Label	Item/year	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029
(A)	Gross Drug Cost (GDCC)	(5.7)	(6.4)	(7.1)	(7.8)	(8.6)	(9.3)	(10.2)	(11.1)	(12.2)	(13.2)
(B)	Drug cost covered by plan (Supplemental and non-Part D) CCP.	(4.1)	(4.5)	(4.9)	(5.4)	(5.8)	(6.2)	(6.8)	(7.4)	(8.0)	(8.6)
(C)	OOP including GAP Discount	(1.6)	(1.9)	(2.1)	(2.4)	(2.7)	(3.0)	(3.4)	(3.8)	(4.2)	(4.6)
(D)	General Premium Subsidy	1.9	2.2	2.4	2.7	3.0	3.2	3.6	3.9	4.3	4.6
(E)	Reinsurance	(0.6)	(0.6)	(0.7)	(0.7)	(0.7)	(0.8)	(0.8)	(0.8)	(0.9)	(0.9)
(F)	LIS Cost-Sharing Subsidy	(0.5)	(0.6)	(0.6)	(0.7)	(0.8)	(0.9)	(1.1)	(1.2)	(1.3)	(1.4)

TABLE 9—IMPACT (Billions) OF REQUIRING APPLICATION OF PHARMACY PRICE CONCESSIONS AT POINT OF SALE INCLUDES APPLICATION TO COVERAGE GAP—Continued

Label	Item/year	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029
(G)	LIS Premium Subsidy	0.1	0.1	0.1	0.1	0.1	0.2	0.2	0.2	0.2	0.2
(H)	Total Government	0.9	1.1	1.2	1.4	1.5	1.7	1.9	2.1	2.3	2.5
(I)	Cost sharing enrollees	(0.8)	(0.9)	(1.1)	(1.2)	(1.4)	(1.5)	(1.7)	(1.9)	(2.1)	(2.3)
(J)	Premiums from Enrollees	0.3	0.4	0.4	0.5	0.5	0.6	0.6	0.7	0.8	0.9
(K)	Total Enrollee Costs	(0.5)	(0.6)	(0.7)	(0.7)	(0.8)	(0.9)	(1.0)	(1.2)	(1.3)	(1.4)
(L)	Total Benefits	1.2	1.4	1.6	1.8	2.1	2.3	2.5	2.8	3.1	3.3
(M)	Gap Discount	(0.4)	(0.4)	(0.4)	(0.5)	(0.5)	(0.6)	(0.6)	(0.7)	(0.8)	(0.8)

TABLE 10—TOTAL IMPACTS FOR 2020 THROUGH 2029 WITH APPLICATION IN COVERAGE GAP

	Total (billions)	Average per member—per year	Percent change
Beneficiary Costs (G6: (K))	($9.2)	($16.52)	(1)
Cost Sharing (G6: (I))	(14.8)	(26.69)	(3)
Premium (G6: (J))	5.6	10.16	2
Government Costs	16.6	29.95	1
Direct Subsidy (G6: (D))	31.8	57.71	14
Reinsurance (G6: (E))	(7.6)	(13.94)	(1)
LI Cost-Sharing Subsidy (G6: (F))	(9.2)	(16.54)	(2)
LI Premium Subsidy (G6: (G))	1.5	2.73	2
Manufacturer Gap Discount (G6: (M))	(5.8)	(10.50)	(3)

One primary purpose or effect of performance-based pharmacy payment arrangements, according to Part D sponsors responding to our Request for Information, is to encourage generic substitutions for brand drugs. For example, a pharmacy may claim that its staff informs patients when a generic alternative is available for their prescription, and that they may have lower costs for the generic version. The pharmacy is willing to structure its payments contingent on meeting a generic dispensing rate through these interventions. Such substitutions, although saving money to enrollees and plan sponsors, are a transfer primarily between the manufacturers of brand drugs and the manufacturers of generic drugs.

These projected dollar savings to the Medicare Trust Fund are classified as transfers because the money on brand drugs would instead be spent on generic drugs. While brand drugs are more expensive, the primary driver of this expense is the research and development (R&D) that went into them, and for drugs that are already on the market R&D has already been done and would not change. In other words, although this proposed regulatory provision would reduce the return on drug development because enrollees who are expected to purchase the brand and thus pay for the initial R&D would instead purchase generics, this reduced return would be experienced after the initial R&D has been completed; consequently, any immediate reduction in R&D services would not impact the availability of new drugs until later. There would be also no reduction in production of drugs, since generic manufacturers would produce the drugs consumed by enrollees rather than brand manufacturers. However, the cost to the enrollee and the Medicare Trust Fund would be significantly less because the enrollee and Trust Fund would no longer pay for the initial R&D. In conclusion, this provision would not reduce activities of production but rather transfers the performance of those services from brand manufacturers to generic manufacturers; however, as a consequence, the enrollees and Trust Fund would experience reduced dollars spent.

II. One-Time Administrative Costs for Part D Sponsors

We anticipate that this potential policy change would require Part D sponsors to make certain system changes related to the calculation of the amounts they report in one or two fields in the PDE data collection form. We anticipate that this would cause sponsors to incur one-time administrative costs.

Please note that the impact amounts for this policy are consistent with the feedback received through the Request for Information Regarding the Application of Manufacturer Rebates and Pharmacy Price Concessions to Drug Prices at the Point of Sale in the Medicare Program that was included in the proposed rule, entitled ''Contract Year 2019 Policy and Technical Changes to the Medicare Advantage, Medicare Cost Plan, Medicare Fee-for-Service, the Medicare Prescription Drug Benefit Programs, and the Pace Program'' (82 FR 56419).

To estimate the administrative costs associated with submission of PDE data, we consider the following factors: (1) The amount of data that must be submitted; (2) the number of plan sponsors (or sponsors' intermediaries) submitting data; and (3) the time required to complete the data processing and transmission transactions.

PDE Data Submission: The amount of data that must be submitted is a function of the number of prescription drug events per beneficiary and the number of data elements per event (57). Based on 3 years of enrollment data (2014, 2015, and 2016), CMS estimates that an annual average of 38,009,579 Medicare beneficiaries are enrolled in Part D prescription drug plans. The average number of PDEs per year is 1,409,828,464 (based on 2013, 2014, and 2015). To compute the average number of PDEs per beneficiary, we divide the average number of PDEs per year by the average number of beneficiaries enrolled per year. This computation leads to an average of 37 PDEs per beneficiary per year.

Number of Part D Contracts (Respondents): The average number of Part D contracts per year is 779 (based on 2014, 2015, and 2016 data).

Time Required to Process Data: The third factor that contributes to the burden estimate for submitting PDE data depends upon the time and effort necessary to complete data transaction

activities. Since our regulations require Part D sponsors to submit PDE data to CMS that can be linked at the individual level to Part A and Part B data in a form and manner similar to the process provided under § 422.310 (Part C), the data transaction timeframes will be based on risk adjustment (Part C) and prescription drug industry experiences. Moreover, our PDE data submission format will only support electronic formats. The drug industry's estimated average processing time for electronic data submission is 1 hour for 500,000 records. The average number of PDE records per year is 1,409,828,464. Therefore, the estimated total annual processing time for all PDE records is 2,820 hours. The estimated average annual electronic processing time cost per hour is $17.75. The estimated total cost related to PDE processing is therefore $50,055 (2,820 * $17.75). There are on average 38,009,579 beneficiaries enrolled in Part D, which means that the average cost of PDE processing per beneficiary is $0.0013 (that is, $50,055/38,009,579). The average number of Part D beneficiaries enrolled in a Part D contract is 48,793. The average annual cost to respondents for each Part D contract is therefore $63.43 (that is, $0.0013 * 48,793). We believe the additional effort needed to make the system changes necessitated by the amendment to the definition of negotiated prices being considered will cause a one-time increase in the administrative costs related to submission of PDE data. Therefore, we have doubled the cost per hour to $35.50 for contract year 2020. The estimated average cost related to PDE processing for contract year 2020 only is $126.86, which represents a one-time increase of $63.43 per sponsor. We estimate that the amendment to the definition of negotiated prices being considered will cause the administrative costs related to submission of PDE data for all Part D sponsors to be $100,110 for contract year 2020 only, which is an increase of $50,055 over the estimated administrative costs related to submission of PDE data reporting in the absence of the amendment being considered.

The estimated annual administrative costs related to submission of PDE data are shown in Table 11, along with the 1-year cost estimate for contract year 2020.

TABLE 11—ESTIMATED ADMINISTRATIVE COSTS RELATED TO SUBMISSION OF PRESCRIPTION DRUG EVENT (PDE) DATA

		Notes
A. Number of Respondents	779	779 is the annual average number of Part D contracts from 2013, 2014, and 2015.
B. Number of Medicare Beneficiaries Enrolled in Part D per Year.	38,009,579	Average number of Medicare beneficiaries enrolled in Part D.
C. Average Number of Part D Beneficiaries per Contract.	48,793	(B) divided by (A).
D. Average Number of PDEs per Year	1,409,828,464	The average is based on annual average PDEs from 2013 to 2015.
E. Frequency of Response	37 PDEs/per beneficiary per year	Average PDEs per beneficiary per year.
F. Number of Transactions per Hour	500,000	Drug industry's estimated average processing volume per hour.
G. Total Annual Transaction Hours	2,820	(D) divided by (F).
H. Average Electronic Cost per Hour	Annual: $17.75	Based on $17.75 per hour, the risk adjustment estimated average annual electronic processing cost per hour.
	Contract Year 2020: $35.50	Doubled in 2020 to reflect increased effort associated with implementing system changes.
I. Cost of Annual Transaction Hours	Annual: $50,055 Contract Year 2020: $100,110.	(H) multiplied by (G).
J. Average Cost per Part D Beneficiary	Annual: $0.0013 Contract Year 2020: $0.0026.	(I) Divided by (B).
K. Annual Cost to Respondents	Annual: $63.43 Contract Year 2019: $126.86.	(J) multiplied by (C).

The discussion earlier in section C.6 of this regulatory impact analysis assumes cost based on the application of the new definition of ''negotiated price'' being considered to determine the price at the point of sale both outside the coverage gap and in it (that is, during all phases of the Part D benefit). For purposes of comparison, to allow for equal consideration of both options, we also provide a cost analysis of the provision based on the application of the new definition of ''negotiated price'' being considered to determine the price at the point of sale only outside the coverage gap. The 10-year impact is summarized in Table 12, which reflects raw sums of the figures in the corresponding rows in Table 13. The construction of and labels in Tables 12 and 13 are identical to those in Tables 9 and 10; therefore the explanatory narrative provided for Tables 9 and 10 in Section C.6 of this proposed rule, applies to Tables 12 and 13 and need not be repeated here.

TABLE 12—TOTAL IMPACTS FOR 2020 THROUGH 2029 WITHOUT APPLICATION IN COVERAGE GAP

	Total (billions)	Average per member—per year	Percent change (%)
Beneficiary Costs (G8: (K))	($7.1)	($12.80)	(1)
Cost Sharing (G8: (I))	(11.8)	(21.22)	(2)
Premium (G8: (J))	4.7	8.42	2
Government Costs	13.6	24.58	1

TABLE 12—TOTAL IMPACTS FOR 2020 THROUGH 2029 WITHOUT APPLICATION IN COVERAGE GAP—Continued

	Total (billions)	Average per member—per year	Percent change (%)
Direct Subsidy (G8: (D))	25.8	46.72	12
Reinsurance (G8: (E))	(5.7)	(10.55)	(1)
LI Cost-Sharing Subsidy (G8: (F))	(7.7)	(13.85)	(2)
LI Premium Subsidy (G8: (G))	1.3	2.26	2
Manufacturer Gap Discount (G8: (M))	(4.9)	(8.80)	(2)

TABLE 13—IMPACT (BILLIONS) FROM CONCESSIONS

[Assumes no application in coverage gap]

Label	Item/year	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029
(A)	Gross Drug Cost (GDCC)	(4.7)	(5.3)	(5.9)	(6.5)	(7.2)	(7.8)	(8.6)	(9.4)	(10.3)	(11.1)
(B)	Drug cost covered by plan (Supplemental and non-Part D) CCP.	(3.5)	(3.8)	(4.2)	(4.5)	(4.9)	(5.3)	(5.8)	(6.2)	(6.8)	(7.3)
(C)	OOP including GAP Discount	(1.2)	(1.5)	(1.7)	(2.0)	(2.2)	(2.5)	(2.8)	(3.1)	(3.5)	(3.8)
(D)	General Premium Subsidy	1.5	1.8	2.0	2.2	2.4	2.6	2.9	3.2	3.5	3.8
(E)	Reinsurance	(0.5)	(0.5)	(0.5)	(0.5)	(0.6)	(0.6)	(0.6)	(0.6)	(0.6)	(0.7)
(F)	LIS Cost-Sharing Subsidy	(0.4)	(0.4)	(0.5)	(0.6)	(0.7)	(0.8)	(0.9)	(1.0)	(1.1)	(1.2)
(G)	LIS Premium Subsidy	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.2	0.2	0.2
(H)	Total Government	0.7	0.9	1.0	1.1	1.3	1.4	1.5	1.7	1.9	2.1
(I)	Cost sharing enrollees	(0.6)	(0.7)	(0.8)	(0.9)	(1.1)	(1.2)	(1.4)	(1.5)	(1.7)	(1.9)
(J)	Premiums from Enrollees	0.2	0.3	0.3	0.4	0.4	0.5	0.5	0.6	0.7	0.7
(K)	Total Enrollee Costs	(0.3)	(0.4)	(0.5)	(0.6)	(0.6)	(0.7)	(0.8)	(0.9)	(1.0)	(1.1)
(L)	Total Benefits	1.0	1.2	1.3	1.5	1.7	1.9	2.1	2.3	2.6	2.8
(M)	Gap Discount	(0.3)	(0.3)	(0.4)	(0.4)	(0.5)	(0.5)	(0.5)	(0.6)	(0.7)	(0.7)

Moreover, while not accounted for when modeling the impacts in Section C, we believe that requiring pharmacy price concessions to be included in the negotiated price, as we consider, would also lead to prices and Part D bids and premiums being more accurately comparable and reflective of relative plan efficiencies, with no unfair competitive advantage accruing to one sponsor over another based on a technical difference in how costs are reported. We believe this outcome could make the Part D market more competitive and efficient.

D. Expected Benefits

Any relevant expected benefits for enrollees, stakeholders, and the government have been fully discussed in section IV.C. of this proposed rule.

E. Alternatives Considered

1. Providing Plan Flexibility To Manage Protected Classes (§ 423.120(b)(2)(vi))

Previous proposals to address the protected classes were aimed at changing both the protected classes and exceptions to the requirement that formularies include all drugs in the protected class. However, we remain concerned that previous criteria, as established either by statute under the MIPPA authority, or by CMS under the Patient Protection and Affordable Care Act authority, did not strike the appropriate balance among enrollee access, quality assurance, cost-containment, and patient welfare that we were striving to achieve. Consequently, we elected not to propose any changes to the drug categories or classes that are the protected classes. As a result, the critical policy decision was how broadly or narrowly to establish exceptions to the requirement that all protected class drugs be included on the formulary. Overly broad exceptions might inappropriately limit the products within the protected classes, thereby creating access issues for Part D enrollees. Only narrow exceptions afford enrollee protections such as adequate access and improved quality assurance while also providing an incentive for manufacturers to aggressively rebate their products for formulary placement in an operationally feasible manner for Part D sponsors.

6. E-Prescribing and the Part D Prescription Drug Program; Updating Part D E-Prescribing Standards (§ 423.160)

We propose to require that each Part D plan select a real time benefit tool (RTBT) of its choosing by January 1, 2020. We had considered delaying regulatory action around real time requirements until the industry has developed a real time standard that could be used by all Part D plans. However, we believe that the benefits that would come with a real time standard in the form of cost transparency are substantial and should not be further delayed. We also considered requiring that plans use the optional fields in the NCPDP Formulary and Benefit standards (F&B) to provide much of the cost data that we believe would be important for prescribers to know. However, by definition, the F&B standards are batch standards so that the information provided is, by definition, not contemporaneous and are not specific to each beneficiary. For these reasons we opted in favor of proposing RTBT rather than proposing to require that plans use enhanced F&B standards.

4. Medicare Advantage and Step Therapy for Part B Drugs (§§ 422.136, 422.568, 422.570, 422.572, 422.584, 422.590, 422.618, and 422.619)

This rule proposes requirements under which MA plans may apply step therapy as a utilization management tool for Part B drugs. In this proposal, we confirm authority for MA plans to implement appropriate utilization management and prior authorization tools for managing Part B drugs and propose parameters on using step therapy to ensure it is implemented in a manner to reduce costs for both enrollees and the Medicare program. Our proposal includes specific parameters for how step therapy may be implemented for Part B drugs, including requiring approval from P&T Committee that meets specific standards and permitting step therapy only for new administrations of the drug (subject to a 108 look-back period). We also proposed new appeal timeframes and deadlines for MA plans to adjudicate

and respond to requests concerning Part B drug coverage. An additional alternative considered during development of the proposed regulation was allowing step therapy for ongoing prescriptions or administrations of Part B drugs for enrollees who are actively receiving the affected medication at the time the step therapy program is adopted. MA plans may be able to provide better oversight for step therapy programs that do not distinguish new prescriptions from enrollees who are actively receiving the affected medication and allowing plans to utilize step therapy for all Part B drugs might result in more cost savings for enrollees and Medicare. However, allowing MA plans to implement step therapy on ongoing prescriptions and administrations would require the development of a transition process for affected enrollees. The estimated costs of developing a transition process, including notification to enrollees with appropriate notice regarding their transition process and providing a temporary supply of affected drugs likely outweighs any savings. Moreover, CMS recognizes the significance of many Part B drug regimens (for example, cancer treatments) and is working to ensure enrollees will not encounter unnecessary barriers to medically necessary drugs or have disruptions in care. Therefore, under § 422.136(a)(1) of the proposed rule, new step therapy programs would not be permitted to disrupt enrollees' ongoing Part B drug therapies. We are proposing that step therapy only be applied to new prescriptions or administrations of Part B drugs for enrollees who are not actively receiving the affected medication. MA plans would be required to have a look back period of 108 days, consistent with current policy in Part D, to determine if the enrollee is actively taking a Part B medication. Further, when an enrollee elects a new plan, the plan would still be required to determine whether the enrollee has taken the Part B drug (that would otherwise be subject to step therapy) within the past 108 days. If the enrollee is actively taking the Part B drug, such enrollee would be exempted from the plan's step therapy requirement concerning that drug.

5. Pharmacy Price Concessions in the Negotiated Price (§ 423.100)

The critical policy decision was how to adapt the existing negotiated price reporting standards to best account for current pharmacy payment practices and achieve transparency and consistency in how pharmacy price concessions and drug costs are reported and treated. Several alternative approaches were considered.

- The current regulatory structure implements the statute accurately and could have been maintained, but does not account for the performance-contingent pharmacy payment adjustments that dominate today.
- Another option would be to require Part D sponsors to adjust negotiated prices in the current period using pharmacy payment adjustments determined for prior periods, which would not allow for price transparency in the current period and could drive beneficiaries away from high performing pharmacies, for which the negotiated prices would include incentive payments and, thus, be higher than for poor performing pharmacies.
- An additional option we considered was to require Part D sponsors to include in the negotiated price an approximation of the pharmacy payment adjustments that would apply. However, this approach would have no effect on differential reporting among Part D sponsors given that the accuracy of the approximations would likely vary by Part D sponsor, and it would not allow for greater price transparency if the approximations are inaccurate. This option would also drive beneficiaries away from high performing pharmacies for which the negotiated prices would be higher than for poor performing pharmacies.
- Finally, we considered an option to develop a standard set of metrics from which plans and pharmacies would base their contractual agreements. We request commenter feedback on whether these metrics could be designed to provide pharmacies with more predictability in their reimbursements while maintaining plan's ability to negotiate terms. Additionally, we seek comment on the most appropriate agency or organization to develop these standards, or whether this a matter better left to private negotiations.

In summary, the revision to the definition of negotiated price we are considering would create uniform, easily interpreted standards for negotiated price reporting that would support consistent implementation by all Part D sponsors and, thus, impose the least amount of burden on Part D sponsors and their intermediaries.

F. Accounting Statement and Table

The following table summarizes costs, savings, and transfers by provision.

As required by OMB Circular A–4 (available at *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/*), in Table 14, we have prepared an accounting statement showing the savings and transfers associated with the provisions of this proposed rule for contract years 2020 through 2029. Table 14 is based on Table G15 which lists savings, costs, and transfers by provision.

TABLE 14—ACCOUNTING STATEMENT—CLASSIFICATIONS OF ESTIMATED SAVINGS, COSTS, AND TRANSFERS

[Negative numbers indicate savings]

From calendar years 2020 to 2024 ($ in millions)	Savings			Whom is spending or transferring
	Discount rate		Period covered	
	7%	3%		
Net Annualized Monetized Savings.	1.13	1.13	CYs 2020–2029	Federal government, MA organizations and Part D Sponsors, Pharmacy Benefit Managers, Pharmacies.
Annualized Monetized Savings.	.....	.....	CYs 2020–2029	Pharmacies.
Annualized Monetized Cost ..	1.13	1.13	CYs 2020–2029	MA Organizations, Part D Sponsors, Contractors for the Federal Government.
Transfers	(437.83)	(445.55)	CYs 2020–2029	Federal government, MA organizations and Part D Sponsors, Pharmacy Benefit Managers, Pharmacies, Beneficiaries.

The following Table 15 summarizes savings, costs, and transfers by provision and formed a basis for the accounting table. For reasons of space, Table 15 is broken into Table 15A (2020 through 2024) and Table 15B (2025 through 2029), In these tables savings are indicated as negative numbers in columns marked savings while costs are indicated as positive numbers in columns marked costs. Transfers may be negative or positive with negative numbers indicating savings to the Medicare Trust Fund and positive numbers indicating costs to the Medicare Trust Fund. All numbers are in millions. The row ''aggregate total by year'' gives the total of costs and savings for that year but does not include transfers. Table 15 forms the basis for Table 14 and for the calculation to the infinite horizon discounted to 2016, mentioned in the conclusion.

TABLE 15A—AGGREGATE SAVINGS, COSTS, AND TRANSFERS IN MILLION BY PROVISION AND YEAR

	2020 Savings	2020 Cost	2020 Transfers	2021 Savings	2021 Cost	2021 Transfers	2022 Savings	2022 Cost	2022 Transfers	2023 Savings	2023 Cost	2023 Transfers	2024 Savings	2024 Cost	2024 Transfers
Total Savings															
Total Costs		1.20			1.00			1.00			1.10			1.10	
Aggregate Total		1.20			1.00			1.00			1.10			1.10	
Total Transfers			(342.00)			(366.07)			(388.54)			(413.36)			(438.48)
Protected Classes, Government			(141.00)			(151.07)			(160.54)			(170.36)			(180.48)
Protected Classes, Enrollees			(51.00)			(56.00)			(59.00)			(63.00)			(67.00)
Gag Clauses															
E-Prescribing															
Part D EOB		0.20													
Step Therapy, Government			(145.00)			(154.00)			(164.00)			(174.00)			(185.00)
Step Therapy Cost Sharing			(5.00)			(5.00)			(5.00)			(6.00)			(6.00)
Step Therapy Appeals		1.00			1.00			1.00			1.10			1.10	

TABLE 15B—AGGREGATE SAVINGS, COSTS, AND TRANSFERS IN MILLION BY PROVISION AND YEAR

	2025 Savings	2025 Cost	2025 Transfers	2026 Savings	2026 Cost	2026 Transfers	2027 Savings	2027 Cost	2027 Transfers	2028 Savings	2028 Cost	2028 Transfers	2029 Savings	2029 Cost	2029 Transfers	Raw 10 year totals
Total Savings																
Total Costs		1.10			1.20			1.20			1.20			1.30		10.20
Aggregate Total		1.10			1.20			1.20			1.20			1.30		10.20
Total Transfers			(459.22)			(487.89)			(512.89)			(539.88)			(567.77)	(4,516.11)
Protected Classes, Government			(188.22)			(198.89)			(208.89)			(219.88)			(231.77)	(1,851.11)
Protected Classes, Enrollees			(70.00)			(75.00)			(79.00)			(84.00)			(88.00)	(692.00)
Gag Clauses																
E-Prescribing																
Part D EOB																0.20
Step Therapy, Government			(195.00)			(207.00)			(218.00)			(229.00)			(240.00)	(1,911.00)
Step Therapy Cost Sharing			(6.00)			(7.00)			(7.00)			(7.00)			(8.00)	(62.00)
Step Therapy Appeals		1.10			1.20			1.20			1.20			1.30		11.20

G. Conclusion

As indicated in Table 14, we estimate that this proposed rule generates for each year in 2020–2029, net annualized costs of approximately $1.1 million primarily to entities involved with the Part D appeal process, such as Part D sponsors, the appeals contractor, and administrative law judges. The annualized $1.1 million cost primarily reflects increased appeals arising from the Step Therapy provision. There are additional (minor) first year costs in 2020 to (i) contractors for the Federal Government who will respond to requests for claims data, and (ii) to CMS staff for updating templates with the Part D EOB. The aggregate raw cost is $10.2 million from 2020–2029.

Although other impacts in this rule are classified as transfers as discussed in each provision, the aggregate effect of these transfers reduce dollar spending by Medicare Advantage enrollees and the Medicare Trust Fund:

- *Enrollees:* Enrollees are estimated to reduce their spending on cost sharing by $754 million over 10 years ($62 million and $692 million arising from reduced cost sharing from Step Therapy and Protected Classes respectively).
- *Government:* The Medicare Trust Fund in aggregate reduces their dollar spending by $3.8 billion over 10 years (the Trust Fund reduces its dollar spending by $1.85 billion, and $1.91 billion arising from the Protected Class and Step Therapy provisions, respectively).

H. Reducing Regulation and Controlling Regulatory Costs

The Department believes that this proposed rule, if finalized as proposed, is considered a regulatory action under Executive Order 13771. The Department estimates that this rule generates $0.9 million in annualized cost at a 7-percent discount rate, discounted relative to 2016, over a perpetual time horizon. Notably, however, this estimate does not include impacts related to the RTBT proposal. If this proposal were finalized, the related costs or cost savings (on which we seek comment below) would also be considered under Executive Order 13771.

List of Subjects

42 CFR Part 422

Administrative practice and procedure, Health facilities, Health maintenance organizations (HMO), Medicare, Penalties, Privacy, and Reporting and recordkeeping requirements.

42 CFR Part 423

Administrative practice and procedure, Emergency medical services, Health facilities, Health maintenance organizations (HMO), Health professionals, Medicare, Penalties, Privacy, and Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend CFR chapter IV as set forth below:

PART 422—MEDICARE ADVANTAGE PROGRAM

■ 1. The authority citation for part 422 is revised to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

■ 2. Section 422.2 is amended by adding a definition for ''Step Therapy'' in alphabetical order to read as follows:

§ 422.2 Definitions.

* * * * *

Step Therapy means a utilization management policy for coverage of drugs that begins medication for a medical condition with the most preferred or cost effective drug therapy and progresses to other drug therapies if medically necessary.

■ 3. Section 422.136 is added to subpart C to read as follows:

§ 422.136 Medicare Advantage and Step Therapy for Part B drugs.

(a) *General.* If an MA plan implements a step therapy program to control the utilization of Part B-covered drugs, the MA organization must—

(1) Apply step therapy only to new administrations of Part B drugs, using at least a 108 day look-back period;

(2) Establish policies and procedures to educate and inform health care providers and enrollees concerning its step therapy policies.

(3) Prior to implementation of a step therapy program, ensure that the step therapy program has been reviewed and approved by the MA organization's pharmacy and therapeutic (P&T) committee.

(b) *Step therapy and pharmacy and therapeutic committee requirements.* An MA plan must establish a P&T committee prior to implementing any step therapy program. An MA plan must use a P&T committee to review and approve step therapy programs used in connection with Part B drugs. To meet this requirement, a MA–PD plan may utilize an existing Part D P&T committees established for purposes of administration of the Part D benefit under part 423 of this chapter and an MA plan may utilize an existing Part D P&T committee established by an MA–PD plan operated under the same contract as the MA plan. The P&T committee must—

(1) Include a majority of members who are practicing physicians or practicing pharmacists.

(2) Include at least one practicing physician and at least one practicing pharmacist who are independent and free of conflict relative to—

(i) The MA organization and MA plan; and

(ii) Pharmaceutical manufacturers.

(3) Include at least one practicing physician and one practicing pharmacist who are experts regarding care of elderly or disabled individuals.

(4) Clearly articulate and document processes to determine that the requirements under paragraphs (b)(1) through (3) of this section have been met, including the determination by an objective party of whether disclosed financial interests are conflicts of interest and the management of any recusals due to such conflicts.

(5) Base clinical decisions on the strength of scientific evidence and standards of practice, including assessing peer-reviewed medical literature, pharmacoeconomic studies, outcomes research data, and other such information as it determines appropriate.

(6) Consider whether the inclusion of a particular Part B drug in a utilization management program, such as step therapy, has any therapeutic advantages in terms of safety and efficacy.

(7) Review policies that guide exceptions and other utilization management processes, including drug utilization review, quantity limits, generic substitution, and therapeutic interchange.

(8) Evaluate and analyze treatment protocols and procedures related to the plan's step therapy policies at least annually consistent with written policy guidelines and other CMS instructions.

(9) Document in writing its decisions regarding the development and revision and utilization management activities and make this documentation available to CMS upon request.

(10) Review and approve all clinical prior authorization criteria, step therapy protocols, and quantity limit restrictions applied to each covered Part B drug.

(11) Meet other requirements consistent with written policy guidelines and other CMS instructions.

(c) *Off-label drug requirement.* An MA plan may include a drug supported only by an off-label indication in step therapy protocols only if the off-label indication is supported by widely used treatment guidelines or clinical literature that CMS considers to represent best practices.

(d) *Non-covered drugs.* A step therapy program must not include as a component of a step therapy protocol or other condition or requirement any drugs not a covered by the applicable MA plan as a Part B drug or, in the case of an MA–PD plan, a Part D drug.

■ 4. Section 422.568 is amended by revising paragraphs (b), (d), (e) introductory text, and (e)(4)(i) to read as follows:

§ 422.568 Standard timeframes and notice requirements for organization determinations.

* * * * *

(b) *Timeframes*—(1) *Requests for service or item.* Except as provided in paragraph (b)(1)(i) of this section, when a party has made a request for a service or an item, the MA organization must notify the enrollee of its determination as expeditiously as the enrollee's health condition requires, but no later than 14 calendar days after the date the organization receives the request for a standard organization determination.

(i) *Extensions; requests for service or item.* The MA organization may extend the timeframe by up to 14 calendar days if—

(A) The enrollee requests the extension;

(B) The extension is justified and in the enrollee's interest due to the need for additional medical evidence from a noncontract provider that may change an MA organization's decision to deny an item or service; or

(C) The extension is justified due to extraordinary, exigent, or other non-routine circumstances and is in the enrollee's interest.

(ii) *Notice of extension.* When the MA organization extends the timeframe, it must notify the enrollee in writing of the reasons for the delay, and inform the enrollee of the right to file an expedited grievance if he or she disagrees with the MA organization's decision to grant an extension. The MA organization must notify the enrollee of its determination as expeditiously as the enrollee's health condition requires, but no later than upon expiration of the extension.

(2) *Requests for a Part B drug.* An MA organization must notify the enrollee (and the prescribing physician or other prescriber involved, as appropriate) of its determination as expeditiously as the enrollee's health condition requires, but no later than 72 hours after receipt of the request. This 72 hour period may not be extended under the provisions in paragraph (b)(1)(i) of this section.

* * * * *

(d) *Written notice for MA organization denials.* The MA organization must give the enrollee a written notice if—

(1) An MA organization decides to deny a service or an item, Part B drug, or payment in whole or in part, or reduce or prematurely discontinue the level of care for a previously authorized ongoing course of treatment.

(2) An enrollee requests an MA organization to provide an explanation of a practitioner's denial of an item, service or Part B drug, in whole or in part.

(e) *Form and content of the MA organization notice.* The notice of any denial under paragraph (d) of this section must—

* * * * *

(4)(i) For service, item, and Part B drug denials, describe both the standard

and expedited reconsideration processes, including the enrollee's right to, and conditions for, obtaining an expedited reconsideration and the rest of the appeal process; and

* * * * *

■ 5. Section 422.570 is amended by revising paragraph (d)(1) to read as follows:

§ 422.570 Expediting certain organization determinations.

* * * * *

(d) * * *

(1) Automatically transfer a request to the standard timeframe and make the determination within the 72 hour or 14-day timeframe, as applicable, established in § 422.568 for a standard determination. The timeframe begins when the MA organization receives the request for expedited determination.

* * * * *

■ 6. Section 422.572 is amended by revising paragraph (a), the paragraph (b) subject heading, and paragraph (b)(1) to read as follows:

§ 422.572 Timeframes and notice requirements for expedited organization determinations.

(a) *Timeframes*—(1) *Requests for service or item.* Except as provided in paragraph (b) of this section, an MA organization that approves a request for expedited determination must make its determination and notify the enrollee (and the physician involved, as appropriate) of its decision, whether adverse or favorable, as expeditiously as the enrollee's health condition requires, but no later than 72 hours after receiving the request.

(2) *Requests for a Part B drug.* An MA organization that approves a request for expedited determination must make its determination and notify the enrollee (and the physician or prescriber involved, as appropriate) of its decision as expeditiously as the enrollee's health condition requires, but no later than 24 hours after receiving the request. This 24 hour period may not be extended under the provisions in paragraph (b) of this section.

(b) *Extensions; requests for service or item.* (1) The MA organization may extend the 72-hour deadline for expedited organization determinations for requests for services or items by up to 14 calendar days if—

(i) The enrollee requests the extension;

(ii) The extension is justified and in the enrollee's interest due to the need for additional medical evidence from a noncontract provider that may change an MA organization's decision to deny an item or service; or

(iii) The extension is justified due to extraordinary, exigent, or other nonroutine circumstances and is in the enrollee's interest.

* * * * *

■ 7. Section 422.584 is amended by revising paragraph (d)(1) to read as follows:

§ 422.584 Expediting certain reconsiderations.

* * * * *

(d) * * *

(1) Automatically transfer a request to the standard timeframe and make the determination within the 30 calendar day or 7 calendar day, as applicable, timeframe established in § 422.590(a) and (c). The timeframe begins the day the MA organization receives the request for expedited reconsideration.

* * * * *

■ 8. Section 422.590 is revised to read as follows:

§ 422.590 Timeframes and responsibility for reconsiderations.

(a) *Standard reconsideration: Requests for service or item.* (1) Except as provided in paragraph (f) of this section, if the MA organization makes a reconsidered determination that is completely favorable to the enrollee, the MA organization must issue the determination (and effectuate it in accordance with § 422.618(a)) as expeditiously as the enrollee's health condition requires, but no later than 30 calendar days from the date it receives the request for a standard reconsideration.

(2) If the MA organization makes a reconsidered determination that affirms, in whole or in part, its adverse organization determination, it must prepare a written explanation and send the case file to the independent entity contracted by CMS as expeditiously as the enrollee's health condition requires, but no later than 30 calendar days from the date it receives the request for a standard reconsideration (or no later than the expiration of an extension described in paragraph (a)(1) of this section). The organization must make reasonable and diligent efforts to assist in gathering and forwarding information to the independent entity.

(b) *Standard reconsideration: Requests for payment.* (1) If the MA organization makes a reconsidered determination that is completely favorable to the enrollee, the MA organization must issue its reconsidered determination to the enrollee (and effectuate it in accordance with § 422.618(a)(1)) no later than 60 calendar days from the date it receives the request for a standard reconsideration.

(2) If the MA organization affirms, in whole or in part, its adverse organization determination, it must prepare a written explanation and send the case file to the independent entity contracted by CMS no later than 60 calendar days from the date it receives the request for a standard reconsideration. The organization must make reasonable and diligent efforts to assist in gathering and forwarding information to the independent entity.

(c) *Standard reconsideration: Requests for a Part B drug.* (1) If the MA organization makes a reconsidered determination that is completely favorable to the enrollee, the MA organization must issue the determination (and effectuate it in accordance with § 422.618(a)(3)) as expeditiously as the enrollee's health condition requires, but no later than 7 calendar days from the date it receives the request for a standard reconsideration. This 7 calendar day period may not be extended under the provisions in paragraph (f) of this section.

(2) If the MA organization makes a reconsidered determination that affirms, in whole or in part, its adverse organization determination, it must prepare a written explanation and send the case file to the independent entity contracted with CMS no later than 7 calendar days from the date it receives the request for a standard reconsideration. The organization must make reasonable and diligent efforts to assist in gathering and forwarding the information to the independent entity.

(d) *Effect of failure to meet timeframe for standard reconsideration.* If the MA organization fails to provide the enrollee with a reconsidered determination within the timeframes specified in paragraph (a), (b), or (c) of this section, this failure constitutes an affirmation of its adverse organization determination, and the MA organization must submit the file to the independent entity in the same manner as described under paragraphs (a)(2), (b)(2), and (c)(2) of this section.

(e) *Expedited reconsideration*—(1) *Timeframe for services or items.* Except as provided in paragraph (f) of this section, an MA organization that approves a request for expedited reconsideration must complete its reconsideration and give the enrollee (and the physician involved, as appropriate) notice of its decision as expeditiously as the enrollee's health condition requires but no later than 72 hours after receiving the request.

(2) *Timeframe for Part B drugs.* An MA organization that approves a request for expedited reconsideration must complete its reconsideration and give the enrollee (and the physician or other prescriber involved, as appropriate) notice of its decision as expeditiously as the enrollee's health condition requires but no later than 72 hours after receiving the request. This 72 hour period may not be extended under the provisions in paragraph (f) of this section.

(3) *Confirmation of oral notice.* If the MA organization first notifies an enrollee of a completely favorable expedited reconsideration orally, it must mail written confirmation to the enrollee within 3 calendar days.

(4) *How the MA organization must request information from noncontract providers.* If the MA organization must receive medical information from noncontract providers, the MA organization must request the necessary information from the noncontract provider within 24 hours of the initial request for an expedited reconsideration. Noncontract providers must make reasonable and diligent efforts to expeditiously gather and forward all necessary information to assist the MA organization in meeting the required timeframe. Regardless of whether the MA organization must request information from noncontract providers, the MA organization is responsible for meeting the timeframe and notice requirements.

(5) *Affirmation of an adverse expedited organization determination.* If, as a result of its reconsideration, the MA organization affirms, in whole or in part, its adverse expedited organization determination, the MA organization must submit a written explanation and the case file to the independent entity contracted by CMS as expeditiously as the enrollee's health condition requires, but not later than within 24 hours of its affirmation. The organization must make reasonable and diligent efforts to assist in gathering and forwarding information to the independent entity.

(f) *Extensions; requests for service or item.* (1) As described in paragraphs (f)(1)(i) through (iii) of this section, the MA organization may extend the standard or expedited reconsideration deadline for services by up to 14 calendar days if—

(i) The enrollee requests the extension; or

(ii) The extension is justified and in the enrollee's interest due to the need for additional medical evidence from a noncontract provider that may change an MA organization's decision to deny an item or service; or

(iii) The extension is justified due to extraordinary, exigent or other non-routine circumstances and is in the enrollee's interest.

(2) When the MA organization extends the deadline, it must notify the enrollee in writing of the reasons for the delay and inform the enrollee of the right to file an expedited grievance if he or she disagrees with the MA organization's decision to grant an extension. The MA organization must notify the enrollee of its determination as expeditiously as the enrollee's health condition requires, but no later than upon expiration of the extension.

(g) *Failure to meet timeframe for expedited reconsideration.* Failure to meet timeframe for expedited reconsideration. If the MA organization fails to provide the enrollee with the results of its reconsideration within the timeframe described in paragraph (e)(1) or (2) of this section, as applicable, of this section, this failure constitutes an adverse reconsidered determination, and the MA organization must submit the file to the independent entity within 24 hours of expiration of the timeframe set forth in paragraph (e)(1) or (2) of this section.

(h) *Who must reconsider an adverse organization determination.* (1) A person or persons who were not involved in making the organization determination must conduct the reconsideration.

(2) When the issue is the MA organization's denial of coverage based on a lack of medical necessity (or any substantively equivalent term used to describe the concept of medical necessity), the reconsidered determination must be made by a physician with expertise in the field of medicine that is appropriate for the services at issue. The physician making the reconsidered determination need not, in all cases, be of the same specialty or subspecialty as the treating physician.

■ 9. Section 422.618 is amended by revising paragraph (a) and adding paragraph (b)(3) to read as follows:

§ 422.618 How an MA organization must effectuate standard reconsidered determinations or decisions.

(a) *Reversals by the MA organization*—(1) *Requests for service.* If, on reconsideration of a request for service, the MA organization completely reverses its organization determination, the organization must authorize or provide the service under dispute as expeditiously as the enrollee's health condition requires, but no later than 30 calendar days after the date the MA organization receives the request for reconsideration (or no later than upon expiration of an extension described in § 422.590(f)).

(2) *Requests for payment.* If, on reconsideration of a request for payment, the MA organization completely reverses its organization determination, the organization must pay for the service no later than 60 calendar days after the date the MA organization receives the request for reconsideration.

(3) *Requests for a Part B drug.* If, on reconsideration of a request for a Part B drug, the MA organization completely reverses its organization determination, the MA organization must authorize or provide the Part B drug under dispute as expeditiously as the enrollee's health condition requires, but no later than 7 calendar days after the date the MA organization receives the request for reconsideration.

(b) * * *

(3) *Requests for a Part B drug.* If, on reconsideration of a request for a Part B drug, the MA organization's determination is reversed in whole or in part by the independent outside entity, the MA organization must authorize or provide the Part B drug under dispute within 72 hours from the date it receives notice reversing the determination. The MA organization must inform the independent outside entity that the organization has effectuated the decision.

* * * * *

■ 10. Section 422.619 is amended by—

■ a. Revising paragraphs (a) and (b);

■ b. Redesignating paragraph (c)(2) as paragraph (c)(3); and

■ c. Adding a new paragraph (c)(2).

The revisions and addition read as follows:

§ 422.619 How an MA organization must effectuate expedited reconsidered determinations.

(a) *Reversals by the MA organization*—(1) *Requests for service or item.* If, on reconsideration of an expedited request for service, the MA organization completely reverses its organization determination, the MA organization must authorize or provide the service or item under dispute as expeditiously as the enrollee's health condition requires, but no later than 72 hours after the date the MA organization receives the request for reconsideration (or no later than upon expiration of an extension described in § 422.590(f)).

(2) *Requests for a Part B drug.* If, on reconsideration of a request for a Part B drug, the MA organization completely reverses its organization determination, the MA organization must authorize or provide the Part B drug under dispute

as expeditiously as the enrollee's health condition requires, but no later than 72 hours after the date the MA organization receives the request for reconsideration.

(b) *Reversals by the independent outside entity*—(1) *Requests for service or item.* If the MA organization's determination is reversed in whole or in part by the independent outside entity, the MA organization must authorize or provide the service under dispute as expeditiously as the enrollee's health condition requires but no later than 72 hours from the date it receives notice reversing the determination. The MA organization must inform the independent outside entity that the organization has effectuated the decision.

(2) *Requests for a Part B drug.* If, on reconsideration of a request for a Part B drug, the MA organization's determination is reversed in whole or in part by the independent outside entity, the MA organization must authorize or provide the Part B drug under dispute as expeditiously as the enrollee's health condition requires but no later than 24 hours from the date it receives notice reversing the determination. The MA organization must inform the outside entity that the organization has effectuated the decision.

(c) * * *

(2) *Reversals of decisions related to Part B drugs.* If the independent outside entity's determination is reversed in whole or in part by an ALJ/attorney adjudicator or at a higher level of appeal, the MA organization must authorize or provide the Part B drug under dispute as expeditiously as the enrollee's health condition requires but no later than 24 hours from the date it receives notice reversing the determination. The MA organization must inform the outside entity that the organization has effectuated the decision.

* * * * *

PART 423—MEDICARE PROGRAM; MEDICARE PRESCRIPTION DRUG PROGRAM

■ 11. The authority citation for part 423 is revised to read as follows:

Authority: 42 U.S.C. 1302, 1395w–101 through 1395w–152, and 1395hh.

■ 12. Section 423.100 is amended by adding a definition for ''Applicable period'' in alphabetical order to read as follows:

§ 423.100 Definitions.

* * * * *

Applicable period means—

(1) With respect to exceptions in accordance with § 423.120(b)(2)(vi)(E) for contract year 2020, September 1, 2018 through February 28, 2019; or

(2) With respect to exceptions in accordance with § 423.120(b)(2)(vi)(E) for contract year 2021 and subsequent years, September 1 of the third year prior to the contract year in which the exception would apply, through August 31 of the second year prior to the contract year in which the exception would apply.

* * * * *

■ 13. Section 423.120 is amended—

■ a. In paragraph (a)(8)(i) by removing ''and'' from the end;

■ b. In paragraph (a)(8)(ii) by removing the period and adding in its place ''; and'';

■ c. Adding paragraph (a)(8)(iii);

■ d. Revising paragraph (b)(2)(vi)(A);

■ e. Reassigning paragraph (b)(2)(vi)(C) as (b)(2)(vi)(F); and

■ f. Adding new paragraph (b)(2)(vi)(C) and paragraphs (b)(2)(vi)(D) and (E).

The revision and additions read as follows:

§ 423.120 Access to covered Part D drugs.

(a) * * *

(8) * * *

(iii) May not prohibit a pharmacy from, nor penalize a pharmacy for, informing a Part D plan enrollee of the availability at that pharmacy of a prescribed medication at a cash price that is below the amount that the enrollee would be charged to obtain the same medication through the enrollee's Part D plan.

* * * * *

(b) * * *

(2) * * *

(vi) * * *

(A) Drug or biological products that are rated as either of the following:

(*1*) Therapeutically equivalent (under the Food and Drug Administration's most recent publication of ''Approved Drug Products with Therapeutic Equivalence Evaluations,'' also known as the Orange Book).

(*2*) Interchangeable (under the Food and Drug Administration's most recent publication of the Purple Book: Lists of Licensed Biological Products with Reference Product Exclusivity and Biosimilarity or Interchangeability Evaluations).

* * * * *

(C) Prior authorization and step therapy requirements that are implemented to confirm use is intended for a protected class indication, ensure clinically appropriate use, promote utilization of preferred formulary alternatives, or a combination thereof, subject to CMS review and approval.

(D) In the case of a single-source drug or biological product for which the manufacturer introduces a new formulation with the same active ingredient or moiety that does not provide a unique route of administration.

(E) A single-source drug or biological product, meaning a Part D drug that is approved under a new drug application submitted under section 505(b) of the Federal Food Drug and Cosmetic Act (FDCA); an authorized generic as defined under section 505(t)(3) of the FDCA; or in the case of a biological product, licensed under section 351 of the Public Health Service Act, that a Part D sponsor identifies, for which the wholesale acquisition cost between the baseline date and any point in the applicable period, increased more than the cumulative increase in the consumer price index for all urban consumers over the same period. The baseline date is the following:

(*1*) September 1, 2018 for a drug or biological product that is first marketed in the United States on or before September 1, 2018.

(*2*) The first day of the first full quarter after the date a drug or biological product is first marketed in the United States after September 1, 2018.

* * * * *

■ 14. Section 423.128 is amended by redesignating paragraphs (e)(5) and (6) as paragraphs (e)(6) and (7) and adding a new paragraph (e)(5) to read as follows:

§ 423.128 Dissemination of Part D plan information.

* * * * *

(e) * * *

(5) For each prescription drug claim, include the cumulative percentage change (if any) in the negotiated price since the first day of the current benefit year and therapeutic alternatives with lower cost-sharing, when available as determined by the plan, from the applicable approved plan formulary.

* * * * *

■ 15. Section 423.160 is amended by adding paragraph (b)(7) to read as follows:

§ 423.160 Standards for electronic prescribing.

* * * * *

(b) * * *

(7) *Real time benefit tools.* No later than January 1, 2020, implement one or more electronic real-time benefit tools (RTBT) that are capable of integrating prescribers' e-Prescribing (eRx) and electronic medical record (EMR) systems to provide complete, accurate, timely, clinically appropriate, patient-specific formulary and benefit

information to the prescriber in real time for assessing coverage under the Part D plan. Such information must include enrollee cost-sharing information, clinically appropriate formulary alternatives, when available, and the formulary status of each drug presented including any utilization management requirements applicable to each alternative drug. Patients must specifically consent to use of their protected health information for RTBT.

* * * * *

Dated: November 16, 2018.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

Dated: November 19, 2018.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2018–25945 Filed 11–26–18; 4:15 pm]

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Part V

Environmental Protection Agency

40 CFR Part 52
Approval and Promulgation of Implementation Plans; Arkansas; Approval of Regional Haze State Implementation Plan Revision and Partial Withdrawal of Federal Implementation Plan; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2015–0189; FRL–9986–67–Region 6]

Approval and Promulgation of Implementation Plans; Arkansas; Approval of Regional Haze State Implementation Plan Revision and Partial Withdrawal of Federal Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is proposing to approve a portion of the revision to the Arkansas State Implementation Plan (SIP) that addresses certain requirements of the CAA and the EPA's regional haze rules for the protection of visibility in mandatory Class I Federal areas (Class I areas) for the first implementation period. The EPA is proposing to approve the portions of the SIP revision addressing the best available retrofit technology (BART) requirements for sulfur dioxide (SO_2), particulate matter (PM) and nitrogen oxide (NO_X) for seven electric generating units (EGUs) in Arkansas. The EPA is also proposing to approve the determination that no additional controls at any Arkansas sources are necessary under reasonable progress; calculation of the revised reasonable progress goals (RPGs) for Arkansas' Class I areas; certain components of the long-term strategy for making reasonable progress; the clarification that both the 6A and 9A Boilers at the Georgia-Pacific Crossett Mill are BART-eligible; and the additional information and technical analysis in support of the determination that the Georgia-Pacific Crossett Mill 6A and 9A Boilers are not subject to BART. In conjunction with our proposed approval of portions of the SIP revision, we are proposing to withdraw the corresponding federal implementation plan (FIP) provisions established in a prior action to address regional haze requirements for Arkansas.

DATES: Written comments must be received on or before December 31, 2018.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2015–0189, at *http://www.regulations.gov* or via email to *R6AIR_ARHaze@epa.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* 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 Dayana Medina, *medina.dayana@epa.gov.* For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

Docket: The index to the docket for this action is available electronically at *www.regulations.gov* and in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available at either location (*e.g.,* CBI).

FOR FURTHER INFORMATION CONTACT: Dayana Medina, 214–665–7241, *medina.dayana@epa.gov.* To inspect the hard copy materials, please schedule an appointment with Dayana Medina or Mr. Bill Deese at 214–665–7253.

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we,'' ''us,'' or ''our'' is used, we mean the EPA.

Table of Contents

I. Background

A. The Regional Haze Program

Regional haze is visibility impairment that is produced by a multitude of sources and activities that are located across a broad geographic area and emit fine particulates ($PM_{2.5}$) (*e.g.,* sulfates, nitrates, organic carbon (OC), elemental carbon (EC), and soil dust), and their precursors (*e.g.,* SO_2, NO_X, and in some cases, ammonia (NH_3) and volatile organic compounds (VOCs)). Fine particle precursors react in the atmosphere to form $PM_{2.5}$, which impairs visibility by scattering and absorbing light. This light scattering reduces the clarity, color and visible distance that one can see. Particulate matter can also cause serious health effects in humans (including premature death, heart attacks, irregular heartbeat, aggravated asthma, decreased lung function and increased respiratory symptoms) and contribute to

environmental effects such as acid deposition and eutrophication.

Data from the existing visibility monitoring network, the ''Interagency Monitoring of Protected Visual Environments'' (IMPROVE) monitoring network, show that at the time the Regional Haze Rule was finalized in 1999, visibility impairment caused by air pollution occurred virtually all the time at most national parks and wilderness areas. The average visual range [1] in many Class I areas in the western U.S. was 62–93 miles, but in some Class I areas, these visual ranges may have been impacted by natural wildfire and dust episodes in addition to anthropogenic impacts. In most of the eastern Class I areas of the U.S., the average visual range was less than 19 miles.[2] CAA programs have reduced emissions of some haze-causing pollution, lessening some visibility impairment and resulting in partially improved average visual ranges.[3]

In section 169A of the 1977 Amendments to the CAA, Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section of the CAA establishes as a national goal the prevention of any future, and the remedying of any existing, man-made impairment of visibility in 156 national parks and wilderness areas designated as mandatory Class I Federal areas.[4] Congress added section 169B to the CAA in 1990 to address regional haze issues, and the EPA promulgated regulations addressing regional haze in 1999. The Regional Haze Rule [5] revised the existing visibility regulations to add provisions addressing regional haze impairment and established a comprehensive visibility protection program for Class I areas. The requirements for regional haze, found at 40 CFR 51.308 and 51.309, are included in our visibility protection regulations at 40 CFR 51.300–309. The requirement to submit a regional haze SIP revision at periodic intervals applies to all 50 states, the District of Columbia, and the Virgin Islands. States were required to submit the first implementation plan addressing regional haze visibility impairment no later than December 17, 2007.[6]

Section 169A of the CAA directs states to evaluate the use of retrofit controls at certain larger, often under-controlled, older stationary sources in order to address visibility impacts from these sources. Specifically, section 169A(b)(2)(A) of the CAA requires states to revise their SIPs to contain such measures as may be necessary to make reasonable progress toward the natural visibility goal, including a requirement that certain categories of existing major stationary sources [7] built between 1962 and 1977 procure, install, and operate BART controls. Larger ''fossil-fuel fired steam electric plants'' are one of these source categories. Under the Regional Haze Rule, states are directed to conduct BART determinations for ''BART-eligible'' sources that may be anticipated to cause or contribute to any visibility impairment in a Class I area. Sources that are reasonably anticipated to cause or contribute to any visibility impairment in a Class I area are determined to be subject-to-BART. For each source subject to BART, 40 CFR 51.308(e)(1)(ii)(A) requires that states (or EPA, in the case of a FIP) identify the level of control representing BART after considering the factors set out in CAA section 169A(g). The evaluation of BART for EGUs that are located at fossil-fuel fired power plants having a generating capacity in excess of 750 megawatts (MW) must follow the ''Guidelines for BART Determinations Under the Regional Haze Rule'' at appendix Y to 40 CFR part 51 (hereinafter referred to as the ''BART Guidelines''). Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or other alternative program as long as the alternative provides for greater reasonable progress towards improving visibility than BART.

The vehicle for ensuring continuing progress towards achieving the natural visibility goal is the submission of a series of regional haze SIPs that contain long-term strategies to make reasonable progress towards natural visibility conditions. As part of this process, States also establish RPGs for every Class I area to provide assessments of the improvements in visibility anticipated to result from the long-term strategies. States have significant flexibility in establishing long-term strategies and RPGs,[8] but must determine whether additional control measures beyond BART and other ''on the books'' controls are needed for reasonable progress based on consideration of the following factors set out in section 169A of the CAA: (1) The costs of compliance; (2) the time necessary for compliance; (3) the energy and non-air quality environmental impacts of compliance; and (4) the remaining useful life of any potentially affected sources. States must demonstrate in their SIPs how these factors are considered when selecting measures for their long-term strategies and calculating the associated RPGs for each applicable Class I area. We commonly refer to this as the ''reasonable progress analysis'' or ''four factor analysis.''

B. Our Previous Actions on Arkansas Regional Haze

Arkansas submitted a SIP revision on September 9, 2008, to address the requirements of the first regional haze implementation period. On August 3, 2010, Arkansas submitted a SIP revision with mostly non-substantive revisions to Arkansas Pollution Control and Ecology Commission (APCEC) Regulation 19, Chapter 15.[9] On

[1] Visual range is the greatest distance, in kilometers or miles, at which a dark object can be discerned against the sky by a typical observer. Visual range is inversely proportional to light extinction (bext) by particles and gases and is calculated as: Visual Range = 3.91/bext (Bennett, M.G., The physical conditions controlling visibility through the atmosphere; Quarterly Journal of the Royal Meteorological Society, 1930, 56, 1–29). Light extinction has units of inverse distance (*i.e.,* Mm^{-1} or inverse Megameters [mega = 106]).

[2] 64 FR 35715 (July 1, 1999).

[3] An interactive ''story map'' depicting efforts and recent progress by EPA and states to improve visibility at national parks and wilderness areas may be visited at: *http://arcg.is/29tAbS3.*

[4] Areas designated as mandatory Class I Federal areas consist of National Parks exceeding 6,000 acres, wilderness areas and national memorial parks exceeding 5,000 acres, and all international parks that were in existence on August 7, 1977. 42 U.S.C. 7472(a). In accordance with section 169A of the CAA, EPA, in consultation with the Department of Interior, promulgated a list of 156 areas where visibility is identified as an important value. 44 FR 69122 (November 30, 1979). The extent of a mandatory Class I area includes subsequent changes in boundaries, such as park expansions. 42 U.S.C. 7472(a). Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to ''mandatory Class I Federal areas.'' Each mandatory Class I Federal area is the responsibility of a ''Federal Land Manager.'' 42 U.S.C. 7602(i). When we use the term ''Class I area'' in this action, we mean a ''mandatory Class I Federal area.''

[5] Here and elsewhere in this document, the term ''Regional Haze Rule,'' refers to the 1999 final rule (64 FR 35714), as amended in 2005 (70 FR 39156, July 6, 2005), 2006 (71 FR 60631, October 13, 2006), 2012 (77 FR 33656, June 7, 2012), and 2017 (82 FR 3078, January 10, 2017).

[6] See 40 CFR 51.308(b). EPA's regional haze regulations require subsequent updates to the regional haze SIPs. 40 CFR 51.308(f)–(i). The next update is due by July 31, 2021.

[7] See 42 U.S.C. 7491(g)(7) (listing the set of ''major stationary sources'' potentially subject-to-BART).

[8] *Guidance for Setting Reasonable Progress Goals under the Regional Haze Program,* June 1, 2007, memorandum from William L. Wehrum, Acting Assistant Administrator for Air and Radiation, to EPA Regional Administrators, EPA Regions 1–10 (pp. 4–2, 5–1).

[9] The September 9, 2008, SIP submittal included APCEC Regulation 19, Chapter 15, which is the state regulation that identified the BART-eligible and subject-to-BART sources in Arkansas and established BART emission limits for subject-to-

Continued

September 27, 2011, the State submitted supplemental information to address the regional haze requirements. We are hereafter referring to these regional haze submittals collectively as the ''2008 Arkansas Regional Haze SIP.'' On March 12, 2012, we partially approved and partially disapproved the 2008 Arkansas Regional Haze SIP.[10] On September 27, 2016, we promulgated a FIP (the Arkansas Regional Haze FIP) addressing the disapproved portions of the 2008 Arkansas Regional Haze SIP.[11] Among other things, the FIP established SO_2, NO_X, and PM emission limits under the BART requirements for nine units at six facilities: AECC Bailey Plant Unit 1; AECC McClellan Plant Unit 1; SWEPCO Flint Creek Plant Boiler No. 1; Entergy Lake Catherine Plant Unit 4; Entergy White Bluff Plant Units 1 and 2; Entergy White Bluff Auxiliary Boiler; and the Domtar Ashdown Mill Power Boilers No. 1 and 2. The FIP also established SO_2 and NO_X emission limits under the reasonable progress requirements for Entergy Independence Units 1 and 2.

Following the issuance of the Arkansas Regional Haze FIP, the State of Arkansas and several industry parties filed petitions for reconsideration and an administrative stay of the final rule.[12] On April 14, 2017, we announced our decision to convene a proceeding to reconsider several elements of the FIP, as follows: Appropriate compliance dates for the NO_X emission limits for Flint Creek Boiler No. 1, White Bluff Units 1 and 2, and Independence Units 1 and 2; the low-load NO_X emission limits applicable to White Bluff Units 1 and 2 and Independence Units 1 and 2 during periods of operation at less than 50 percent of the unit's maximum heat input rating; the SO_2 emission limits for White Bluff Units 1 and 2; and the compliance dates for the SO_2 emission limits for Independence Units 1 and 2.[13]

EPA also published a notice in the **Federal Register** on April 25, 2017, administratively staying the effectiveness of the NO_X compliance dates in the FIP for the Flint Creek, White Bluff, and Independence units, as well as the compliance dates for the SO_2 emission limits for the White Bluff and Independence units for a period of 90 days.[14] On July 13, 2017, the EPA published a proposed rule to extend the NO_X compliance dates for Flint Creek Boiler No. 1, White Bluff Units 1 and 2, and Independence Units 1 and 2, by 21 months to January 27, 2020.[15] However, EPA did not take final action on the July 13, 2017, proposed rule because on July 12, 2017, Arkansas submitted a proposed SIP revision with a request for parallel processing, addressing the NO_X BART requirements for Bailey Unit 1, McClellan Unit 1, Flint Creek Boiler No. 1, Lake Catherine Unit 4, White Bluff Units 1 and 2, White Bluff Auxiliary Boiler, as well as the reasonable progress requirements with respect to NO_X (Arkansas Regional Haze NO_X SIP revision or Arkansas NO_X SIP revision). In a proposed rule published in the **Federal Register** on September 11, 2017, we proposed to approve the Arkansas Regional Haze NO_X SIP revision and to withdraw the corresponding parts of the Arkansas Regional Haze FIP.[16] On October 31, 2017, we received ADEQ's final Regional Haze NO_X SIP revision addressing NO_X BART for EGUs and the reasonable progress requirements with respect to NO_X for the first implementation period. On February 12, 2018, we took final action to approve the Arkansas Regional Haze NO_X SIP revision and to withdraw the corresponding parts of the FIP.[17]

II. Our Evaluation of Arkansas' SO_2 and PM Regional Haze SIP Revision

On August 8, 2018, Arkansas submitted a SIP revision (Arkansas Regional Haze SO_2 and PM SIP revision) addressing all remaining disapproved parts of the 2008 Regional Haze SIP, with the exception of the BART and associated long-term strategy requirements for the Domtar Ashdown Mill Power Boilers No. 1 and 2. The SIP revision also includes a discussion on Arkansas' interstate visibility transport requirements. We are proposing action on a portion of the August 8, 2018, Arkansas Regional Haze SO_2 and PM SIP revision in this **Federal Register** notice, and we are also proposing to withdraw the parts of the FIP corresponding to our proposed approvals. Since we are proposing to withdraw certain portions of the FIP, we are also proposing to redesignate the FIP by revising the numbering of certain paragraphs under section 40 CFR 52.173. Our proposed redesignation of the numbering of these paragraphs is non-substantive and does not mean we are reopening these parts for public comment in this proposed rulemaking. We intend to propose action on the portion of this SIP revision discussing the interstate visibility transport requirements for pollutants that affect visibility in Class I areas in nearby states in a future proposed rulemaking.

The Arkansas Regional Haze SO_2 and PM SIP revision submitted to us on August 8, 2018, addresses the majority of the remaining parts of the 2008 Regional Haze SIP that EPA disapproved on March 12, 2012.[18] Specifically, the August 8, 2018, SIP revision revises ADEQ's identification of BART-eligible sources by now identifying the 6A Boiler at the Georgia-Pacific Crossett Mill as BART-eligible; provides additional information and technical analysis in support of the determination that the Georgia-Pacific Crossett Mill 6A and 9A Boilers are not subject to BART;[19] prohibits the burning of fuel oil at Lake Catherine Unit 4 until SO_2 and PM BART determinations for the fuel oil firing scenario are approved into the SIP by EPA; and addresses the following BART requirements: SO_2 and PM BART for Bailey Unit 1 and McClellan Unit 1; SO_2 BART for Flint Creek Boiler No. 1; SO_2 BART for White Bluff Units 1 and 2; and SO_2, NO_X, and PM BART for the White Bluff Auxiliary Boiler. The SIP revision also addresses the reasonable progress requirements, arriving at the conclusion that no additional controls at Independence Units 1 and 2 or any other Arkansas sources are necessary under reasonable progress,[20] and establishes revised RPGs for Arkansas' two Class I areas, the Caney Creek Wilderness Area and the Upper Buffalo Wilderness Area. Finally, the SIP

BART sources. The August 3, 2010, SIP revision did not revise Arkansas' list of BART-eligible and subject-to-BART sources or revise any of the BART requirements for affected sources. Instead, it included mostly non-substantive revisions to the state regulation.

[10] 77 FR 14604.

[11] 81 FR 66332; *see also* 81 FR 68319 (October 4, 2016) (correction).

[12] See the docket associated with this proposed rulemaking for a copy of the petitions for reconsideration and administrative stay submitted by the State of Arkansas; Entergy Arkansas Inc., Entergy Mississippi Inc., and Entergy Power LLC (collectively ''Entergy''); AECC; and the Energy and Environmental Alliance of Arkansas (EEAA).

[13] Letter from E. Scott Pruitt, Administrator, EPA, to Nicholas Jacob Bronni and Jamie Leigh Ewing, Arkansas Attorney General's Office (April 14, 2017). A copy of this letter is included in the docket, *https://www.regulations.gov/document?D=EPA-R06-OAR-2015-0189-0240.*

[14] 82 FR 18994.

[15] 82 FR 32284.

[16] 82 FR 42627.

[17] 83 FR 5927 and 83 FR 5915 (February 12, 2018).

[18] 77 FR 14604.

[19] BART eligible sources that are reasonably anticipated to cause or contribute to any visibility impairment in a Class I area are determined to be subject-to-BART. In the 2008 Arkansas Regional Haze SIP, ADEQ used a contribution threshold of 0.5 dv for determining whether a source ''contributes'' to visibility impairment and is thus subject to BART.

[20] In a SIP revision submitted on October 31, 2017, Arkansas provided a reasonable progress analysis and reasonable progress determination with respect to NO_X, and we took final action to approve the analysis and determination in a final action published on February 12, 2018 (see 83 FR 5927). Thus, the August 8, 2018 SIP revision addresses reasonable progress requirements with respect to SO_2 and PM emissions.

revision revises the State's long-term strategy by including in the long-term strategy an SO_2 emission limit of 0.60 lb/MMBtu for Independence Units 1 and 2 based on the use of low sulfur coal, as well as each of the BART measures listed above. The August 8, 2018, SIP revision does not address BART for the Domtar Ashdown Mill Power Boilers No. 1 and 2 and relies on the Domtar BART emission limits from our FIP and the 2012 partially approved SIP for the associated long-term strategy requirements.

The August 8, 2018, SIP revision is the subject of this proposed action, in conjunction with our proposed withdrawal of the parts of the Arkansas Regional Haze FIP corresponding to our proposed approval. We are proposing to approve ADEQ's revised identification of the 6A Boiler at the Georgia-Pacific Crossett Mill as BART-eligible; the additional information and technical analysis presented in the SIP revision in support of the determination that the Georgia-Pacific Crossett Mill 6A and 9A Boilers are not subject to BART; and the state's BART decisions for the seven subject-to-BART units listed above. We are proposing to withdraw our prior approval of Arkansas' reliance on participation in the Cross-State Air Pollution Rule (CSAPR) for ozone season NO_X to satisfy the NO_X BART requirement for the White Bluff Auxiliary Boiler. The Arkansas Regional Haze NO_X SIP revision erroneously stated that the Auxiliary Boiler participates in CSAPR for ozone season NO_X and that the state was electing to rely on participation in that trading program to satisfy the Auxiliary Boiler's NO_X BART requirements, and we erroneously approved this determination in a final action published in the **Federal Register** on February 12, 2018.[21] We are proposing to withdraw our approval of that determination for the Auxiliary Boiler and to replace it with our proposed approval of a source specific NO_X BART emission limit contained in the Arkansas Regional Haze SIP Revision before us.

We are also proposing to approve Arkansas' reasonable progress determinations for Independence Units 1 and 2 and all other sources in Arkansas, and to approve the revised RPGs contained in the August 8, 2018, SIP revision. We are further proposing to find that, based on the state's currently approved SIP and the analyses and determinations we are proposing to approve in this action, the state's reasonable progress obligations for the first implementation period have been satisfied. At this time, the majority of the BART requirements for the Domtar Ashdown Mill are satisfied by a FIP.[22] The SIP revision explains that, based upon the BART determinations and analysis in that FIP, nothing further is currently needed for reasonable progress at the Domtar Ashdown Mill. EPA agrees. If the State chooses to submit a further SIP revision to address BART requirements for Domtar Power Boilers No. 1 and No. 2 that are currently satisfied by the FIP, we will evaluate that SIP submittal, including as well as any conclusions ADEQ draws about the adequacy of such SIP-based measures for reasonable progress. We will also, at that time, evaluate any changes in the measures for the Domtar Ashdown Mill relative to those currently in the FIP to determine whether the calculation of the reasonable progress goals for the first implementation period continue to be sufficient.

Finally, we are proposing to approve the components of the long-term strategy addressed by the August 8, 2018, SIP revision and to find that Arkansas' long-term strategy for reasonable progress with respect to all sources other than Domtar is approved. The long-term strategy is the compilation of all control measures a state will use during the implementation period of the specific SIP submittal to make reasonable progress towards the goal of natural visibility conditions, including emission limitations corresponding to BART determinations. If the proposed approvals of the BART measures and the emission limitations for the Independence facility addressed in this action are finalized, those measures will also be integrated into the State's long-term strategy. Because the August 8, 2018, SIP revision does not address the BART requirements for Domtar, that component of the long-term strategy will remain satisfied by the FIP unless and until EPA has received and approved a SIP revision containing the required analyses and determinations for this facility.

We are also proposing to withdraw the majority of the Arkansas Regional Haze FIP we promulgated on September 27, 2016. Upon finalization of this proposed rulemaking, the majority of remaining FIP provisions would be replaced by the corresponding revisions to the SIP that we are proposing to approve in this proposed rulemaking. Specifically, we are proposing to withdraw the following components of the FIP: The SO_2 and PM BART emission limits for Bailey Unit 1; the SO_2 and PM BART emission limits for McClellan Unit 1; the SO_2 BART emission limit for Flint Creek Boiler No. 1; the SO_2 BART emission limit for White Bluff Units 1 and 2; the SO_2 and PM BART emission limits for the White Bluff Auxiliary Boiler; the prohibition on burning fuel oil at Lake Catherine Unit 4; and the SO_2 emission limits for Independence Units 1 and 2 under the reasonable progress provisions. Since we are proposing to withdraw certain portions of the FIP, we are also proposing to redesignate the FIP by revising the numbering of certain paragraphs under section 40 CFR 52.173. Our proposed redesignation of the numbering of these paragraphs is non-substantive and does not mean we are reopening these parts for public comment in this proposed rulemaking.

The SIP revision also includes a discussion on interstate visibility transport. Specifically, the SIP revision discusses the impacts of Arkansas sources on Missouri's Class I areas, as well as the most recent IMPROVE monitoring data for Missouri's Class I areas. The SIP revision concludes that Missouri is on track to achieve its visibility goals, that the visibility progress observed indicates that sources in Arkansas are not interfering with the achievement of Missouri's RPGs for the Hercules-Glades Wilderness Area and Mingo Wilderness Area, and that no additional controls on sources within Arkansas are necessary to ensure that other states' visibility goals for their Class I areas are met. We are deferring proposing action on the interstate visibility transport portion of the SIP revision until a future proposed rulemaking.

A. Identification of BART-Eligible and Subject-to-BART Sources

States are required to identify all the BART-eligible sources within their boundaries by utilizing the three eligibility criteria in the BART Guidelines [23] and the Regional Haze Rule [24]: (1) One or more emission units at the facility fit within one of the 26 categories listed in the BART Guidelines; (2) the emission unit(s) began operation on or after August 6, 1962, and the unit was in existence on August 6, 1977; and (3) the potential emissions of any visibility impairing pollutant from subject units are 250 tons or more per year. Sources that meet

[21] 83 FR 5927.

[22] We note that the PM determination for Domtar Ashdown Mill Power Boiler No. 1 in the 2008 SIP was approved in our 2012 rulemaking. (77 FR 14604, March 12, 2012).

[23] 70 FR 39158.

[24] 40 CFR 51.301.

these three criteria are considered BART-eligible. Once a list of the BART-eligible sources within a state has been compiled, states must determine whether to make BART determinations for all of them or whether some may not reasonably be anticipated to cause or contribute to any visibility impairment in a Class I area and may thus not be subject to further BART analysis or requirements. The BART Guidelines present several options that rely on modeling and/or emissions analyses to determine if a source may reasonably be anticipated to cause or contribute to visibility impairment in a Class I area. A source that may not be reasonably anticipated to cause or contribute to any visibility impairment in any Class I area is not ''subject to BART,'' and for such sources, a state need not make a BART determination.

In our March 12, 2012, final action on the 2008 Arkansas Regional Haze SIP, we approved Arkansas' identification of BART-eligible sources with the exception of the Georgia-Pacific Crossett Mill 6A Boiler.[25] We also approved Arkansas' determination of which sources are subject to BART, with the exception of its determination that the Georgia-Pacific Crossett Mill 6A and 9A Boilers are not subject to BART. In that final action, we determined that the 2008 Arkansas Regional Haze SIP did not include sufficient documentation to demonstrate that the 6A Boiler is not BART-eligible and did not contain sufficient documentation to demonstrate that the 6A and 9A Boilers are not subject to BART. In the Arkansas Regional Haze FIP, we made the determination that the 6A Boiler is BART-eligible. We also noted that we continued to agree with the state's previous determination from the 2008 Arkansas Regional Haze SIP that the 9A Boiler is BART-eligible. Based on additional information and a technical analysis provided to the EPA by Georgia-Pacific, EPA determined that the 6A and 9A Boilers are not subject to BART. In the August 8, 2018, Arkansas Regional Haze SO_2 and PM SIP revision, Arkansas has made determinations consistent with our findings in the FIP. Specifically, Arkansas made a revision to its identification of BART-eligible sources,[26] now identifying the 6A Boiler at the Georgia-Pacific Crossett Mill as BART-eligible. In the 2008 Arkansas Regional Haze SIP, the state had already identified the 9A Boiler at the Georgia-Pacific Crossett Mill as BART-eligible; in the August 8, 2018, SIP revision, the state made no changes to the identification of the 9A Boiler as BART-eligible. In addition, Arkansas included in the SIP revision a copy of the technical analysis and other information that was provided by Georgia-Pacific to EPA, which we previously included in the record for the Arkansas Regional Haze FIP in support of our determination that the 6A and 9A Boilers are not subject to BART.[27] As Arkansas explains in the SIP revision, Georgia-Pacific provided information regarding revisions to emission limits included in the facility's permit and additional dispersion modeling conducted in 2011 using those revised limits. The results of this 2011 BART screening modeling demonstrated that the maximum impact of the Georgia-Pacific Crossett Mill boilers on any Class I area was less than the 0.5 dv threshold used by ADEQ to determine whether a BART-eligible source should be considered subject to BART. Because the 2011 BART screening modeling was based on permit limits from a permit revision issued in 2012 rather than on maximum 24-hour emission rates from the 2001–2003 baseline period, Georgia-Pacific also provided further information regarding fuel usage during the 2001–2003 baseline and performed calculations using AP–42, Compilation of Air Pollutant Emission Factors, to estimate the 24-hour emission rates for SO_2, NO_X, and PM_{10} for the 6A and 9A Boilers for each day during the baseline years. Georgia Pacific then identified the maximum 24-hour emission rates for each pollutant for the two boilers during the 2001–2003 baseline period. A comparison of the estimated maximum 24-hour emission rates with the emission rates modeled in Georgia-Pacific's 2011 BART screening modeling demonstrates that the maximum 24-hour emission rates from the 2001–2003 baseline were lower than the rates modeled in the 2011 BART screening modeling and lower than the boilers' permit limits. Based upon the additional information provided by Georgia-Pacific, ADEQ concluded that the 6A and 9A Boilers are not subject to BART.[28] Thus, ADEQ revised its identification of BART-eligible sources by identifying the Georgia-Pacific Mill 6A Boiler as BART-eligible. Since ADEQ previously determined in the 2008 Regional Haze SIP that the 9A Boiler is BART-eligible, it made no change to that previous determination. ADEQ did not make changes to its list of subject-to-BART sources, but did include in the SIP revision the additional information and technical analysis from Georgia-Pacific to support and document the determination that the 6A and 9A boilers are not subject to BART.

We are proposing to find that the analysis and documentation provided by Georgia-Pacific and included in the Arkansas Regional Haze SO_2 and PM SIP revision appropriately and sufficiently demonstrate that the 6A and 9A Boilers are not subject to BART. We are proposing to approve ADEQ's revised determination that the 6A Boiler is BART-eligible and concur that the 6A and 9A Boilers are not subject to BART.

B. Arkansas' Five-Factor Analyses for SO_2 and PM BART

In determining BART, the state must consider the five statutory factors in section 169A of the CAA: (1) The costs of compliance; (2) the energy and nonair quality environmental impacts of compliance; (3) any existing pollution control technology in use at the source; (4) the remaining useful life of the source; and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.[29] All units that are subject to BART must undergo a BART analysis. The BART Guidelines break the analysis down into five steps:[30]

STEP 1—Identify All Available Retrofit Control Technologies,

STEP 2—Eliminate Technically Infeasible Options,

STEP 3—Evaluate Control Effectiveness of Remaining Control Technologies,

STEP 4—Evaluate Impacts and Document the Results, and

STEP 5—Evaluate Visibility Impacts.

As mentioned previously, EPA partially approved and partially disapproved the 2008 Arkansas Regional Haze SIP revision in a final action published on March 12, 2012.[31] Following our 2012 partial disapproval of the 2008 Arkansas Regional Haze SIP, ADEQ began the process of generating additional technical information and analyses from the companies whose BART determinations we disapproved. These analyses and technical

[25] 80 FR 18947.

[26] See Arkansas Regional Haze SO_2 and PM SIP revision, Table 1, page 8 and 9.

[27] See the documentation provided by Georgia Pacific to EPA that was previously included in the record for the Arkansas Regional Haze FIP. This documentation is included in the docket at the following location: *https://www.regulations.gov/searchResults?rpp=50&so=ASC&sb=docId&po=0&dktid=EPA-R06-OAR-2015-0189.*

[28] ADEQ provides documentation in support of the determination that the Georgia-Pacific Crossett Mill 6A and 9A Boilers are not subject to BART in Appendix A to the Arkansas Regional Haze SO_2 and PM SIP revision.

[29] See also 40 CFR 51.308(e)(1)(ii)(A).

[30] 70 FR 39103, 39164 (July 6, 2005) [40 CFR 51, App. Y].

[31] 77 FR 14604.

information were provided to EPA and were the basis for our evaluation of BART for subject-to-BART facilities in the FIP. In turn, ADEQ relied on those same analyses and technical information in the state's evaluation of BART for subject-to-BART sources in the Arkansas Regional Haze SO_2 and PM SIP revision, with the exception of White Bluff Units 1 and 2, for which updated technical information has been provided by Entergy and is included in the SIP revision. In evaluating the Arkansas Regional Haze SO_2 and PM SIP revision, we reviewed each BART analysis for SO_2 and PM for each subject-to-BART source and other relevant information provided in the SIP revision.

As noted above, we approved certain parts of the 2008 Arkansas Regional Haze SIP in 2012.[32] The parts that we approved in 2012 included PM BART for Flint Creek Boiler No. 1; PM BART for White Bluff Units 1 and 2; SO_2 and PM BART for the natural gas firing scenario for Lake Catherine Unit 4; and PM BART for Domtar Power Boiler No. 1. We also published a final action on February 12, 2018, in which we approved a SIP revision submitted by ADEQ on October 31, 2017, to address the regional haze requirements for NO_X for EGUs in Arkansas (''Arkansas Regional Haze NO_X SIP Revision'').[33] That final action included approval of Arkansas' NO_X BART determinations for Bailey Unit 1; McClellan Unit 1; Flint Creek Boiler No. 1; Lake Catherine Unit 4 (for both the natural gas firing and fuel oil firing scenarios); White Bluff Units 1 and 2; and the White Bluff Auxiliary Boiler; and removed the corresponding portions of the Arkansas Regional Haze FIP. Thus, the only BART requirements currently addressed under the Arkansas Regional Haze FIP are the SO_2 and PM BART requirements for Bailey Unit 1; the SO_2 and PM BART requirements for McClellan Unit 1; the SO_2 BART requirements for Flint Creek Boiler No. 1; the prohibition on burning fuel oil at Lake Catherine Unit 4 until SO_2 and PM BART determinations for the fuel oil firing scenario are approved into the SIP by EPA; the SO_2 BART requirements for White Bluff Units 1 and 2; the SO_2 and PM BART requirements for the White Bluff Auxiliary Boiler; the SO_2 and NO_X BART requirements for the Domtar Ashdown Mill Power Boiler No. 1; and the SO_2, NO_X, and PM BART requirements for the Domtar Ashdown Mill Power Boiler No. 2. The Arkansas Regional Haze SO_2 and PM SIP revision addresses all these BART requirements currently covered under the FIP, with the exception of the requirements for the Domtar Ashdown Mill Power Boilers No. 1 and 2. As noted above, in the Arkansas Regional Haze NO_X SIP revision, ADEQ erroneously stated that the Auxiliary Boiler participated in CSAPR for ozone season NO_X and the state decided to rely on participation in that trading program to satisfy the Auxiliary Boiler's NO_X BART requirement. In a final action published in the **Federal Register** on February 12, 2018, we took final action to approve this SIP revision, including reliance on CSAPR for ozone season NO_X to satisfy the Auxiliary Boiler's NO_X BART requirement.[34] Since the White Bluff Auxiliary Boiler does not participate in CSAPR for ozone season NO_X, we are proposing to withdraw our prior approval of the NO_X BART determination for the Auxiliary Boiler and to replace it with our proposed approval of a source specific NO_X BART emission limit contained in the August 8, 2018, Arkansas Regional Haze SIP revision. We discuss this in greater detail in section II.B.5.b. of this proposed action.

1. AECC Bailey Unit 1

The AECC Bailey Unit 1 has a wall-fired boiler, a gross output of 122 MW, and a maximum heat input rate of 1,350 million British thermal units per hour (MMBtu/hr). The unit is currently permitted to burn pipeline quality natural gas and fuel oil. The fuel oil burned is currently subject to a sulfur content limit of 2.3% by weight. AECC produced BART analyses dated March 2014 for Bailey Unit 1, which were evaluated by EPA and largely formed the basis for EPA's SO_2 and PM BART evaluations in the FIP.[35] The same BART analyses [36] have now been adopted and incorporated by ADEQ into the Arkansas Regional Haze SO_2 and PM BART SIP revision to address the SO_2 and PM BART requirements for Bailey Unit 1.

a. SO_2 BART Analysis and Determination

In assessing SO_2 BART, ADEQ explained that AECC considered the five BART factors. In assessing feasible control technologies and their effectiveness, AECC considered flue gas desulfurization (FGD) systems and fuel switching during fuel oil burning. Due to the intrinsically low sulfur content of natural gas, no control technologies were evaluated for natural gas burning scenarios. As such, the BART analysis focused on fuel oil firing as the base case. For fuel oil firing, fuel switching was determined to be the only technically feasible control option, and thus AECC did not further consider FGD for SO_2 BART. The baseline fuel AECC assumed in the BART analysis is No. 6 fuel oil with 1.81% sulfur content by weight, which is based on the average sulfur content of the fuel oil from the most recent shipment received by the facility in December 2006. ADEQ explained that AECC evaluated switching to the following fuel types: 1% sulfur No. 6 fuel oil, corresponding to an estimated 45% control efficiency; 0.5% sulfur No. 6 fuel oil, corresponding to 72% control efficiency; and 0.05% sulfur diesel, corresponding to 97% control efficiency.[37]

In considering the costs of compliance for fuel switching, AECC concluded that the fuel switching options evaluated would not require capital investments in equipment, but instead the annual costs would be based upon operation and maintenance costs associated with the different fuel types. AECC estimated that the cost-effectiveness of switching Bailey Unit 1 to No. 6 fuel oil with 1% and 0.5% sulfur content by weight is $1,198/ton and $2,559/ton, respectively. Switching to diesel, which has 0.05% sulfur content, is estimated to cost $5,382/ton. ADEQ stated that the cost in dollars per ton for diesel is out of the range of what is typically considered cost-effective, while the cost of both 1% and 0.5% sulfur No. 6 fuel oil is estimated to be within the range of what is typically considered cost-effective.

ADEQ stated that AECC's evaluation did not identify any energy or non-air quality environmental impacts associated with switching to 1% sulfur No. 6 fuel oil, 0.5% sulfur No. 6 fuel oil, or diesel. In assessing the remaining useful life of Bailey Unit 1, AECC concluded that this factor does not impact the annualized costs of the evaluated control options since fuel switching is not expected to require any significant capital costs in this case.

[32] 77 FR 14604.

[33] 83 FR 5927.

[34] 83 FR 5927.

[35] 80 FR 18950.

[36] ''BART Five Factor Analysis, Arkansas Electric Cooperative Corporation Bailey and McClellan Generating Stations,'' dated March 2014, Version 4, prepared by Trinity Consultants Inc. in conjunction with Arkansas Electric Cooperative Corporation,'' which can be found in Appendix B to the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[37] We also note that AECC evaluated switching to natural gas as an available SO_2 control option in its SO_2 BART analysis, but the evaluation of this control option was not discussed by ADEQ in the SIP revision. We discuss this issue in greater detail below when we present our evaluation of the state's BART determination.

In assessing visibility impacts, the state's submittal included CALPUFF modeling evaluating the visibility benefits of switching from the baseline fuel oil (assuming 100% use of fuel oil) to the various fuel switching options. We summarize the results of that modeling in Table 1.

TABLE 1—ANTICIPATED VISIBILITY BENEFIT DUE TO FUEL SWITCHING AT AECC BAILEY UNIT 1

[CALPUFF, 98th percentile]

Class I area	Baseline visibility impact (dv)	Visibility benefit of controls over baseline (dv)		
		No. 6 fuel oil—1% sulfur	No. 6 fuel oil—0.5% sulfur	Diesel—0.05% sulfur
Caney Creek	0.330	0.137	0.188	0.246
Upper Buffalo	0.348	0.154	0.221	0.279
Hercules-Glades	0.368	0.162	0.233	0.299
Mingo	0.379	0.173	0.209	0.284

Switching to 1% sulfur No. 6 fuel oil is anticipated to achieve visibility benefits of approximately 0.137 dv at Caney Creek, 0.154 dv at Upper Buffalo, 0.162 dv at Hercules-Glades, and 0.173 dv at Mingo over baseline visibility conditions. Switching to 0.5% sulfur No. 6 fuel oil is anticipated to achieve visibility benefits of approximately 0.188 dv at Caney Creek, 0.221 dv at Upper Buffalo, 0.233 dv at Hercules-Glades, and 0.209 dv at Mingo over the baseline. The visibility benefits of switching to diesel are anticipated to be even greater, with benefits of approximately 0.246 dv at Caney Creek, 0.279 dv at Upper Buffalo, 0.299 dv at Hercules-Glades, and 0.284 dv at Mingo over the baseline.

Taking into consideration the cost-effectiveness and the anticipated visibility improvement of the fuel switching options, ADEQ concurred with AECC's recommendation that SO_2 BART for AECC Bailey Unit 1 be determined to be the use of fuel with a sulfur content by weight of 0.5% or less.

We note that switching to diesel would result in additional reductions in SO_2 emissions, but the additional costs per ton for doing so would be high in comparison to the additional visibility benefits. We also note that AECC evaluated switching to natural gas as an available SO_2 control option in its SO_2 BART analysis,[38] but the evaluation of this control option in the SO_2 BART analysis was not discussed by ADEQ in the SIP revision. In its analysis, AECC explained that switching to natural gas may have an adverse energy impact during periods of natural gas curtailment and that the ability to burn both fuel oil and natural gas was important for the facility to maintain electrical reliability.[39] Therefore, AECC did not recommend switching to natural gas and instead recommended switching to fuels with 0.5% sulfur content to be SO_2 BART for Bailey Unit 1.[40] In the Arkansas Regional Haze FIP, we agreed with AECC's recommendation, and explained that the BART Guidelines provide that it is not our intent to direct subject-to-BART sources to switch fuel forms, such as from coal or fuel oil to natural gas (40 CFR part 51, Appendix Y, section IV.D.1).[41] We noted that since natural gas has a sulfur content by weight that is well below 0.5%, the facility may elect to use this type of fuel to comply with BART, but we did not require a switch to natural gas for SO_2 BART in the FIP.[42] Therefore, we do not find that ADEQ's lack of consideration of switching to natural gas as an SO_2 control option in the SO_2 BART analysis for Bailey Unit 1 changes the result of the BART analysis in this instance. We are proposing to approve the state's determination that SO_2 BART for AECC Bailey Unit 1 is the use of fuel with a sulfur content by weight of 0.5% or less. We are also proposing to approve the state's determination that Bailey Unit 1 must comply with this BART requirement no later than October 27, 2021, and that as of the effective date of the Administrative Order, which is August 7, 2018, the source shall not purchase fuel that does not meet the sulfur limit requirement for combustion at Bailey Unit 1. These BART requirements have now been made enforceable by the state through an Administrative Order that has been adopted and incorporated in the SIP revision. The Administrative Order for AECC Bailey Unit 1 includes not only the requirement to limit the sulfur content of the fuel burned, but also requirements for the source to sample and analyze each shipment of fuel to determine the sulfur content by weight and maintain records pertaining to the sampling of each fuel shipment to assess compliance with the BART requirements.[43] We are proposing to approve the state's Administrative Order, including the compliance determination requirements contained in the Administrative Order, into the SIP. The state's SO_2 BART emission limit and compliance date for Bailey Unit 1 are consistent with the BART decision EPA previously made in the FIP we promulgated on September 27, 2016.[44] We are concurrently proposing to withdraw the FIP's SO_2 BART requirements for Bailey Unit 1, as they would be replaced by our approval of the state's SO_2 BART decision.

b. PM BART Analysis and Determination

PM emissions are inherently low when burning natural gas, but are higher when burning fuel oil. Bailey Unit 1 does not currently have pollution control equipment for PM emissions. In assessing PM BART for Bailey Unit 1, ADEQ explained that AECC considered the five BART factors. In assessing feasible control technologies and their

[38] See ''BART Five Factor Analysis, Arkansas Electric Cooperative Corporation Bailey and McClellan Generating Stations, dated March 2014, Version 4, prepared by Trinity Consultants Inc. in conjunction with Arkansas Electric Cooperative Corporation,'' pages 5–1 to 5–14. This BART analysis has been adopted and incorporated by ADEQ into the SIP revision (see Appendix B to the Arkansas Regional Haze SO_2 and PM BART SIP revision).

[39] See ''BART Five Factor Analysis, Arkansas Electric Cooperative Corporation Bailey and McClellan Generating Stations, dated March 2014, Version 4, prepared by Trinity Consultants Inc. in conjunction with Arkansas Electric Cooperative Corporation,'' pages 5–2, 5–10, and 5–14.

[40] *Id.*

[41] 80 FR 18952 and 81 FR at 66339.

[42] *Id.*

[43] The Administrative Order can be found in the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[44] The Arkansas Regional Haze FIP requires Bailey Unit 1 to only use fuel with a sulfur content limit of 0.5% by weight, with a compliance date of October 27, 2021. Additionally, the FIP prohibits the owner or operator of the unit from purchasing fuel for combustion at the unit that does not meet the sulfur content limit; the compliance date for this requirement is October 27, 2016. See 81 FR 66335, 66415–16.

effectiveness, AECC considered the following control technologies for PM BART: Dry electrostatic precipitator (ESP), wet ESP, fabric filter, wet scrubber, cyclone (*i.e.,* mechanical collector), and fuel switching. AECC's evaluation noted that the particulate matter from oil-fired boilers tends to be sticky and small, affecting the collection efficiency of dry ESPs and fabric filters. Dry ESPs operate by placing a charge on the particles through a series of electrodes, and then capturing the charged particles on collection plates, while fabric filters work by filtering the PM in the flue gas through filter bags. The collected particles are periodically removed from the filter bag through a pulse jet or reverse flow mechanism. Because of the sticky nature of particles from oil-fired boilers, AECC considered dry ESPs and fabric filters to be technically infeasible for use at Bailey Unit 1. AECC found wet ESPs, wet scrubbers, cyclones, and fuel switching to be technically feasible PM control options.

Residual fuel, such as the baseline No. 6 fuel oil burned at Bailey Unit 1, has inherent ash that contributes to emissions of filterable PM. Reductions in filterable PM emissions are directly related to the sulfur content of the fuel.[45] Therefore, switching to No. 6 fuel oil with a lower sulfur content is expected to result in lower filterable PM emissions. Also, ash content is much lower in a distillate fuel such as diesel and essentially zero in natural gas. The fuel switching options considered by AECC in the PM BART analysis are No. 6 fuel oil with 1% sulfur content by weight, No. 6 fuel oil with 0.5% sulfur content by weight, natural gas, and diesel. AECC estimated that switching to a lower sulfur fuel has a PM control efficiency ranging from approximately 44%–99%, depending on the fuel type. The estimated PM control efficiency of each control option is summarized in Table 2.

TABLE 2—PM CONTROL EFFICIENCY OF BART CONTROL OPTIONS FOR AECC BAILEY UNIT 1

PM control option	Wet scrubber	Cyclone	Wet ESP	Fuel switching			
				No. 6 fuel oil—1% S	No. 6 fuel oil—0.5% S	Natural gas	Diesel
PM Control Efficiency (%)	55.0	85.0	90.0	65.7	89.3	99.0	99.5

In considering the costs of the PM control options, AECC noted that add-on controls such as a wet scrubber, cyclone, and wet ESP involve capital costs for new equipment, which AECC annualized over a 15-year period in the analysis. Based on this analysis, AECC determined that the estimated cost-effectiveness of the add-on control options are as follows: $3,558,286/ton for a wet scrubber; $54,570/ton for a cyclone; and $981,583/ton for a wet ESP. AECC determined that the estimated cost-effectiveness of the fuel switching options are as follows: $27,528/ton for No. 6 fuel oil with 1% sulfur content; $22,386/ton for No. 6 fuel oil with 0.5% sulfur content; $25,004/ton for diesel; and $2,327/ton for natural gas. AECC noted that it does not consider any of the PM control options to be cost-effective.

ADEQ explained that AECC's PM BART evaluation did not discuss any energy or non-air quality environmental impacts associated with fuel switching. AECC did identify certain energy and non-air quality environmental impacts associated with wet ESPs and wet scrubbers. These impacts, which are factored in the cost of compliance, include increased energy usage for operation of the control equipment, the generation of wastewater streams that must be treated on-site or sent to a waste water treatment plant, and the generation of a filter cake that would likely require land-filling. In assessing the remaining useful life of Bailey Unit 1, AECC concluded that this factor does not impact the annualized costs of the evaluated control options since the remaining useful life of Bailey Unit 1 is at least as long as the capital cost recovery period of 15 years.

In assessing visibility impacts, the state's submittal included CALPUFF modeling evaluating the visibility benefits of switching from the baseline fuel oil (assuming 100% use of fuel oil) to the various fuel switching options. We summarize the results of that modeling in Table 3.

TABLE 3—ANTICIPATED VISIBILITY BENEFIT OF PM CONTROLS AT AECC BAILEY UNIT 1

[CALPUFF, 98th percentile]

Class I area	Baseline visibility impact (dv)	Visibility benefit of controls over baseline (dv)[46]						
		Wet scrubber	Cyclone	Wet ESP	No. 6 fuel oil—1% sulfur	No. 6 fuel oil—0.5% sulfur	Diesel—0.05% sulfur	Natural gas
Caney Creek	0.330	0.002	0.002	0.003	0.137	0.188	0.246	0.247
Upper Buffalo	0.347	0.002	0.002	0.004	0.154	0.221	0.279	0.276
Hercules-Glades	0.367	0.007	0.006	0.011	0.162	0.233	0.299	0.295
Mingo	0.378	0.004	0.004	0.007	0.173	0.209	0.284	0.277

The anticipated visibility benefits of add-on controls (*i.e.,* wet scrubber, cyclone, and wet ESP) are anticipated to be very small, ranging from 0.002 to 0.011 dv at each affected Class I area. As discussed above, fuel switching to lower

[45] See ''AP–42, Compilation of Air Pollutant Emission Factors,'' section 1.3.3.1, and Table 1.3–1, available at *http://www.epa.gov/ttnchie1/ap42/.*

[46] The modeled visibility improvement of the fuel switching options reflects both SO_2 and PM emissions reductions since reductions in filterable PM are directly related to the sulfur content of the fuel.

sulfur fuels is expected to result in both lower filterable PM emissions and lower SO_2 emissions. Switching to 1% sulfur No. 6 fuel oil is anticipated to achieve visibility benefits of approximately 0.137 dv at Caney Creek, 0.154 dv at Upper Buffalo, 0.162 dv at Hercules-Glades, and 0.173 dv at Mingo over baseline visibility conditions. Switching to 0.5% sulfur No. 6 fuel oil is anticipated to achieve visibility benefits of approximately 0.188 dv at Caney Creek, 0.221 dv at Upper Buffalo, 0.233 dv at Hercules-Glades, and 0.209 dv at Mingo over the baseline. The visibility benefits of switching to diesel are anticipated to be even greater, with benefits of approximately 0.246 dv at Caney Creek, 0.279 dv at Upper Buffalo, 0.299 dv at Hercules-Glades, and 0.284 dv at Mingo over the baseline. The visibility benefits of switching to natural gas are anticipated to be only slightly more than switching to diesel. The modeled visibility improvement of switching to lower sulfur fuels reflects benefits of both SO_2 and PM emissions reductions since reductions in filterable PM are directly related to the sulfur content of the fuel. We do note that the majority of the baseline visibility impact at each Class I area when burning the baseline fuel oil is due to SO_2 emissions that form sulfate PM, while direct PM_{10} emissions contribute only a small portion of the baseline visibility impacts at each Class I area.[47] Accordingly, the majority of the visibility improvement associated with switching to lower sulfur fuels, as shown in Table 3, can reasonably be expected to be the result of a reduction in SO_2 emissions rather than PM emissions.

Taking into consideration the cost-effectiveness and the anticipated visibility improvement of the PM control options considered, ADEQ concluded that add-on controls are not cost-effective, with AECC estimating the cost of these controls to be approximately $55,000/ton and greater. ADEQ concluded that the cost of switching to lower sulfur fuels is also not a cost-effective method for reducing PM emissions. However, ADEQ noted that the SO_2 BART determination for Bailey Unit 1, which is the use of fuel that has 0.5% or less sulfur content by weight, would also result in PM emissions reductions. ADEQ therefore arrived at the determination that PM BART for Bailey Unit 1 is no additional control beyond switching to fuel with 0.5% or less sulfur content, consistent with the SO_2 BART decision for the unit.

We do not agree with the use of a 15-year capital cost recovery period for calculating the average cost-effectiveness of a wet ESP, wet scrubber, and cyclone. Per the EPA Control Cost Manual, facilities are to rely on a 30-year capital cost recovery period for calculating the average cost-effectiveness of a wet ESP, wet scrubber, or cyclone barring a technical rationale to deviate from the 30-year capital cost recovery period. AECC Bailey Generating Station did not provide a technical rationale to deviate from the assumed 30-year capital cost recovery period. In addition, we are not aware of any enforceable shutdown date for the AECC Bailey Generating Station, nor did AECC's evaluation or ADEQ's SIP revision indicate any future planned shutdown or provide any reason for adopting a 15-year equipment life for the controls under consideration. Therefore, we believe that assuming a 30-year equipment life rather than a 15-year equipment life would be more appropriate for these control technologies.[48] Extending the amortization period from 15 to 30 years has the effect of decreasing the total annual cost of each control option, thereby improving the average cost-effectiveness value of controls (*i.e.,* lower dollars per ton removed). As discussed above, the cost of add-on PM control equipment at Bailey Unit 1, assuming a 15-year remaining useful life, ranges from $54,570/ton of PM removed for a cyclone to $3,558,286/ton of PM removed for a wet scrubber. Even though adjusting the costs of the add-on controls based on a 30-year remaining useful life as opposed to a 15-year remaining useful life would decrease the $/ton costs, we anticipate that the costs in $/ton would still be considerable and well outside of the range that has generally been considered to be cost-effective for BART. Therefore, we believe that add-on PM controls would still not be justified in light of the considerable costs and the minimal visibility benefits, which would range from 0.002 to 0.011 at each Class I area (see Table 3 above). Therefore, we are proposing to agree with ADEQ's determination that PM add-on controls are not PM BART for Bailey Unit 1.

We also disagree with the total annual cost and cost-effectiveness values for fuel switching presented in AECC's PM BART analysis[49] and in the SIP revision. In AECC's SO_2 BART cost analysis for the same unit, the company considered the same fuel switching options, yet the total annual cost numbers presented in the PM cost analysis are significantly greater than those presented in the SO_2 cost analysis.[50] This appears to be because in the SO_2 cost analysis, AECC calculated the differential cost of fuel switching (*i.e.,* the difference in cost between the baseline fuel and the fuel switching options), whereas the absolute cost of the fuel switching options was calculated in the PM cost analysis. We believe that AECC and ADEQ should have considered the differential cost of fuel switching as opposed to the absolute cost of fuel for each of the fuel switching options in the PM BART analysis, as was done in the SO_2 BART analysis. Thus, we believe that the correct cost effectiveness values that ADEQ should have considered in the PM BART analysis are those presented in Table 5–9 of AECC's SO_2 BART analysis,[51] which shows that the costs of switching to fuel oil with a sulfur content of 1% or 0.5% are within the range that have generally been considered to be cost-effective for BART. Although switching to diesel would result in additional reductions in PM emissions, we believe that the additional cost per ton for switching to diesel would be high in comparison to the additional visibility benefits.[52] We

[47] See Table 4–3 BASELINE VISIBILITY IMPAIRMENT ATTRIBUTABLE TO BAILEY, UNIT 1 (2001–2003)—FUEL OIL, ''BART Five Factor Analysis, Arkansas Electric Cooperative Corporation Bailey and McClellan Generating Stations,'' dated March 2014, Version 4, prepared by Trinity Consultants Inc. in conjunction with Arkansas Electric Cooperative Corporation,'' which can be found in Appendix B to the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[48] The Arkansas Regional Haze FIP assumed a 30-year equipment life in the PM BART analysis for AECC Bailey Unit 1. See 80 FR 18955.

[49] See ''BART Five Factor Analysis, Arkansas Electric Cooperative Corporation Bailey and McClellan Generating Stations,'' dated March 2014, Version 4, prepared by Trinity Consultants Inc. in conjunction with Arkansas Electric Cooperative Corporation,'' Table 7–4, page 7–6. This BART analysis can be found in Appendix B to the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[50] See ''BART Five Factor Analysis, Arkansas Electric Cooperative Corporation Bailey and McClellan Generating Stations,'' dated March 2014, Version 4, prepared by Trinity Consultants Inc. in conjunction with Arkansas Electric Cooperative Corporation,'' Table 5–9, page 5–9.

[51] See ''BART Five Factor Analysis, Arkansas Electric Cooperative Corporation Bailey and McClellan Generating Stations,'' dated March 2014, Version 4, prepared by Trinity Consultants Inc. in conjunction with Arkansas Electric Cooperative Corporation,'' Table 5–9, column titled ''PM_{10} Cost Effectiveness,'' page 5–9.

[52] Based on Table 5–13 from AECC's SO_2 BART analysis, switching to diesel would result in an additional visibility benefit of 0.111 dv compared to switching to 1% No. 6 fuel oil, and in an additional visibility benefit of only 0.075 dv compared to switching to 0.5% No. 6 fuel oil at Mingo, which is the Class I area with the greatest visibility impacts from Bailey Unit 1. Based on

believe that switching to fuel with 0.5% or less sulfur content is within the range that has generally been considered to be cost-effective for BART and since the source will have to comply with that same requirement for SO_2 BART, we consider it appropriate to require it under PM BART as well. Therefore, we are proposing to approve ADEQ's determination that PM BART for AECC Bailey Unit 1 is no additional control beyond switching to fuel with 0.5% or less sulfur content by October 27, 2021. Additionally, the owner or operator of the unit shall not purchase fuel for combustion at the unit that does not meet this sulfur content limit as of the effective date of the Administrative Order, which is August 7, 2018. This BART determination has now been made enforceable by the state through an Administrative Order that has been adopted and incorporated in the SIP revision. We are proposing to approve into the SIP the state's Administrative Order with respect to the PM BART requirements for AECC Bailey Unit 1.[53]

The state's PM BART decision for Bailey Unit 1 is consistent with the BART decision EPA previously made in the FIP we promulgated on September 27, 2016.[54] We are concurrently proposing to withdraw the FIP's PM BART requirements for Bailey Unit 1, as they would be replaced by our approval of the state's PM BART decision.

2. AECC McClellan Unit 1

The AECC McClellan Unit 1 has a wall-fired boiler, a gross output of 122 MW and a maximum heat input rate of 1,436 MMBtu/hr. The unit is currently permitted to burn pipeline quality natural gas and fuel oil. The fuel oil burned is currently subject to a sulfur content limit of 2.8% by weight. AECC produced BART analyses dated March 2014 for McClellan Unit 1, which were evaluated by EPA and largely formed the basis for EPA's SO_2 and PM BART evaluations in the FIP.[55] The same BART analyses[56] have now been adopted and incorporated by ADEQ into the Arkansas Regional Haze SO_2 and PM BART SIP revision to address the SO_2 and PM BART requirements for McClellan Unit 1.

a. SO_2 BART Analysis and Determination

In assessing SO_2 BART, ADEQ explained that AECC considered the five BART factors. In assessing feasible control technologies and their effectiveness, AECC considered FGD systems and fuel switching during fuel oil burning. Due to the intrinsically low sulfur content of natural gas, no control technologies were evaluated for natural gas burning scenarios. As such, the BART analysis focused on fuel oil firing as the base case. For fuel oil firing, fuel switching was determined to be the only technically feasible control option, and thus AECC did not further consider FGD for SO_2 BART. The baseline fuel AECC assumed in the BART analysis is No. 6 fuel oil with 1.38% sulfur content by weight, which is based on the average sulfur content of the fuel oil from the most recent shipment received by the facility in April 2009. ADEQ explained that AECC evaluated switching to the following fuel types: 1% Sulfur No. 6 fuel oil, corresponding to an estimated 28% control efficiency; 0.5% sulfur No. 6 fuel oil, corresponding to 64% control efficiency; and 0.05% sulfur diesel, corresponding to 96% control efficiency.[57]

In considering the costs of compliance for fuel switching, AECC concluded that the fuel switching options evaluated would not require capital investments in equipment, but instead the annual costs would be based upon operation and maintenance costs associated with the different fuel types. AECC estimated that the cost-effectiveness of switching McClellan Unit 1 to No. 6 fuel oil with 1% and 0.5% sulfur content by weight is $2,613/ton and $3,823/ton, respectively. Switching to diesel, which has 0.05% sulfur content, is estimated to cost $7,145/ton. ADEQ stated that the cost in dollars per ton for diesel is out of the range of what is typically considered cost-effective, while the cost of both 1% and 0.5% sulfur No. 6 fuel oil is estimated to be within the range of what is typically considered cost-effective.

ADEQ stated that AECC's evaluation did not identify any energy or non-air quality environmental impacts associated with switching to 1% sulfur No. 6 fuel oil, 0.5% sulfur No. 6 fuel oil, or diesel. In assessing the remaining useful life of McClellan Unit 1, AECC concluded that this factor does not impact the annualized costs of the evaluated control options since fuel switching is not expected to require any significant capital costs in this case.

In assessing visibility impacts, the state's submittal included CALPUFF modeling evaluating the visibility benefits of switching from the baseline fuel (assuming 100% use of fuel oil) to the various fuel switching options. We summarize the results of that modeling in Table 4.

TABLE 4—ANTICIPATED VISIBILITY BENEFIT DUE TO FUEL SWITCHING AT AECC MCCLELLAN UNIT 1

[CALPUFF, 98th percentile]

Class I area	Baseline visibility impact (dv)	Visibility benefit of controls over baseline (dv)		
		No. 6 fuel oil—1% sulfur	No. 6 fuel oil—0.5% sulfur	Diesel—0.05% sulfur
Caney Creek	0.622	0.085	0.300	0.448
Upper Buffalo	0.266	0.035	0.120	0.193
Hercules-Glades	0.231	0.029	0.116	0.169

Table 5–9 from AECC's SO_2 BART analysis, the corrected cost of switching to 1% and 0.5% No. 6 fuel oil is estimated to be $1,165/ton of PM removed and $2,998/ton of PM removed (respectively), while the corrected cost of diesel is estimated to be $7,608/ton of PM removed. We do not consider the additional cost of switching to diesel at Bailey Unit 1 to be warranted by the additional level of anticipated visibility benefit.

[53] The Administrative Order can be found in the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[54] The Arkansas Regional Haze FIP required Bailey Unit 1 to only use fuel with a sulfur content limit of 0.5% by weight, with a compliance date of October 27, 2021. Additionally, the FIP prohibited the owner or operator of the unit from purchasing fuel for combustion at the unit that does not meet the sulfur content limit; the compliance date for this requirement was October 27, 2016. See 81 FR 66335 and 66415–16.

[55] 80 FR 18957.

[56] ''BART Five Factor Analysis, Arkansas Electric Cooperative Corporation Bailey and McClellan Generating Stations,'' dated March 2014, Version 4, prepared by Trinity Consultants Inc. in conjunction with Arkansas Electric Cooperative Corporation,'' which can be found in Appendix B to the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[57] We also note that AECC evaluated switching to natural gas as an available SO_2 control option in its SO_2 BART analysis, but the evaluation of this control option was not discussed by ADEQ in the SIP revision. We discuss this issue in greater detail below when we present our evaluation of the state's BART determination.

TABLE 4—ANTICIPATED VISIBILITY BENEFIT DUE TO FUEL SWITCHING AT AECC MCCLELLAN UNIT 1—Continued
[CALPUFF, 98th percentile]

Class I area	Baseline visibility impact (dv)	Visibility benefit of controls over baseline (dv)		
		No. 6 fuel oil—1% sulfur	No. 6 fuel oil—0.5% sulfur	Diesel—0.05% sulfur
Mingo	0.228	0.035	0.092	0.148

Switching to 1% sulfur No. 6 fuel oil is anticipated to achieve visibility benefits of approximately 0.085 dv at Caney Creek, 0.035 dv at Upper Buffalo, 0.029 dv at Hercules-Glades, and 0.035 dv at Mingo over baseline visibility conditions. Switching to 0.5% sulfur No. 6 fuel oil is anticipated to achieve visibility benefits of approximately 0.300 dv at Caney Creek, 0.120 dv at Upper Buffalo, 0.116 dv at Hercules-Glades, and 0.092 dv at Mingo over the baseline. The visibility benefits of switching to diesel are anticipated to be even greater, with benefits of approximately 0.448 dv at Caney Creek, 0.193 dv at Upper Buffalo, 0.169 dv at Hercules-Glades, and 0.148 dv at Mingo over the baseline.

Taking into consideration the cost-effectiveness and the anticipated visibility improvement of the fuel switching options, ADEQ concurred with AECC's recommendation that SO_2 BART for AECC McClellan Unit 1 be determined to be the use of fuel with a sulfur content by weight of 0.5% or less.

We note that switching to diesel would result in additional reductions in SO_2 emissions, but the additional costs per ton for doing so would be high in comparison to the additional visibility benefits. We also note that AECC evaluated switching to natural gas as an available SO_2 control option in its SO_2 BART analysis,[58] but the evaluation of this control option in the SO_2 BART analysis was not discussed by ADEQ in the SIP revision. In its analysis, AECC explained that switching to natural gas may have an adverse energy impact during periods of natural gas curtailment and that the ability to burn both fuel oil and natural gas was important for the facility to maintain electrical reliability.[59] Therefore, AECC did not recommend switching to natural gas and instead recommended switching to fuels with 0.5% sulfur content to be SO_2 BART for McClellan Unit 1.[60] In the Arkansas Regional Haze FIP, we agreed with AECC's recommendation, and explained that the BART Guidelines provide that it is not our intent to direct subject-to-BART sources to switch fuel forms, such as from coal or fuel oil to natural gas (40 CFR part 51, Appendix Y, section IV.D.1).[61] We noted that since natural gas has a sulfur content by weight that is well below 0.5%, the facility may elect to use this type of fuel to comply with BART, but we did not require a switch to natural gas for SO_2 BART in the FIP.[62] Therefore, we do not find that ADEQ's lack of consideration of switching to natural gas as an SO_2 control option in the SO_2 BART analysis for McClellan Unit 1 changes the result of the BART analysis in this instance. We are proposing to approve the state's determination that SO_2 BART for McClellan Unit 1 is the use of fuel with a sulfur content by weight of 0.5% or less. We are also proposing to approve the state's determination that McClellan Unit 1 must comply with this BART requirement no later than October 27, 2021, and that as of the effective date of the Administrative Order, which is August 7, 2018, the source shall not purchase fuel that does not meet the sulfur limit requirement for combustion at McClellan Unit 1. These BART requirements have now been made enforceable by the state through an Administrative Order that has been adopted and incorporated in the SIP revision. The Administrative Order for AECC McClellan Unit 1 includes not only the requirement to limit the sulfur content of the fuel burned, but also requirements for the source to sample and analyze each shipment of fuel to determine the sulfur content by weight and maintain records pertaining to the sampling of each fuel shipment to assess compliance with the BART requirements.[63] We are proposing to approve the state's Administrative Order, including the compliance determination requirements contained in the Administrative Order, into the SIP. The state's SO_2 BART emission limit and compliance date for McClellan Unit 1 are consistent with the BART decision EPA previously made in the FIP we promulgated on September 27, 2016.[64] We are concurrently proposing to withdraw the FIP's SO_2 BART requirements for McClellan Unit 1, as they would be replaced by our approval of the state's SO_2 BART decision.

b. PM BART Analysis and Determination

PM emissions are inherently low when burning natural gas, but are higher when burning fuel oil. McClellan Unit 1 does not currently have pollution control equipment for PM emissions. In assessing PM BART for McClellan Unit 1, ADEQ explained that AECC considered the five BART factors. In assessing feasible control technologies and their effectiveness, AECC considered the following control technologies for PM BART: Dry ESP, wet ESP, fabric filter, wet scrubber, cyclone, and fuel switching. AECC's evaluation noted that the particulate matter from oil-fired boilers tends to be sticky and small, affecting the collection efficiency of dry ESPs and fabric filters. Dry ESPs operate by placing a charge on the particles through a series of electrodes, and then capturing the charged particles on collection plates,

[58] See ''BART Five Factor Analysis, Arkansas Electric Cooperative Corporation Bailey and McClellan Generating Stations, dated March 2014, Version 4, prepared by Trinity Consultants Inc. in conjunction with Arkansas Electric Cooperative Corporation,'' pages 5–1 to 5–14. This BART analysis has been adopted and incorporated by ADEQ into the SIP revision (see Appendix B to the Arkansas Regional Haze SO_2 and PM BART SIP revision).

[59] See ''BART Five Factor Analysis, Arkansas Electric Cooperative Corporation Bailey and McClellan Generating Stations, dated March 2014, Version 4, prepared by Trinity Consultants Inc. in conjunction with Arkansas Electric Cooperative Corporation,'' pages 5–2, 5–10, and 5–14.

[60] *Id.*

[61] See 80 FR at 18959 and 81 FR at 66340.

[62] *Id.*

[63] The Administrative Order can be found in the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[64] The Arkansas Regional Haze FIP requires McClellan Unit 1 to only use fuel with a sulfur content limit of 0.5% by weight, with a compliance date of October 27, 2021. Additionally, the FIP prohibits the owner or operator of the unit from purchasing fuel for combustion at the unit that does not meet the sulfur content limit; the compliance date for this requirement is October 27, 2016. See 81 FR 66335 and 66415–16.

while fabric filters work by filtering the PM in the flue gas through filter bags. The collected particles are periodically removed from the filter bag through a pulse jet or reverse flow mechanism. Because of the sticky nature of particles from oil-fired boilers, AECC considered dry ESPs and fabric filters to be technically infeasible for use at McClellan Unit 1. AECC found wet ESPs, wet scrubbers, cyclones, and fuel switching to be technically feasible PM control options.

Residual fuel, such as the baseline No. 6 fuel oil burned at McClellan Unit 1, has inherent ash that contributes to emissions of filterable PM. Reductions in filterable PM emissions are directly related to the sulfur content of the fuel. Therefore, switching to No. 6 fuel oil with a lower sulfur content is expected to result in lower filterable PM emissions. Also, ash content is much lower in a distillate fuel such as diesel and essentially zero in natural gas. The fuel switching options considered by AECC in the BART analysis are No. 6 fuel oil with 1% sulfur content by weight, No. 6 fuel oil with 0.5% sulfur content by weight, natural gas, and diesel. AECC estimated that switching to a lower sulfur fuel has a PM control efficiency ranging from approximately 44%–99%, depending on the fuel type. The estimated PM control efficiency of each control option is summarized in Table 5.

TABLE 5—PM CONTROL EFFICIENCY OF BART CONTROL OPTIONS FOR AECC MCCLELLAN UNIT 1

PM control option	Wet scrubber	Cyclone	Wet ESP	Fuel switching			
				No. 6 fuel oil—1% S	No. 6 fuel oil—0.5% S	Natural gas	Diesel
PM Control Efficiency (%)	55.0	85.0	90.0	43.6	82.4	99.0	99.2

In considering the costs of the PM control options, AECC noted that add-on controls such as the wet scrubber, cyclone, and wet ESP involve capital costs for new equipment, which AECC annualized over a 15-year period in the analysis. Based on this analysis, AECC determined that the estimated cost-effectiveness of the add-on control options are as follows: $695,549/ton for a wet scrubber; $14,882/ton for a cyclone; and $266,237/ton for a wet ESP. AECC determined that the estimated cost-effectiveness of the fuel switching options are as follows: $53,044/ton for No. 6 fuel oil with 1% sulfur content; $31,338/ton for No. 6 fuel oil with 0.5% sulfur content; $32,952/ton for diesel; and $571/ton for natural gas. AECC noted that it does not consider any of the PM control options to be cost-effective.

ADEQ explained that AECC's PM BART evaluation did not discuss any energy or non-air quality environmental impacts associated with fuel switching. AECC did identify certain energy and non-air quality environmental impacts associated with wet ESPs and wet scrubbers. These impacts, which are factored in the cost of compliance, include increased energy usage for operation of the control equipment, the generation of wastewater streams that must be treated on-site or sent to a waste water treatment plant, and the generation of a filter cake that would likely require land-filling. In assessing the remaining useful life of McClellan Unit 1, AECC concluded that this factor does not impact the annualized costs of the evaluated control options since the remaining useful life of McClellan Unit 1 is at least as long as the capital cost recovery period of 15 years.

In assessing visibility impacts, the state's submittal included CALPUFF modeling evaluating the visibility benefits of switching from the baseline fuel oil (assuming 100% use of fuel oil) to the various fuel switching options. We summarize the results of that modeling in Table 6.

TABLE 6—ANTICIPATED VISIBILITY BENEFIT OF PM CONTROLS AT AECC MCCLELLAN UNIT 1

[CALPUFF, 98th percentile]

Class I area	Baseline visibility impact (dv)	Visibility benefit of controls over baseline (dv) [65]						
		Wet scrubber	Cyclone	Wet ESP	No. 6 fuel oil—1% sulfur	No. 6 fuel oil—0.5% sulfur	Diesel—0.05% sulfur	Natural gas
Caney Creek	0.621	0.002	0.002	0.004	0.085	0.300	0.448	0.497
Upper Buffalo	0.266	0.002	0.001	0.003	0.035	0.120	0.193	0.214
Hercules-Glades	0.230	0.002	0.001	0.003	0.029	0.116	0.169	0.191
Mingo	0.227	0.003	0.002	0.004	0.035	0.092	0.148	0.17

The anticipated visibility benefits of add-on controls (*i.e.,* wet scrubber, cyclone, and wet ESP) are very small, ranging from 0.001 to 0.004 dv at each affected Class I area. As discussed above, fuel switching to lower sulfur fuels is expected to result in both lower filterable PM emissions and lower SO_2 emissions. Switching to 1% sulfur No. 6 fuel oil is anticipated to achieve visibility benefits of approximately 0.085 dv at Caney Creek, 0.035 dv at Upper Buffalo, 0.029 dv at Hercules-Glades, and 0.035 dv at Mingo over baseline visibility conditions. Switching to 0.5% sulfur No. 6 fuel oil is anticipated to achieve visibility benefits of approximately 0.3 dv at Caney Creek, 0.12 dv at Upper Buffalo, 0.116 dv at Hercules-Glades, and 0.092 dv at Mingo over the baseline. The visibility benefits of switching to diesel are anticipated to be even greater, with benefits of approximately 0.448 dv at Caney Creek, 0.193 dv at Upper Buffalo, 0.169 dv at

[65] The modeled visibility improvement of the fuel switching options reflects both SO_2 and PM emissions reductions since reductions in filterable PM are directly related to the sulfur content of the fuel.

Hercules-Glades, and 0.148 dv at Mingo over the baseline. The visibility benefits of switching to natural gas are anticipated to be only slightly more than switching to diesel. The modeled visibility improvement of switching to lower sulfur fuels reflects benefits of both SO_2 and PM emissions reductions since reductions in filterable PM are directly related to the sulfur content of the fuel. We do note that the majority of the baseline visibility impact at each Class I area when burning the baseline fuel oil is due to SO_2 emissions that form sulfate PM, while direct PM_{10} emissions contribute only a small portion of the baseline visibility impacts at each Class I area.[66] Accordingly, the majority of the visibility improvement associated with switching to lower sulfur fuels, as shown in Table 6, can reasonably be expected to be the result of a reduction in SO_2 emissions rather than PM emissions.

Taking into consideration the cost-effectiveness and the anticipated visibility improvement of the PM control options considered, ADEQ concluded that add-on controls are not cost-effective, with AECC estimating the cost of these controls to be approximately $15,000/ton and greater. ADEQ concluded that the cost of switching to lower sulfur fuels is also not a cost-effective method for reducing PM emissions. However, ADEQ noted that the SO_2 BART determination for McClellan Unit 1, which is the use of fuel that has 0.5% or less sulfur content by weight, would also result in PM emissions reductions. ADEQ therefore arrived at the determination that PM BART for McClellan Unit 1 is no additional control beyond switching to fuel with 0.5% or less sulfur content, consistent with the SO_2 BART decision for the unit.

We do not agree with the use of a 15-year capital cost recovery period for calculating the average cost-effectiveness of a wet ESP, wet scrubber, and cyclone. Per the EPA Control Cost Manual, facilities are to rely on a 30-year capital cost recovery period for calculating the average cost-effectiveness of a wet ESP, wet scrubber, or cyclone barring a technical rationale to deviate from the 30-year capital cost recovery period. AECC Bailey Generating Station did not provide a technical rationale to deviate from the assumed 30-year capital cost recovery period. In addition, we are not aware of any enforceable shutdown date for the AECC McClellan Generating Station, nor did AECC's evaluation or ADEQ's SIP revision indicate any future planned shutdown or provide any reason for adopting a 15-year equipment life for the controls under consideration. Therefore, we believe that assuming a 30-year equipment life rather than a 15-year equipment life would be more appropriate for these control technologies.[67] Extending the amortization period from 15 to 30 years has the effect of decreasing the total annual cost of each control option, thereby improving the average cost-effectiveness value of controls (*i.e.,* lower dollars per ton removed). As discussed above, the cost of add-on PM control equipment at McClellan Unit 1, assuming a 15-year remaining useful life, ranges from $14,882/ton of PM removed for a cyclone to $695,549/ton of PM removed for a wet scrubber. Even though adjusting the costs of the add-on controls based on a 30-year remaining useful life as opposed to a 15-year remaining useful life would decrease the $/ton costs, we anticipate that the costs in $/ton would still be considerable and well outside of the range that has generally been considered to be cost-effective for BART. Therefore, we believe that add-on PM controls would still not be justified in light of the considerable costs and the minimal visibility benefits, which would range from 0.001 to 0.004 at each Class I area (see Table 6 above). Therefore, we are proposing to agree with ADEQ's determination that PM add-on controls are not PM BART for McClellan Unit 1.

We also disagree with the total annual cost and cost-effectiveness values for fuel switching presented in AECC's PM BART analysis[68] and in the SIP revision. In AECC's SO_2 BART cost analysis for the same unit, the company considered the same fuel switching options, yet the total annual cost numbers presented in the PM cost analysis are significantly greater than those presented in the SO_2 cost analysis.[69] This appears to be because in the SO_2 cost analysis, AECC calculated the differential cost of fuel switching (*i.e.,* the difference in cost between the baseline fuel and the fuel switching options), whereas the absolute cost of the fuel switching options was calculated in the PM cost analysis. We believe that AECC and ADEQ should have considered the differential cost of fuel switching as opposed to the absolute cost of fuel for each of the fuel switching options in the PM BART analysis, as was done in the SO_2 BART analysis. Thus, we believe that the correct cost effectiveness values that ADEQ should have considered in the PM BART analysis are those presented in Table 5–10 of AECC's SO_2 BART analysis,[70] which shows that the costs of switching to fuel oil with a sulfur content of 1% or 0.5% are within the range that have generally been considered to be cost effective for BART. Although switching to diesel would result in additional reductions in PM emissions, we believe that the additional cost per ton for switching to diesel would be high in comparison to the additional visibility benefits.[71] We believe that switching to fuel with 0.5% or less sulfur content is within the range that has generally been considered to be cost-effective for BART and since the source will have to comply with that same requirement for SO_2 BART, we consider it appropriate to require it under PM BART as well. Therefore, we are proposing to approve ADEQ's determination that PM BART for AECC McClellan Unit 1 is no additional control beyond switching to fuel with 0.5% or less sulfur content by October 27, 2021. Additionally, the owner or

[66] See Table 4–5 BASELINE VISIBILITY IMPAIRMENT ATTRIBUTABLE TO McCLELLAN, UNIT 1 (2001–2003)—FUEL OIL, ''BART Five Factor Analysis, Arkansas Electric Cooperative Corporation Bailey and McClellan Generating Stations,'' dated March 2014, Version 4, prepared by Trinity Consultants Inc. in conjunction with Arkansas Electric Cooperative Corporation,'' which can be found in Appendix B to the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[67] The Arkansas Regional Haze FIP assumed a 30-year equipment life in the PM BART analysis for AECC McClellan Unit 1. See 80 FR 18962.

[68] See ''BART Five Factor Analysis, Arkansas Electric Cooperative Corporation Bailey and McClellan Generating Stations,'' dated March 2014, Version 4, prepared by Trinity Consultants Inc. in conjunction with Arkansas Electric Cooperative Corporation,'' Table 7–5, page 7–6. This BART analysis can be found in Appendix B to the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[69] See ''BART Five Factor Analysis, Arkansas Electric Cooperative Corporation Bailey and McClellan Generating Stations,'' dated March 2014, Version 4, prepared by Trinity Consultants Inc. in conjunction with Arkansas Electric Cooperative Corporation,'' Table 5–10, page 5–9.

[70] See ''BART Five Factor Analysis, Arkansas Electric Cooperative Corporation Bailey and McClellan Generating Stations,'' dated March 2014, Version 4, prepared by Trinity Consultants Inc. in conjunction with Arkansas Electric Cooperative Corporation,'' Table 5–10, column titled ''PM_{10} Cost Effectiveness,'' page 5–9.

[71] Based on Table 5–14 from AECC's SO_2 BART analysis, switching to diesel would result in an additional visibility benefit of 0.363 dv compared to switching to 1% No. 6 fuel oil and in an additional visibility benefit of only 0.148 dv compared to switching to 0.5% No. 6 fuel oil at Caney Creek, which is the Class I area with the greatest visibility impacts from McClellan Unit 1. Based on Table 5–10 from AECC's SO_2 BART analysis, the corrected costs of switching to 1% and 0.5% No. 6 fuel oil is estimated to be $2,457/ton of PM removed and $4,553/ton of PM removed (respectively), while the corrected cost of switching to diesel is estimated to be $10,698/ton of PM removed. We do not consider the additional cost of switching to diesel at McClellan Unit 1 to be

operator of the unit shall not purchase fuel for combustion at the unit that does not meet this sulfur content limit as of the effective date of the Administrative Order, which is August 7, 2018. This BART determination has now been made enforceable by the state through an Administrative Order that has been adopted and incorporated in the SIP revision. We are proposing to approve into the SIP the state's Administrative Order with respect to the PM BART requirements for AECC McClellan Unit 1.[72]

The state's PM BART decision for McClellan Unit 1 is consistent with the BART decision EPA previously made in the FIP we promulgated on September 27, 2016.[73] We are concurrently proposing to withdraw the FIP's PM BART requirements for McClellan Unit 1, as they would be replaced by our approval of the state's PM BART decision.

3. SWEPCO Flint Creek Plant Boiler No. 1

SWEPCO Flint Creek Plant Boiler No. 1 has a 558 MW dry bottom wall-fired boiler that commenced operation in 1978, has a maximum heat input of 6,324 MMBtu/hr, and burns low sulfur western coal as a primary fuel, but is also permitted to combust fuel oil and tire-derived fuels. Fuel oil firing is only allowed during unit startup and shutdown, during startup and shutdown of pulverizer mills, for flame stabilization when coal is frozen, for No. 2 fuel oil tank maintenance, to prevent boiler tube failure in extreme cold weather when the unit is offline for maintenance, and during malfunction.

SWEPCO produced a BART analysis dated September 2013 for Flint Creek Plant Boiler No. 1, which was evaluated by EPA and largely formed the basis for EPA's SO_2 BART evaluation in the FIP.[74] This BART analysis [75] has now been adopted and incorporated by ADEQ into the Arkansas Regional Haze SO_2 and PM BART SIP revision to address the SO_2 BART requirements for Flint Creek Boiler No. 1.[76]

a. SO_2 BART Analysis and Determination

At the time that SWEPCO performed the BART analysis, no SO_2 controls were in place at Flint Creek Plant Boiler No. 1. The cost analysis and visibility improvement data that are part of SWEPCO's BART analysis are based on the 2001–2003 baseline, not on emissions reflecting current SO_2 controls in place. Since the time the BART analysis was developed, SWEPCO has installed a Novel Integrated Deacidification (NID) system and Activated Carbon Injection (ACI) system at Flint Creek Boiler No. 1 in anticipation of regional haze requirements as well as other CAA requirements. The installation of these controls was completed in May 2016.

In assessing SO_2 BART, SWEPCO considered the five BART factors. The available SO_2 retrofit control technology options considered were dry sorbent injection (DSI), dry FGD, and wet FGD.[77] DSI was estimated to have a control efficiency of 40–60%. Dry FGD was estimated to have a control efficiency of 60–95%. NID, which is a form of dry FGD, was predicted to have a control efficiency of 92%, achieving an SO_2 emission rate of 0.06 lb/MMBtu. Wet FGD was estimated to have a control efficiency of 80–95%, achieving an SO_2 emission rate of 0.04 lb/MMBtu. All control options considered were deemed to be technically feasible.

In considering the costs of compliance, SWEPCO estimated the capital and operating costs of a NID system and wet FGD based on EPA's Control Cost Manual and supplemented, where available, with vendor and site-specific information obtained by SWEPCO. These values were then used by SWEPCO to estimate the cost-effectiveness of controls. SWEPCO estimated the cost of the SO_2 control options to be $3,845/ton for a NID system and $4,919/ton for wet FGD. Since control options with higher control efficiencies were within a range considered cost-effective (with one ultimately selected as BART), SWEPCO's BART analysis did not evaluate the cost of DSI or further consider that control option in the analysis. Thus, the remainder of SWEPCO's analysis focused on a NID system (dry FGD) and wet FGD.

SWEPCO determined that although wet FGD is expected to achieve a slightly higher level of SO_2 control compared to NID technology, it would also have greater potential negative energy and nonair quality environmental impacts. For example, wet FGD is expected to generate large volumes of wastewater and solid waste/sludge that must be treated. Additionally, wet FGD systems have increased power requirements and increased reagent usage over dry FGD, as well as the potential for increased particulate and sulfuric acid mist releases. The costs associated with increased power requirements and greater reagent usage have already been factored into the cost analysis for wet FGD. In assessing the remaining useful life of Flint Creek Boiler No. 1, SWEPCO concluded that this factor does not impact the annualized capital costs of the evaluated control options because the useful life of the unit is anticipated to be at least as long as the capital cost recovery period (30 years).

In assessing visibility impacts, the state's submittal included CALPUFF modeling evaluating the visibility benefits of dry FGD and wet FGD. We summarize the results of that modeling in Table 7.

warranted by the additional level of anticipated visibility benefit.

[72] The Administrative Order can be found in the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[73] The Arkansas Regional Haze FIP required McClellan Unit 1 to only use fuel with a sulfur content limit of 0.5% by weight, with a compliance date of October 27, 2021. Additionally, the FIP prohibited the owner or operator of the unit from purchasing fuel for combustion at the unit that does not meet the sulfur content limit; the compliance date for this requirement was October 27, 2016. See 81 FR 66335 and 66415–16.

[74] 80 FR 18964.

[75] ''BART Five Factor Analysis Flint Creek Power Plant Gentry, Arkansas (AFIN 04–00107),'' dated September 2013, Version 4, prepared by Trinity Consultants Inc. in conjunction with American Electric Power Service Corporation for the Southwestern Electric Power Company Flint Creek Power Plant,'' which can be found in Appendix E to the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[76] In a final action published on March 12, 2012, EPA approved Arkansas' PM BART determination for Flint Creek Plant Boiler No. 1. In the Arkansas Regional Haze SO_2 and PM BART SIP revision, the state is not revising that BART determination or the underlying analysis.

[77] SWEPCO's September 2013 SO_2 BART analysis did not identify or discuss any existing SO_2 control equipment in use at the source because at the time the BART analysis was developed, there were no existing SO_2 controls in place. Since the Arkansas Regional Haze SO_2 and PM SIP revision was submitted at a time when the NID system is the pollution control equipment in use at the source, we give ADEQ credit for considering the existing pollution controls factor in the SIP revision because the existing SO_2 control equipment is among the ''new'' controls addressed in the older SWEPCO SO_2 BART analysis.

TABLE 7—ANTICIPATED VISIBILITY BENEFIT DUE TO SO_2 CONTROLS AT FLINT CREEK BOILER NO. 1

[CALPUFF, 98th percentile]

Class I area	Baseline visibility impact (dv)	Visibility benefit of controls over baseline (dv)	
		NID System	Wet FGD
Caney Creek	0.963	0.615	0.629
Upper Buffalo	0.965	0.464	0.477
Hercules-Glades	0.657	0.345	0.352
Mingo	0.631	0.414	0.423

The installation and operation of SO_2 controls is anticipated to result in considerable visibility improvement from the baseline at the four impacted Class I areas. NID technology is anticipated to result in visibility improvement ranging from 0.345 to 0.615 dv at each affected Class I area. Although wet FGD is also anticipated to result in considerable visibility improvement, the visibility benefit of wet FGD over NID technology at each individual Class I area is anticipated to be only slight, ranging from 0.007 to 0.014 dv at each Class I area.

As discussed above, SWEPCO determined that NID technology would result in considerable visibility improvement and is estimated to cost $3,845/ton. On the other hand, a wet scrubber is estimated to cost $4,919/ton, and would only achieve slightly more visibility benefit than NID technology (see Table 7).[78] Therefore, SWEPCO recommended that SO_2 BART for Flint Creek Boiler No. 1 be an emission limit of 0.06 lb/MMBtu on a 30-day rolling average over each boiler operating day, based on the installation of NID technology. ADEQ concurred with this BART recommendation. We are proposing to agree that an SO_2 emission limit of 0.06 lb/MMBtu based on NID technology would result in significant visibility benefits from the baseline and is generally cost-effective. We do not believe the additional cost of a wet scrubber would be justified in light of the small amount of additional visibility benefit anticipated over NID technology. Therefore, we are proposing to approve the state' determination that SO_2 BART for Flint Creek Boiler No. 1 is an emission limit of 0.06 lb/MMBtu based on NID technology.

Taking into consideration that the control equipment has already been installed and is operating at the facility, we are also proposing to approve the state's determination that the source must comply with the SO_2 BART requirements as of the effective date of the Administrative Order, which is August 7, 2018. These BART requirements have now been made enforceable by the state through an Administrative Order that has been adopted and incorporated in the SIP revision. The Administrative Order for Flint Creek Boiler No. 1 includes not only the SO_2 emission limit, but also a requirement for the source to determine compliance with the SO_2 emission limit by using a continuous emission monitoring system.[79] We are proposing to approve into the SIP the state's Administrative Order with respect to the SO_2 BART requirements, including the compliance determination requirements contained in the Administrative Order. The state's SO_2 BART decision for Flint Creek Boiler No. 1 is consistent with the BART decision EPA previously made in the FIP we promulgated on September 27, 2016.[80] We are concurrently proposing to withdraw the FIP's SO_2 BART requirements for Flint Creek Boiler No. 1, as they would be replaced by our approval of the state's SO_2 BART decision.

4. Entergy Lake Catherine Unit 4

Entergy Lake Catherine Unit 4 has a 558 MW tangentially-fired boiler with a maximum heat input of 5,850 MMBtu/hr. Lake Catherine Unit 4 is currently permitted to burn only pipeline quality natural gas, but until recently was also permitted to burn No. 6 fuel oil as a secondary fuel. Entergy produced a BART analysis dated May 2014 for Lake Catherine Unit 4, which was evaluated by EPA and largely formed the basis for EPA's BART evaluation in the FIP.[81] The same BART analysis [82] has now been adopted and incorporated by ADEQ into the Arkansas Regional Haze SO_2 and PM BART SIP revision to address BART requirements for Lake Catherine Unit 4 under the fuel oil firing scenario.[83]

In the May 2014 BART analysis submitted by ADEQ as part of the SIP revision, Entergy explained that no fuel oil has been burned at Unit 4 since prior to the 2001–2003 baseline period and that the company does not project that it will burn fuel oil at the unit in the foreseeable future. Therefore, the May 2014 BART analysis does not consider emissions from fuel oil firing and does not include a BART five factor analysis or BART determinations for the fuel oil firing scenario. Entergy stated in the BART analysis that if conditions change such that it becomes economic to burn fuel oil in the future, it will submit a BART five factor analysis for the fuel oil firing scenario to the state for use in the development of a SIP revision, and that Entergy commits to not burn fuel oil at Lake Catherine Unit 4 until final EPA approval of BART for the fuel oil firing scenario. Furthermore, Unit 4 is not currently permitted to burn fuel oil.[84] Entergy's commitment has now been made enforceable by the state through an Administrative Order that has been adopted and incorporated in the SIP revision. We are proposing to find that

[78] Although not discussed by ADEQ in the SIP revision, SWEPCO's BART analysis also presents the incremental cost effectiveness of wet scrubbers over NID technology. As shown in Tables 5–3 and 5–7 of SWEPCO's September 2013 SO_2 BART analysis for Flint Creek, the incremental cost effectiveness of wet scrubbers over NID technology for Boiler No. 1 is estimated to be $35,198/ton removed, yet the incremental visibility benefit is projected to be only 0.014 dv at Caney Creek and 0.013 dv at Upper Buffalo and even less at Hercules Glades and Mingo.

[79] The Administrative Order can be found in the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[80] 81 FR 66335 and 66416–17.

[81] 80 FR 18975.

[82] ''Revised BART Five Factor Analysis Lake Catherine Steam Electric Station Malvern, Arkansas (AFIN 30–00011),'' dated May 2014, prepared by Trinity Consultants Inc. in conjunction with Entergy Services Inc.,'' which can be found in Appendix C to the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[83] In a final action published on March 12, 2012, EPA approved Arkansas' SO_2 and PM BART determinations under the natural gas firing scenario for Lake Catherine Unit 4. In the Arkansas Regional Haze SO_2 and PM BART SIP revision, the state is not revising those BART determinations or any of the underlying analyses.

[84] See ADEQ Air Permit No. 1717–AOP–R7, issued on October 26, 2016. A copy of the air permit can be found in the docket for this proposed rulemaking.

this approach is appropriate and we are proposing to approve the state's Administrative Order for Lake Catherine Unit 4 into the SIP. The Administrative Order would allow the unit to burn natural gas only, per Entergy's commitment to not burn fuel oil at Unit 4 until ADEQ submits a SIP revision that includes BART analyses for the fuel oil firing scenario for Unit 4 and EPA takes final action to approve the BART determinations. The state's action with respect to addressing BART for the fuel oil firing scenario for Lake Catherine Unit 4 is consistent with the action EPA previously took in the FIP we promulgated on September 27, 2016.[85] We are concurrently proposing to withdraw the FIP provision concerning BART for the fuel oil firing scenario for Lake Catherine Unit 4, as it would be replaced by our approval of the state's BART action.

5. Entergy White Bluff Units 1 and 2 and the White Bluff Auxiliary Boiler

Entergy White Bluff Units 1 and 2 each have tangentially-fired 850 MW boilers with a maximum heat input capacity of 8,950 MMBtu/hr. White Bluff also has a 183 MMBtu/hr Auxiliary Boiler that is permitted to burn only No. 2 fuel oil or biodiesel. Entergy produced a BART analysis for White Bluff dated October 2013, which was evaluated by EPA and largely formed the basis for EPA's SO_2 BART evaluation in the FIP.[86] Entergy also submitted revised analyses dated August 2015 and August 2016 for EPA to consider before the FIP was finalized. Entergy provided ADEQ with supplemental information on April 5, 2017, providing cost-effectiveness data for dry FGD for Units 1 and 2 with various remaining useful life assumptions. Additionally, at ADEQ's request, Entergy produced an updated BART analysis dated August 18, 2017, that evaluated several control options and provided updated remaining useful life information for White Bluff Units 1 and 2. These BART analyses and other documentation provided by Entergy have been adopted and incorporated by ADEQ into the Arkansas Regional Haze SO_2 and PM BART SIP revision[87] to address the SO_2 BART requirements for White Bluff Units 1 and 2, as well as the SO_2, NO_X, and PM BART requirements for the Auxiliary Boiler.[88]

a. White Bluff Unit 1 and Unit 2 SO_2 BART Analysis and Determinations

In assessing SO_2 BART, Entergy considered the five BART factors. There is currently no SO_2 control equipment in use at Units 1 and 2. The current permitted SO_2 emissions rate for Units 1 and 2 is a 3-hour average emission rate of 1.2 lb/MMBtu, based on the new source performance standard for fossil-fuel fired steam generators in effect at the time they were constructed. The available SO_2 control technology options considered in Entergy's August 2017 BART analysis are switching to low sulfur coal, DSI, spray dryer absorber (SDA), circulating dry scrubber (CDS), and wet FGD.

Entergy estimated that by switching to low sulfur coal, Units 1 and 2 can achieve an emission rate of 0.6 lb/MMBtu,[89] which would result in approximately an 8.75% reduction in SO_2 emissions from baseline levels. For DSI, Entergy considered two particulate collection methods. The first collection method, ''DSI,'' would utilize the existing ESP, and is expected to achieve a control efficiency of 50%. Entergy expects that DSI would achieve an SO_2 emission rate of 0.35 lb/MMBtu. The second collection method, ''enhanced DSI,'' would require the installation of a fabric filter or baghouse. The use of a fabric filter or baghouse in enhanced DSI increases the residence time and improves the collection efficiency to allow more sorbent to be injected, thereby resulting in greater emissions reductions. Entergy expects that enhanced DSI would achieve 80% control efficiency, and an SO_2 emission rate of 0.15 lb/MMBtu. In the August 2017 BART analysis, Entergy claimed that DSI has not yet been demonstrated on units comparable to those at White Bluff. Entergy explained that the largest known installed and operational DSI system has a design feed rate of 12 tons/hour of sorbent, while most installed DSI systems typically inject approximately 5–6 tons/hour of sorbent into the exhaust gas stream. Entergy pointed out that the predicted injection rate of enhanced DSI at White Bluff is approximately 15 tons/hour of sorbent. Entergy noted that the greater the injection rates, it is anticipated that more issues associated with supply and delivery logistics are likely to arise. Entergy stated that before DSI technology is selected as BART for White Bluff, a demonstration test would need to be performed to confirm its feasibility, achievable performance, and balance of plant impacts (brown plume formation, ash handling modifications, landfill/leachate considerations, and impact to mercury control).

The dry FGD control option considered by Entergy is SDA, which utilizes a fine mist of lime slurry sprayed into an absorption tower to absorb SO_2 with the resulting calcium sulfite and calcium sulfate then collected with a fabric filter. SDA systems can typically achieve SO_2 control efficiencies ranging from 60–95%. Entergy expects that an SDA system would achieve an emission rate of 0.06 lb/MMBtu at Units 1 and 2. Although wet FGD was identified as a technically feasible control option, it is not expected to achieve significant visibility benefit beyond dry/semi-dry FGD despite having a greater estimated cost, based on the October 2013 BART analysis that EPA relied on to develop the Arkansas Regional Haze FIP.[90] In fact, dry/semi-dry FGD was expected to achieve slightly greater visibility benefit than wet FGD at Hercules-Glades and Mingo based on the October 2013 BART analysis.[91] Therefore, Entergy did not further consider wet FGD in its August 18, 2017, BART analysis, on which the Arkansas Regional Haze SO_2 and PM BART SIP revision is largely based.

In considering the costs of compliance, Entergy's coal suppliers provided the company with an estimated incremental cost of $0.50 per ton for delivering coal guaranteed to have a sulfur content consistent with achieving an SO_2 emission limit of 0.6 lb/MMBtu. ADEQ noted in the SIP revision that the annualized cost of switching to low sulfur coal is not dependent on the remaining useful life of White Bluff Units 1 and 2, since no capital investments in equipment would be necessary. For the remaining control options, Entergy obtained capital costs

[85] 81 FR 66335 and 66418.

[86] 80 FR 18969. See also ''Revised BART Five Factor Analysis White Bluff Steam Electric Station Redfield, Arkansas (AFIN 35–00110),'' dated October 2013, prepared by Trinity Consultants Inc. in conjunction with Entergy Services Inc.'' This BART analysis can be found in Appendix D to the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[87] These BART analyses and other information provided by Entergy can be found in Appendix D to the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[88] In a final action published on March 12, 2012, EPA approved Arkansas' PM BART determinations for White Bluff Units 1 and 2. In the Arkansas Regional Haze SO_2 and PM BART SIP revision, the state is not revising those PM BART determinations or any of the underlying analyses.

[89] The White Bluff SO_2 BART analysis provided to ADEQ by Entergy and incorporated by ADEQ as part of the SIP revision considered an SO_2 emission limit of 0.6 lb/MMBtu for the switching to low sulfur coal control option. However, in response to comments the state received during the public comment period that noted that it is typical to round to the nearest significant digit when demonstrating compliance, which could result in less emissions reductions than assumed in the BART analysis, ADEQ ultimately finalized an emission limit of 0.60 lb/MMBtu in the final SIP revision.

[90] 80 FR 18972.

[91] 80 FR 18972.

and annual operating and maintenance costs from its consultant and used this to estimate the cost effectiveness of controls. The annualized cost of DSI, enhanced DSI, and dry/semi-dry FGD is dependent on the remaining useful life of the White Bluff units since those control options require capital investments in new equipment or retrofit of existing equipment. These capital investments were amortized over the remaining useful life of the White Bluff units to determine the annualized costs and compared to annual emission reductions to determine cost-effectiveness. In the August 18, 2017, BART analysis, Entergy stated that it anticipates cessation of coal combustion at White Bluff by the end of 2028 and that it will voluntarily take an enforceable restriction on Units 1 and 2 to that effect. ADEQ noted that the BART Guidelines provide that the remaining useful life calculation should begin on the date that controls will be put in place (*i.e.,* compliance date) and end on the date the facility permanently stops operations.[92] The Regional Haze Rule also states that the compliance date for BART controls must be as expeditiously as practicable, but in no event later than 5 years after approval of the SIP.[93] Considering that the FIP currently requires SO_2 emission limits for White Bluff Units 1 and 2 that are based on dry scrubber installation and which have a compliance date of October 27, 2021, ADEQ acknowledged that the record suggests that a compliance date for scrubbers that is ''as expeditiously as practicable'' would be October 27, 2021. Therefore, ADEQ assumed a remaining useful life of 7 years to estimate the cost-effectiveness of SDA for White Bluff Units 1 and 2. Entergy also assumed that DSI and enhanced DSI could be installed and operational 2 years earlier than FGD, and therefore assumed in the BART analysis that DSI and enhanced DSI could be operational at White Bluff Units 1 and 2 by the end of 2019 and that the capital recovery period for those controls is therefore 9 years.

Entergy also explained that for DSI, enhanced DSI, and SDA, it developed two sets of cost estimates. The first is the actual cost Entergy anticipates incurring for each control option, and the second reflects the exclusion of certain cost items that are disallowed costs under the methodology in the EPA's Air Pollution Control Cost Manual (EPA Control Cost Manual).[94] These ''disallowed'' line items include Allowance for Funds Used During Construction (AFUDC). Entergy stated in its BART analysis that it disagrees with EPA that AFUDC and certain other cost items are not allowed to be considered in estimating the cost effectiveness of controls for BART purposes under the EPA Control Cost Manual, but nonetheless provided a set of cost estimates reflecting the exclusion of the disallowed line items as well as a set of cost estimates that included these line items. ADEQ explained in the SIP revision that its evaluation of controls is based on Entergy's set of cost numbers that excludes the disallowed line items and follows the EPA Control Cost Manual. Therefore, we present here only the set of cost numbers that follows the methodology allowed under the Control Cost Manual.[95]

Entergy determined that switching to low sulfur coal would entail an increased annual cost of operation based on purchase contract terms for the specific sulfur content of the coal. Based on estimates provided by the coal supplier of the cost premium for low sulfur coal and the estimated reduction in emissions, Entergy anticipated that the cost to guarantee that the units achieve an SO_2 emission limit of 0.6 lb/MMBtu translates to a cost-effectiveness for SO_2 control of approximately $1,150/ton at Unit 1 and $1,148/ton at Unit 2. Entergy estimated the cost-effectiveness of DSI to be $6,269/ton at Unit 1 and $6,211/ton at Unit 2 and the cost-effectiveness of enhanced DSI to be $6,427/ton at Unit 1 and $6,384/ton at Unit 2. Entergy also estimated the cost of SDA to be $5,420/ton at Unit 1 and $5,387/ton at Unit 2. In the BART analysis, ADEQ also took into consideration the cost of controls in terms of dollars per dv improvement ($/dv) for each SO_2 control option considered for White Bluff. A summary of the cost of controls in terms of $/dv is provided in Table 8. A summary of Entergy's assessment of the visibility benefits of the control options in terms of dv is presented in Tables 9 and 10. ADEQ stated that the average cost-effectiveness values for DSI, enhanced DSI, and SDA at White Bluff all exceed what is typically considered to be cost-effective for BART, taking into account a capital cost recovery period of 7 years for SDA and 9 years for DSI and enhanced DSI. ADEQ noted that cost-effectiveness values of BART determinations made in previous regional haze actions have typically been below $5,000/ton, and that the costs of DSI and SDA exceed this value. Additionally, ADEQ noted that the cost in terms of $/dv for DSI, enhanced DSI, and SDA are approximately an order of magnitude greater than for switching to low sulfur coal.

TABLE 8—COST OF SO_2 CONTROLS ($/DV) FOR WHITE BLUFF UNITS 1 AND 2

SO_2 control option	Class I area			
	Caney Creek	Upper Buffalo	Hercules Glades	Mingo
Low Sulfur Coal	$14,500,519	$11,932,988	$10,666,332	$13,554,882
DSI	133,341,667	105,417,939	120,512,761	116,126,126
Enhanced DSI	158,855,956	139,165,572	168,897,541	173,433,064
SDA	131,447,683	121,373,255	153,165,608	153,852,117

[92] 70 FR 39104.

[93] 40 CFR 51.308(e)(iv).

[94] At the time the BART Guidelines were finalized, the current version of the Control Cost Manual was the *EPA Air Pollution Control Cost Manual, Sixth Edition,* EPA/452/B–02–001, January 2002. *https://www.epa.gov/economic-and-cost-analysis-air-pollution-regulations/cost-reports-and-guidance-air-pollution.* The EPA is engaged in a long-term process to update portions of the Control Cost Manual. A project plan describing the scope and schedule for this update effort is available at *https://www3.epa.gov/ttn/ecas/docs/cost_manual_timeline_2016-08-04.pdf.* As draft or final updated chapters are available, states should follow the recommendations in those rather than in the 6th Edition. Final revised chapters are posted at *https://www.epa.gov/economic-and-cost-analysis-air-pollution-regulations/cost-reports-and-guidance-air-pollution.* Draft revised chapters are announced in the **Federal Register** when available for public comment and can be obtained from EPA Docket No. EPA–HQ–OAR–2015–0341 at *www.regulationgs.gov.*

[95] Please see the TSD associated with this proposed rulemaking and the Arkansas Regional Haze SO_2 and PM SIP revision for Entergy's set of cost numbers that included line items that are not allowed to be considered in estimating the cost effectiveness of controls for BART purposes under the EPA Control Cost Manual.

In the BART analysis, Entergy noted that there were adverse energy and nonair quality environmental impacts associated with DSI, enhanced DSI, and SDA. These impacts were factored into the costs of compliance. With regard to consideration of the remaining useful life factor, Entergy stated in the August 2017 BART analysis that it anticipates cessation of coal combustion at White Bluff by the end of 2028 and that it will voluntarily take an enforceable restriction on Units 1 and 2 to that effect. Entergy's voluntary decision to cease coal combustion by the end of 2028 is enforceable by the state through an Administrative Order that has been adopted and incorporated in the SIP revision. Therefore, for White Bluff Units 1 and 2, ADEQ assumed a remaining useful life of 7 years to estimate the cost-effectiveness of SDA and a remaining useful life of 9 years to estimate the cost-effectiveness of DSI.

In assessing visibility impacts, the state's submittal included the CALPUFF modeling that was included in Entergy's August 18, 2017, BART analysis, evaluating the visibility benefits of switching to low sulfur coal, DSI, enhanced DSI, and SDA. We summarize the results of that modeling in Tables 9 and 10.[96]

TABLE 9—ANTICIPATED VISIBILITY BENEFIT DUE TO SO_2 CONTROLS AT WHITE BLUFF UNIT 1

[CALPUFF, 98th percentile]*

Class I area	Baseline visibility impact (dv)	Visibility benefit of controls over baseline (dv)			
		Low sulfur coal	DSI	Enhanced DSI	SDA
Caney Creek	1.505	0.129	0.308	0.492	0.603
Upper Buffalo	1.051	0.143	0.375	0.555	0.642
Hercules-Glades	0.925	0.167	0.341	0.467	0.525
Mingo	0.802	0.115	0.333	0.436	0.504

*This table shows the modeled visibility benefits of SO_2 controls for White Bluff Unit 1, as presented in Table 4–6 of Entergy's August 18, 2017, SO_2 BART analysis for White Bluff, which can be found in Appendix D of the Arkansas Regional Haze SO_2 and PM SIP revision. Although the combined visibility benefits on a facility-wide basis were not modeled, we expect that such combined visibility benefits would be greater than the unit specific values shown in this table.

TABLE 10—ANTICIPATED VISIBILITY BENEFIT DUE TO SO_2 CONTROLS AT WHITE BLUFF UNIT 2

[CALPUFF, 98th percentile]*

Class I area	Baseline visibility impact (dv)	Visibility benefit of controls over baseline (dv)			
		Low sulfur coal	DSI	Enhanced DSI	SDA
Caney Creek	1.533	0.097	0.274	0.460	0.574
Upper Buffalo	1.059	0.127	0.359	0.531	0.632
Hercules-Glades	0.912	0.137	0.303	0.429	0.486
Mingo	0.819	0.122	0.333	0.435	0.501

*This table shows the modeled visibility benefits of SO_2 controls for White Bluff Unit 2, as presented in Table 4–7 of Entergy's August 18, 2017, SO_2 BART analysis for White Bluff, which can be found in Appendix D of the Arkansas Regional Haze SO_2 and PM SIP revision. Although the combined visibility benefits on a facility-wide basis were not modeled, we expect that such combined visibility benefits would be greater than the unit specific values shown in this table.

The SO_2 control options considered are anticipated to result in considerable visibility improvement from the baseline at the four impacted Class I areas. For White Bluff Unit 1, switching to low sulfur coal is anticipated by the state submittal to result in visibility improvement ranging from 0.115 to 0.167 dv at each affected Class I area. DSI is anticipated to result in visibility improvement ranging from 0.308 to 0.375 dv at each affected Class I area, while enhanced DSI is anticipated to result in visibility improvement ranging from 0.436 to 0.555 dv. SDA is anticipated to result in the greatest visibility improvement, ranging from 0.504 to 0.642 dv.

For White Bluff Unit 2, switching to low sulfur coal is anticipated by the state submittal to result in visibility improvement ranging from 0.097 to 0.137 dv at each affected Class I area. DSI is anticipated to result in visibility improvement ranging from 0.274 to 0.359 dv at each affected Class I area, while enhanced DSI is anticipated to result in visibility improvement ranging from 0.429 to 0.531 dv. SDA is anticipated to result in the greatest visibility improvement, ranging from 0.486 to 0.632 dv.

[96] As explained by ADEQ in the SIP revision, Entergy's modeling of the visibility improvement from evaluated SO_2 controls in the August 18, 2017, SO_2 BART analysis for White Bluff is based on an updated baseline of 2009–2013 emissions, rather than the 2001–2003 emissions baseline EPA used in the Arkansas Regional Haze FIP to estimate the visibility improvement anticipated from SDA and wet FGD. Entergy's change in baseline emissions impacts the modeled visibility benefit anticipated from SDA, resulting in a modeled visibility benefit that is 15% to 26% lower at each unit in Entergy's updated analysis compared to the FIP. In the FIP, EPA did not evaluate the visibility improvement anticipated from DSI, enhanced DSI, and switching to low sulfur coal, but ADEQ stated it expects that the relative difference in $/dv among the control options evaluated by Entergy would be similar across both baseline periods. Further, ADEQ believes that the differences in projected visibility benefits resulting from different baseline emissions in the FIP, compared to the updated Entergy BART analysis, would not result in a change to ADEQ's ultimate SO_2 BART decision for White Bluff Units 1 and 2.

Taking into consideration the remaining useful life of White Bluff Units 1 and 2 and the resulting cost-effectiveness as well as the anticipated visibility improvement of the SO_2 control options, ADEQ concurred with Entergy's recommendation that SO_2 BART for White Bluff Units 1 and 2 is an emission limit of 0.60 lb/MMBtu based on the use of low sulfur coal.[97] All other SO_2 control options for White Bluff have an average cost-effectiveness value greater than $5,000/ton, which ADEQ stated exceeds what has typically been considered to be cost-effective for BART. Additionally, ADEQ noted that the cost-effectiveness in terms of $/dv for DSI, enhanced DSI, and SDA are approximately an order of magnitude greater than for LSC. Considering the costs and the visibility benefits of the control options, ADEQ determined that SO_2 BART for White Bluff is an emission limit of 0.60 lb/MMBtu based on the use of low sulfur coal.[98]

In support of its assertion that a 3-year compliance deadline is needed to meet this emission limit, Entergy submitted a letter to ADEQ dated April 3, 2018, explaining that it is the company's practice to project how much coal will be needed in future years and to contract for a portion of its coal supply up to 3 years in advance.[99] Entergy stated that it keeps a reserve supply of coal at White Bluff to ensure that the units can continue to operate in the event of a fuel supply disruption. Entergy finds that a 3-year compliance date is necessary for the 0.60 lb/MMBtu emission limit because the sulfur content limits of Entergy's existing coal contracts for the next 3 years exceed this emission rate. Entergy is currently under contract for coal with a sulfur content of 1.2 lb/MMBtu or less. Entergy noted that even though the coal delivered to White Bluff has lately been of lower sulfur content than required by the contract, its experience is that the sulfur content can vary widely. Entergy also stated that as of the letter dated April 3, 2018, it had already contracted for a portion of its coal supply needs for the next 3 years (through the end of the year 2020). Those contracts are for coal with a sulfur content limit ranging from 0.7 to 0.9 lb/MMBtu. Additionally, Entergy stated it cannot accurately calculate expected SO_2 emissions from blending of coals from its stockpile and new deliveries of coal because the sulfur content of the stockpile coal is not tracked. Entergy explained that this means that it cannot ensure that White Bluff will receive coal with a low enough sulfur content to ensure compliance with the 0.60 lb/MMBtu emission limit until the company has had sufficient time to negotiate new contracts and the existing coal supply has been depleted and replaced with coal that has a lower sulfur content. ADEQ agreed that a 3-year compliance date for the 0.60 lb/MMBtu emission limit based on the use of low sulfur coal is reasonable given the site-specific circumstances for White Bluff as discussed in Entergy's letter dated April 3, 2018.

With regard to the cost analysis for SO_2 controls for White Bluff, we agree that AFUDC and certain other cost items are not allowed to be considered in estimating the cost effectiveness of controls for BART purposes under the EPA Control Cost Manual, and we also acknowledge and agree with ADEQ's decision to base its evaluation of controls on Entergy's set of cost numbers that does not include the disallowed line items. Nevertheless, there is one aspect of Entergy's cost analysis that we do not agree with. Entergy's cost analysis is based on an SDA system assuming a coal sulfur content of 1.2 lb/MMBtu, which Entergy stated is based on its current coal contract sulfur limit. However, the White Bluff units have historically burned coal with a lower sulfur content. In its BART analysis, Entergy stated that the current average sulfur content of coal received at the White Bluff station is 0.57 lb SO_2/MMBtu but that the facility could receive coal with sulfur content up to 1.2 lb SO_2/MMBtu. Given that, Entergy's analysis is based on a scrubber designed to handle that sulfur load. In the Arkansas Regional Haze FIP, we noted that Entergy's SO_2 cost analysis for White Bluff, which was provided to us by Entergy for EPA's evaluation and consideration in the development of the FIP, took the approach of costing a scrubber system designed to burn coal with a sulfur content much higher than what has been historically burned,[100] an approach similar to what Entergy has done in the August 2017 BART analysis. In the FIP, we stated that we disagreed with Entergy's approach for costing of the scrubber system, and our FIP cost analysis was instead based on a dry scrubber system assuming a sulfur content of 0.68 lb/MMBtu, the maximum monthly emission rate from 2009–2013. Relying on our FIP's cost analysis for dry scrubbers for White Bluff, which was based on a scrubber system designed to burn coal having a sulfur content consistent with what the units have historically burned, and adjusting for a 7-year as opposed to a 30-year capital cost recovery period to reflect that the units will cease coal combustion by the end of 2028,[101] we estimate that the cost of dry scrubbers at White Bluff Units 1 and 2 is $4,376/ton for Unit 1 and $4,129/ton for Unit 2.[102] As noted in the SIP revision, Entergy's August 18, 2017, SO_2 BART analysis for White Bluff shows that the estimated visibility benefit of dry scrubbers for Unit 1 is 0.603 dv at Caney Creek and 0.642 dv at Upper Buffalo, and for Unit 2 is 0.574 dv at Caney Creek and 0.632 dv at Upper Buffalo.[103] Although our cost estimates for dry scrubbers are more cost-effective than estimated by Entergy, we still consider these cost numbers to be on the higher end of what has been found to be cost effective in other regional haze actions when also taking into account the level of visibility benefit of the controls. We are proposing to agree with ADEQ's conclusion that dry scrubbers are not BART for White Bluff Units 1 and 2.

We are also proposing to agree with ADEQ that the cost of compliance, in dollars per ton, for DSI and enhanced DSI is not cost effective when the

[97] Entergy evaluated an SO_2 emission rate of 0.6 lb/MMBtu based on the use of low sulfur coal in the SO_2 BART analysis for White Bluff. However, ADEQ ultimately selected 0.60 lb/MMBtu as the BART emission limit in response to comments it received during the state public comment period raising concerns that finalizing an emission limit of 0.6 lb/MMBtu could result in smaller SO_2 reductions than assumed because it is typical to round to the nearest significant digit when demonstrating compliance.

[98] The White Bluff SO_2 BART analysis submitted by Entergy and ADEQ's SIP revision both considered an SO_2 emission limit of 0.6 lb/MMBtu for the switching to low sulfur coal control option. However, in response to comments the state received during the public comment period that noted that it is typical to round to the nearest significant digit when demonstrating compliance, which could result in less emissions reductions than assumed in the analysis, ADEQ ultimately finalized an emission limit of 0.60 lb/MMBtu in the final SIP revision.

[99] The letter from Entergy, dated April 3, 2018, is found in Appendix D the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[100] 81 FR 66385; See also ''Response to Comments for the **Federal Register** Notice for the State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan,'' pages 261–263, and 345–349. The FIP Response to Comments document is found in the docket at *https://www.regulations.gov/document?D=EPA-R06-OAR-2015-0189-0187*.

[101] We are proposing to agree that it is appropriate to assume a capital cost recovery period of 7 years for scrubber controls in the BART analysis since Entergy's voluntarily proposed date for cessation of coal combustion at White Bluff Units 1 and 2 by the end of 2028 has been made enforceable through an Administrative Order. The Administrative Order can be found in the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[102] See Excel spreadsheet titled ''EPA Revised cost calcs_WB_Corrected CRF 7 years.xlsx,'' which is found in the docket for this proposed rulemaking.

[103] See Tables 4–6 and 4–7 of Entergy's August 18, 2017, White Bluff SO_2 BART analysis.

remaining useful life of White Bluff Units 1 and 2 is taken into account. We are proposing to agree that switching to low sulfur coal would result in visibility benefits from the baseline and would be very cost-effective. Therefore, we are proposing to approve the state's determination that given Entergy's enforceable commitment to cease coal combustion at White Bluff Units 1 and 2 by the end of 2028, SO_2 BART for Units 1 and 2 is an SO_2 emission limit of 0.60 lb/MMBtu based on switching to low sulfur coal. The Administrative Order for the White Bluff units also includes a requirement for the source to determine compliance with the SO_2 emission limits for Units 1 and 2 by using a continuous emission monitoring system. These BART requirements are enforceable by the state through an Administrative Order that has been adopted and incorporated in the SIP revision. We are proposing to approve in the SIP the state's Administrative Order, including the 3-year compliance date to meet the 0.60 lb/MMBtu emission limit and the requirement for Entergy to move forward with its proposed plan to cease coal combustion at White Bluff Units 1 and 2 no later than December 31, 2028.[104] We are proposing to find that Entergy's explanation that it cannot ensure that White Bluff will receive coal with a low enough sulfur content to ensure compliance with the 0.60 lb/MMBtu emission limit until the company has had sufficient time to negotiate new contracts and the existing coal supply, including the coal for which Entergy is already under contract through the year 2020, has been depleted and replaced with coal that has a lower sulfur content, is reasonable. Therefore, we are proposing to find that a 3-year compliance date for the 0.60 lb/MMBtu SO_2 BART emission limit is appropriate and reasonable. We are concurrently proposing to withdraw the FIP's SO_2 BART requirements for White Bluff Units 1 and 2, as they would be replaced by our approval of the state's SO_2 BART decision.

b. White Bluff Auxiliary Boiler BART Determinations

In determining BART for the White Bluff Auxiliary Boiler, ADEQ relied on Entergy's October 2013 BART analysis for White Bluff.[105] In the BART analysis, Entergy explained that air dispersion modeling demonstrates that the maximum visibility impact predicted from the Auxiliary Boiler is 0.036 dv, which it characterized as a very low level of visibility impact. The modeling results also show that looking at the 98th percentile visibility impacts, the greatest impact from the Auxiliary Boiler is 0.01 dv at Caney Creek.[106] Entergy reasoned that since the existing visibility impairment due to the Auxiliary Boiler is extremely low, any improvement due to controls are expected to be negligible. ADEQ further expanded on this finding by explaining that the Arkansas Regional Haze FIP found that due to the small level of baseline visibility impairment caused by the Auxiliary Boiler, the existing SO_2, NO_X, and PM emission limitations in the Entergy White Bluff permit were determined to satisfy BART for the Auxiliary Boiler. ADEQ stated that it agrees that SO_2, NO_X, and PM BART for the Auxiliary Boiler are the existing emission limits in the facility's air permit. We are proposing to find that the state's SO_2, NO_X, and PM BART decisions for the Auxiliary Boiler are appropriate. The BART Rule provides:

''Consistent with the CAA and the implementing regulations, States can adopt a more streamlined approach to making BART determinations where appropriate. Although BART determinations are based on the totality of circumstances in a given situation, such as the distance of the source from a Class I area, the type and amount of pollutant at issue, and the availability and cost of controls, it is clear that in some situations, one or more factors will clearly suggest an outcome. Thus, for example, a State need not undertake an exhaustive analysis of a source's impact on visibility resulting from relatively minor emissions of a pollutant where it is clear that controls would be costly and any improvements in visibility resulting from reductions in emissions of that pollutant would be negligible.'' [107]

Given the very small baseline visibility impacts from the Auxiliary Boiler, we believe it is appropriate to take a streamlined approach for determining BART in this case. Because of the very low baseline visibility impacts from the Auxiliary Boiler at each modeled Class I area, we believe that the visibility improvement that could be achieved through the installation and operation of controls would be negligible, such that the cost of those controls could not be justified. Therefore, we are proposing to approve the state's determination that the existing SO_2, NO_X, and PM emission limitations in the Entergy White Bluff permit are BART for the Auxiliary Boiler. Specifically, these emission limits are 105.2 lb/hr SO_2, 32.2 lb/hr NO_X, and 4.5 lb/hr PM. These BART requirements are enforceable by the state through an Administrative Order that has been adopted and incorporated in the SIP revision. We are proposing to approve into the SIP the state's Administrative Order, including the requirement that the White Bluff Auxiliary Boiler comply with BART as of the effective date of the Administrative Order, which is August 7, 2018.[108] We are concurrently proposing to withdraw the FIP's SO_2 and PM BART requirements for the Auxiliary Boiler, as they would be replaced by our approval of the state's BART decisions.

We also note that in the Arkansas Regional Haze NO_X SIP revision, ADEQ erroneously identified the Auxiliary Boiler as participating in CSAPR for ozone season NO_X, and the state elected to rely on participation in that trading program to satisfy the Auxiliary Boiler's NO_X BART requirements. In a final action published in the **Federal Register** on February 12, 2018, we took final action to approve this SIP revision, including reliance on CSAPR for ozone season NO_X to satisfy the Auxiliary Boiler's NO_X BART requirements.[109] Our approval of this determination for the Auxiliary Boiler was made in error. Therefore, we are proposing to withdraw our prior approval of the state's reliance on CSAPR for ozone season NO_X to satisfy the NO_X BART requirement for the Auxiliary Boiler that was included in the Arkansas Regional Haze NO_X SIP revision submitted to us on October 31, 2017. We are proposing to replace our approval of that BART finding for the Auxiliary Boiler with approval of the source specific 32.2 lb/hr NO_X BART emission limit contained in the August 8, 2018, Arkansas Regional Haze SIP revision.

C. Reasonable Progress Analysis for SO_2

In determining whether additional controls are necessary under the reasonable progress requirements and

[104] The Administrative Order can be found in the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[105] ''Revised BART Five Factor Analysis White Bluff Steam Electric Station Redfield, Arkansas (AFIN 35–00110), dated October 2013, prepared by Trinity Consultants Inc. in conjunction with Entergy Services Inc.'' This BART analysis can be found in Appendix D to the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[106] ''Revised BART Five Factor Analysis White Bluff Steam Electric Station Redfield, Arkansas (AFIN 35–00110), dated October 2013, prepared by Trinity Consultants Inc. in conjunction with Entergy Services Inc.,'' see Table 4–4.

[107] 70 FR 39116.

[108] The Administrative Order can be found in the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[109] 83 FR 5927.

thus in establishing RPGs, a state must consider the four statutory factors in section 169A(g)(1) of the CAA: (1) The costs of compliance, (2) the time necessary for compliance, (3) the energy and nonair quality environmental impacts of compliance, and (4) the remaining useful life of any existing source subject to such requirements. The Regional Haze Rule also states that in establishing the RPGs, the state must consider the uniform rate of improvement in visibility for the period covered by the implementation plan.[110] The uniform rate of visibility improvement, or uniform rate of progress (URP), needed to reach natural conditions by 2064 for each Class I area can be determined by comparing baseline conditions with natural conditions. The Regional Haze Rule provides for the use of an analytical framework that compares the rate of progress that will be achieved by a SIP (as represented by the reasonable progress goals for the end of the implementation period) to the rate of progress that if continued would result in natural conditions in 2064 (*i.e.,* the URP). When a Class I area's visibility conditions for the most impaired days are better (*i.e.,* less impaired) than the URP, the visibility conditions at the Class I areas are said to be ''below the URP line'' or ''below the glidepath.''

Consistent with section 169A(b) of the CAA, 40 CFR 51.308(d)(3) requires that states include in their SIP a long-term strategy for making reasonable progress for each Class I area within their state. This long-term strategy is the compilation of all control measures a state will use during the implementation period of the specific SIP submittal to achieve reasonable progress, and thus to meet any applicable RPGs for a particular Class I area. The long-term strategy includes control measures determined necessary pursuant to both the BART and reasonable progress analyses.

In the Arkansas Regional Haze SO_2 and PM SIP revision,[111] ADEQ noted that EPA's ''Guidance for Setting Reasonable Progress Goals under the Regional Haze Program'' [112] (EPA's RPG Guidance), provides that states have flexibility in how to take into consideration the four statutory factors. The SIP revision states that, considering this guidance, ADEQ believes that the four reasonable progress factors can be appropriately applied broadly to a group of sources state-wide rather than in a source-specific manner. However, ADEQ stated that since EPA evaluated the four factors for controls at the Independence facility in the Arkansas Regional Haze FIP as part of a source-specific analysis, it determined that application of the four factors to that particular source is also ''relevant'' in its reasonable progress analysis as a way of addressing EPA's previous analysis as reflected in the FIP. Therefore, in addition to considering a broader analysis using the four factors, ADEQ also conducted a more specific analysis for the Independence facility. The former analysis in the SIP is ''broad'' in the sense that it does not quantify costs or visibility benefits for any particular source or source category and discusses visibility benefits and costs in only qualitative terms. In the explanation of its approach, the SIP states that both analyses were completed and the results taken into consideration before the state determined whether any controls are necessary under reasonable progress.

Before presenting its broad analysis, the SIP identified the key pollutants and source categories that contribute to visibility impairment in Arkansas Class I areas. After presenting its broad analysis, the SIP presents an evaluation of which sources should be the focus of a narrow four-factor analysis and selected Independence as the only such source. The identification of the key pollutants and source categories that contribute to visibility impairment in Arkansas Class I areas, the broad reasonable progress analysis performed by ADEQ, the identification of Independence as the only source for which a narrow analysis would be performed, and ADEQ's determination regarding additional measures for Independence that are necessary for reasonable progress are discussed in the subsections that follow. We provide our assessment of each component of the reasonable progress section of the SIP revision before summarizing and assessing the next component.

1. Arkansas' Discussion of Key Pollutants and Source Category Contributions

As part of its reasonable progress analysis, ADEQ provided a discussion of the results of air quality modeling performed by the Central Regional Air Planning Association (CENRAP) in support of SIP development in the central states region for 2002 and projected 2018 emissions.[113] The CENRAP modeling included Particulate Source Apportionment Technology Tool (PSAT) with Comprehensive Air Quality model with extensions (CAMx) version 4.4, which was used to provide source apportionment by geographic regions and major source categories for pollutants that contribute to visibility impairment at each of the Class I areas in the central states region.[114] The SIP revision provided a discussion of PSAT data for sources region-wide (*i.e.,* sources both in and outside Arkansas, including sources in the continental U.S. and international sources) as well as a discussion of PSAT data for Arkansas sources. Below, we provide a summary of each set of PSAT data.

a. Region-Wide PSAT Data for Caney Creek and Upper Buffalo

Based on the region-wide PSAT data, which looked at sources both in and outside Arkansas, it was found that point sources are the primary contributor to light extinction at Arkansas' Class I areas on the 20% worst days in 2002. Region-wide point sources were found to contribute 81.04 inverse Megameters (Mm^{-1}) at Caney Creek and 77.8 Mm^{-1} at Upper Buffalo on the 20% worst days in 2002, which makes up approximately 60% of the total light extinction at each Class I area. The region-wide PSAT data showed that area stationary anthropogenic sources are the next largest source category contributor to light extinction at Arkansas Class I areas, contributing 17.81 Mm^{-1} at Caney Creek and 20.46 Mm^{-1} at Upper Buffalo, which makes up approximately 13% and 16% of the total light extinction at each Class I area, respectively. The remaining source categories (*i.e.,* natural, on-road, and non-road sources) were found to each contribute between 2 and 6% of the

[110] 40 CFR 51.308(d)(1)(i)(B).

[111] In a SIP revision submitted on October 31, 2017, Arkansas provided a reasonable progress analysis and reasonable progress determination with respect to NO_X, and we took final action to approve the analysis and determination in a final action published on February 12, 2018 (see 83 FR 5927). Thus, the Arkansas Regional Haze SO_2 and PM SIP revision addresses the reasonable progress requirements with respect to SO_2 and PM emissions.

[112] *Guidance for Setting Reasonable Progress Goals under the Regional Haze Program,* June 1, 2007, memorandum from William L. Wehrum, Acting Assistant Administrator for Air and Radiation, to EPA Regional Administrators, EPA Regions 1–10 (p. 5–1).

[113] The central states region includes Texas, Oklahoma, Louisiana, Arkansas, Kansas, Missouri, Nebraska, Iowa, Minnesota, and the tribal governments within these states.

[114] See the TSD for CENRAP Emissions and Air Quality Modeling to Support Regional Haze State Implementation, which is found in Appendix 8.1 of the 2008 Arkansas Regional Haze SIP. The 2008 Arkansas Regional Haze SIP can be found in the docket associated with this proposed rulemaking.

total light extinction at Arkansas Class I areas.

Based on the region-wide PSAT data, Arkansas also found that sulfate (SO_4) contributed 87.05 Mm^{-1} at Caney Creek and 83.18 Mm^{-1} at Upper Buffalo on the 20% worst days in 2002, which is approximately 65% and 63% of the total modeled light extinction at each Class I area, respectively. Most of the light extinction due to SO_4 was attributed to point sources. Out of the light extinction due to SO_4, the point source category was responsible for approximately 86 to 87% of that light extinction. Point sources of SO_4 contributed 75.1 Mm^{-1} at Caney Creek and 72.17 Mm^{-1} at Upper Buffalo, or approximately 55 to 56% of the total light extinction at Arkansas Class I areas on the 20% worst days in 2002. In contrast, the other pollutant species were responsible for a much smaller proportion of the total light extinction at Arkansas' Class I areas. For example, nitrate (NO_3) contributed approximately 10%, primary organic aerosols (POA) contributed approximately 8%, elemental carbon (EC) contributed approximately 4%, crustal material (CM) contributed approximately 3 to 5%, and soil contributed approximately 1% of the total modeled light extinction at each Arkansas Class I area on the 20% worst days in 2002.

The region-wide PSAT data also showed that point sources are projected to remain the primary contributor to light extinction at Arkansas Class I areas, contributing 45.27 Mm^{-1} at Caney Creek and 43.02 Mm^{-1} at Upper Buffalo on the 20% worst days in 2018. This constitutes approximately 53% of the total light extinction at Caney Creek and 50% of the total light extinction at Upper Buffalo. Area sources are projected to continue to be the second largest contributor to light extinction, being responsible for 20% of the total light extinction at Caney Creek and 23% of the total light extinction at Upper Buffalo. The remaining source categories (*i.e.,* natural, on-road, and non-road sources) are projected to continue to contribute 5% of the total light extinction at Arkansas Class I areas on the 20% worst days in 2018. Based on the region-wide PSAT data, light extinction due to SO_4 is projected to decrease by 44% at Caney Creek and 45% at Upper Buffalo between 2002 and 2018.[115] However, SO_4 is projected to continue to be the primary driver of total light extinction at Arkansas Class I areas, with point sources continuing to be the primary source of light extinction due to SO_4. Point sources of SO_4 are projected to contribute 39.83 Mm^{-1} at Caney Creek and 37.09 Mm^{-1} at Upper Buffalo, which is between 43 and 46% of the total light extinction on the 20% worst days in 2018.

b. Arkansas PSAT Data for Caney Creek and Upper Buffalo

When looking at the PSAT data for sources within Arkansas only, the state found that the relative contribution of sources within Arkansas to total light extinction on the 20% worst days at Arkansas Class I areas is small. Species attributed to Arkansas sources contributed approximately 10% of the total light extinction on the 20% worst days in 2002 and were projected to contribute between 13 and 14% of the total light extinction on the 20% worst days in 2018. Additionally, the state found that when only the visibility impact of sources within Arkansas were considered, area sources actually had a larger impact on light extinction than point sources. Based on the Arkansas source PSAT data, area sources within Arkansas contributed 5.03 Mm^{-1} at Caney Creek on the 20% worst days in 2002, which is approximately 37% of the light extinction attributed to Arkansas sources at Caney Creek and accounts for 4% of the total light extinction at the Class I area. Based on the Arkansas source PSAT data, area sources within Arkansas contributed 6.72 Mm^{-1} at Upper Buffalo on the 20% worst days in 2002, which is approximately 50% of the light extinction attributed to Arkansas sources at Upper Buffalo and accounts for 5% of the total light extinction at the Class I area. In contrast, Arkansas point sources contributed 3.85 Mm-1 at Caney Creek on the 20% worst days in 2002, which is approximately 28% of the light extinction attributed to Arkansas sources at Caney Creek and accounts for 3% of the total light extinction at the Class I area. Arkansas point sources also contributed 3.25 Mm^{-1} at Upper Buffalo on the 20% worst days in 2002, which is approximately 24% of the light extinction attributed to Arkansas sources and accounts for 2% of the total light extinction at the Class I area. The other sources in Arkansas contributed between 7 and 14% each to light extinction attributed to Arkansas sources, accounting for approximately 1% each to the total light extinction at each Arkansas Class I area on the 20% worst days in 2002.

Based on the Arkansas source PSAT data, it was also found that SO_4 from Arkansas sources (all source categories) contributed 4.14 Mm^{-1} at Caney Creek and 3.97 Mm-1 at Upper Buffalo, which is approximately 3% of the total visibility extinction at each of the Class I areas on the 20% worst days in 2002. Out of the light extinction attributed to SO_4 from Arkansas sources, the point source category contributed approximately 67% of that light extinction at Caney Creek and Upper Buffalo. At Caney Creek, the largest contributing pollutant species next to SO_4 was POA, which contributed approximately 3.54 Mm^{-1}. At Upper Buffalo, the largest contributing pollutant species next to SO_4 was CM, which contributed approximately 3.53 Mm^{-1}. NO_3 from Arkansas sources was found to contribute 2.11 Mm^{-1} at Caney Creek and 1.07 Mm^{-1} at Upper Buffalo, which is approximately 2% and 1% of the of the total light extinction at Caney Creek and Upper Buffalo, respectively. On-road sources accounted for approximately 50% of the light extinction attributed to Arkansas sources of NO_3 at Arkansas Class I areas.

The Arkansas source PSAT data also showed that when only sources located in Arkansas are considered, area sources are projected to remain the primary contributor to light extinction at Arkansas Class I areas on the 20% worst days in 2018. Arkansas area sources are projected to contribute 4.85 Mm^{-1} at Caney Creek and 6.52 Mm^{-1} at Upper Buffalo on the 20% worst days in 2018, which is approximately 43% of light extinction attributed to Arkansas sources at Caney Creek and 54% of the light extinction attributed to Arkansas sources at Upper Buffalo. In contrast, Arkansas point sources are projected to contribute 4.05 Mm^{-1} at Caney Creek and 3.63 Mm^{-1} at Upper Buffalo on the 20% worst days in 2018. Arkansas also notes that overall, light extinction attributed to Arkansas sources of SO_4 is projected to decrease at Arkansas Class I areas on the 20% worst days in 2018, but light extinction attributed to point sources of SO_4 located in Arkansas is projected to increase by 4% at Caney Creek and 5% at Upper Buffalo.

[115] The CENRAP's 2018 modeling projections made the following regional haze control assumptions for Arkansas' point sources: (1) Installation of scrubber controls at Flint Creek Boiler No. 1 to meet the presumptive SO_2 BART limit of 0.15 lb/MMBtu; (2) installation of low NO_X burners to satisfy NO_X BART requirements at Flint Creek Boiler No. 1 and White Bluff Units 1 and 2; and (3) the shutdown of AECC Bailey Unit 1 and Entergy Lake Catherine Unit 4 by 2018. The SIP revision we are proposing to take action on requires a more stringent SO_2 emission limit for Flint Creek Boiler No. 1; requires an interim SO_2 emission limit of 0.60 lb/MMBtu and cessation of coal combustion by the end of 2028 at White Bluff Units 1 and 2; requires an SO_2 emission limit of 0.60 lb/MMBtu for Independence Units 1 and 2; does not require the installation of low NO_X burners for any of Arkansas' EGUs; and does not require shutdown of AECC Bailey Unit 1 or Entergy Lake Catherine Unit 4.

Nevertheless, Arkansas noted that the contribution to total light extinction of SO_4 from Arkansas point sources is projected to be approximately 3% of the total light extinction at each Arkansas Class I area on the 20% worst days in 2018, which is a value the state considers to be relatively small.

c. Arkansas' Conclusions Regarding Key Pollutants and Source Category Contributions

Based on an assessment of both the region-wide PSAT data and the Arkansas source PSAT data, Arkansas identified SO_4 as the key pollutant species contributing to light extinction at Caney Creek and Upper Buffalo. When looking at the region-wide PSAT data, SO_4 is the pollutant species responsible for the vast majority of the visibility impairment at Arkansas Class I areas on the 20% worst days. When looking at the Arkansas source PSAT data, SO_4 is still the pollutant species with the largest contribution to visibility impairment at Arkansas Class I areas on the 20% worst days, but its relative contribution to light extinction is not as heavily weighted as it is in the region-wide PSAT data. The primary driver of SO_4 formation at Arkansas Class I areas is emissions of SO_2 from point sources, both when looking at visibility impacts from sources region-wide and also when looking at visibility impacts only from sources in Arkansas.

Arkansas also noted that only a small proportion of total light extinction is due to NO_3 from Arkansas sources, and that this proportion has been driven by on-road sources. For example, NO_3 from Arkansas point sources contributed less than 0.5% of the total light extinction on the 20% worst days at Caney Creek and Upper Buffalo. Based on this observation, Arkansas decided not to evaluate sources of NO_3 under the four reasonable progress factors in the October 2017 Arkansas Regional Haze NO_X SIP Revision. When focusing only on sources in Arkansas, a comparison of the various source categories reveals that area sources do contribute a larger proportion of total light extinction than the other source categories. The majority of the light extinction from Arkansas area sources is due to CM and POA, but Arkansas noted that these pollutant species originate from many individual small sources and that the cost-effectiveness of these controls is therefore difficult to quantify and Arkansas therefore decided not to evaluate area sources under the four reasonable progress factors.

Since Arkansas determined that SO_4 is the key pollutant species contributing to light extinction at Caney Creek and Upper Buffalo on the 20% worst days and that the majority of light extinction due to SO_4 is attributed to point sources, it evaluated point sources emitting at least 250 tons per year (tpy) of SO_2 to determine whether their emissions and proximity to Arkansas Class I areas warrant further analysis under the four reasonable progress factors.

We agree with Arkansas that the PSAT results for Arkansas sources show that the relative contribution to light extinction of SO_4 on the 20% worst days at Arkansas Class I areas is not as great compared to the regional contribution results. However, SO_4 is still the species with the largest contribution to light extinction at Caney Creek and Upper Buffalo on the 20% worst days in both the regional data and the Arkansas source PSAT data. We agree with Arkansas' identification of SO_4 as the key species contributing to light extinction at Caney Creek and Upper Buffalo on the 20% worst days. Newer IMPROVE monitoring data that has become available after the CENRAP modeling was performed does not appear to contradict this conclusion.[116] We are also proposing to agree that the primary driver of SO_4 formation at Arkansas Class I areas is SO_2 emissions from point sources, both when looking at visibility impacts from sources region-wide and also when looking at visibility impacts only from sources in Arkansas. Arkansas' conclusions are consistent with our finding in the Arkansas Regional Haze FIP that the CENRAP's CAMx modeling shows that SO_4 from point sources is the driver of regional haze at Caney Creek and Upper Buffalo on the 20% worst days in both 2002 and 2018.[117] We also agree with Arkansas' assertion that when only sources located in Arkansas are considered, light extinction due to area sources (all pollutant species considered) is greater compared to the light extinction due to point sources at both Caney Creek and Upper Buffalo on the 20% worst days in 2002. And we agree with Arkansas that the cost of controlling many individual small area sources may be difficult to quantify, and we are therefore proposing to find that it is acceptable for Arkansas to choose not to further evaluate area sources for controls under reasonable progress in this implementation period. This is consistent with EPA's decision not to conduct a four-factor analysis of area sources under reasonable progress for this implementation period in the Arkansas Regional Haze FIP.[118] Therefore, we are proposing to find that it is appropriate for Arkansas to focus its evaluation on point sources emitting at least 250 SO_2 tpy to determine whether their emissions and proximity to Arkansas Class I areas warrant further analysis under the four reasonable progress factors.

2. Arkansas' Analysis of Reasonable Progress Factors Broadly Applicable to Arkansas Sources

In addition to the four reasonable progress factors under CAA section 169A(g)(1), ADEQ determined that visibility is also a relevant factor for consideration in its reasonable progress analysis. ADEQ's broad evaluation of the four reasonable progress factors plus visibility is summarized below.

Visibility: ADEQ explained that, since restoring natural visibility conditions in Class I areas is the central goal of the regional haze program, it considers visibility to be the necessary context within which to view whether additional controls are reasonable in the first planning period. ADEQ noted that visibility has improved dramatically in Arkansas' Class I areas since 2004, with visibility improving at a rate more rapid than needed to meet the 2018 point on the URP and Arkansas' Class I areas being on track to achieve natural visibility conditions in Arkansas Class I areas by 2064. ADEQ also noted that the observed improvement in visibility conditions has taken place even before implementation of most of the controls included in the Arkansas Regional Haze SO_2 and PM SIP revision. ADEQ stated that the observed visibility improvement at Arkansas Class I areas is the result of reductions from state and federal programs, including New Source Performance Standards for a variety of source types; vehicle emissions standards; changes in NAAQS; innovations in emissions control technologies; retirement or reconstruction of older facilities; and market-driven changes in electricity generation. ADEQ stated it anticipates

[116] IMPROVE monitoring data for Caney Creek and Upper Buffalo, as well as other Class I areas can be found at *http://views.cira.colostate.edu/fed/QueryWizard/Default.aspx.*

[117] 80 FR 18996.

[118] In the FIP we explained that the CENRAP CAMx modeling with PSAT showed that point sources are responsible for a majority of the light extinction at Arkansas Class I areas on the 20% worst days in 2002 (this is taking into account all pollutant species and sources both in and outside Arkansas). We reasoned that since other source types (*i.e.,* natural, on-road, non-road, and area) each contributed a much smaller proportion of the total light extinction at each Class I area, it was appropriate to focus only on point sources in our reasonable progress analysis for this implementation period. See 80 FR 18944 and 81 FR 66332 at 66336. See also the ''Arkansas Regional Haze FIP Response to Comments (RTC) Document,'' pages 71–99.

that the implementation of the BART controls required under the SIP revision will further keep Arkansas Class I areas on track to achieve natural visibility conditions on or before 2064.

ADEQ also stated that the visibility trajectory in Arkansas' Class I areas is a relevant factor for consideration in its reasonable progress analysis. According to ADEQ, if Arkansas Class I areas were making less progress than necessary to achieve the URP during the first planning period, then more costly controls could be warranted if found reasonable after consideration of the four statutory factors and other factors the state considers relevant. ADEQ stated that ADEQ therefore deems it reasonable to consider that Arkansas Class I areas are already below the 2018 point on the URP, in addition to considering the statutory reasonable progress factors, in evaluating whether additional controls are necessary under reasonable progress for the first implementation period.

Costs of Compliance: ADEQ pointed out that EPA's RPG Guidance provides that the cost of compliance factor ''can be interpreted to encompass . . . the implication of compliance costs to the health and vitality of industries within a state.'' [119] Considering the visibility trends at Arkansas' Class I areas, ADEQ determined that this interpretation is appropriate to apply in this case. ADEQ believes that the cost of additional controls under reasonable progress would create a negative impact on the health and vitality of industries within the state, and that such adverse impacts would be especially great if additional SO_2 controls were imposed on the electricity sector. This is because under Arkansas law, energy companies are permitted to recover costs related to the installation of emissions controls at EGUs required under a SIP from electricity ratepayers subject to approval by the Arkansas Public Service Commission. These costs, in turn, would be allowed to be passed on to Arkansas ratepayers, including a variety of industries, in the form of increased electric rates. ADEQ believes that energy-intensive industries would be disproportionately impacted by these costs.

Time Necessary for Compliance: ADEQ noted that the time necessary for compliance varies depending on the control technology under consideration. ADEQ stated that the time necessary for compliance for SO_2 control technologies considered for BART in the SIP revision was typically 3–5 years, unless progress had already been made toward implementing those control technologies.

Energy and Non-air Quality Impacts of Compliance: ADEQ stated that the installation of additional controls, such as dry and wet scrubbers, under reasonable progress for Arkansas EGUs may have negative impacts, including temporary outages necessary to install the controls. Arkansas expects that this would temporarily disrupt the supply of electricity to the grid. Additionally, ADEQ noted that certain control technologies can result in reduced generating capacity for EGUs, which is referred to as parasitic load.

Furthermore, ADEQ noted that market trends for coal and natural gas have already resulted in the decreased dispatch of coal-fired facilities, which has in turn resulted in a decrease in overall emissions of key pollutants that impact visibility at Arkansas Class I areas. ADEQ cited to data from the Energy Information Administration showing that the trend of decreased net electricity generation from coal and increased net electricity generation from natural gas and renewable energy is expected to continue for the remainder of the 2008–2018 implementation period, and well beyond.

Remaining Useful Life of Potentially Affected Sources: ADEQ pointed out that the EPA RPG Guidance provides that this factor is generally best treated as one element of the overall cost analysis. ADEQ noted that if the remaining useful life for a given facility is less than the typical amortization period for new control equipment, the annualized cost increases and the controls become less cost effective. Additionally, ADEQ pointed out that the cost of controls may result in a company making an economic decision to discontinue operations, thus truncating the remaining useful life of a source.

3. Identification of Potential Sources for Evaluation of SO_2 Controls Under Reasonable Progress

In identifying which sources to evaluate for SO_2 controls in its reasonable progress analysis, Arkansas compiled a list of all point sources that emitted at least 250 SO_2 tpy as reported to the EPA emissions Inventory System (EIS) in any given year between 2002 and 2015. For sources that participate in EPA's Acid Rain Program, Arkansas obtained SO_2 emissions data for 2015 using the Air Markets Program Data tool. Arkansas then narrowed down the list to only those sources that emitted at least 250 tpy averaged over the most recent 3-year period for which data is available. Arkansas identified 11 sources that met this criterion (see Table 11).

TABLE 11—POINT SOURCES IN ARKANSAS WITH SO_2 EMISSIONS GREATER THAN 250 TPY

Facility	Most recent 3-year period	Average SO_2 emissions (tpy)
Entergy White Bluff*	2014–2016	24,346
Entergy Independence	2014–2016	22,531
SWEPCO Flint Creek Power Plant*	2014–2016	5,350
Plum Point Energy Station Unit 1	2014–2016	2,759
FutureFuel Chemical Company	2013–2015	2,837
Domtar A.W. LLC, Ashdown Mill*	2013–2015	1,553
Evergreen Packaging—Pine Bluff	2013–2015	986
Albemarle Corporation—South Plant	2013–2015	1,382
SWEPCO John W. Turk Jr. Power Plant	2014–2016	908
Ash Grove Cement Company/Foreman Cement Plant	2013–2015	369
Nucor—Yamato Steel Company	2013–2015	301

*These facilities are subject to BART requirements, and the state therefore did not further consider these sources for additional controls under reasonable progress.

[119] *Guidance for Setting Reasonable Progress Goals under the Regional Haze Program,* June 1, 2007, memorandum from William L. Wehrum, Acting Assistant Administrator for Air and Radiation, to EPA Regional Administrators, EPA Regions 1–10 (p. 5–1).

Arkansas explained that, since White Bluff, Flint Creek, and Domtar are subject to BART and the BART analyses conducted to determine BART control requirements are based on an assessment of many of the same factors that must be evaluated in determining whether additional controls are needed under the reasonable progress provisions and thus in establishing the RPGs, no additional controls under reasonable progress are necessary for these sources in the first implementation period. For the remaining sources on the list, Arkansas calculated the total average actual emission rate (Q) in SO_2 tpy over the most recent 3-year period and determined the distance (D) in kilometers of each source to its closest Class I area (see Table 12). Arkansas used a ''Q divided by D'' (Q/D) value of 10 as a threshold for identifying sources to further evaluate for reasonable progress controls. Arkansas explained that it selected this value as a threshold based on guidance contained in the BART Guidelines and also noted that this is consistent with the approach used in other regional haze actions.

TABLE 12—Q/D VALUES FOR LARGE SO_2 POINT SOURCES IN ARKANSAS

Facility	Q/D value	
	Upper buffalo	Caney creek
Entergy Independence	126	81
Plum Point Energy Station Unit 1	9	7
FutureFuel Chemical Company	17	10
Evergreen Packaging—Pine Bluff	4	5
Albemarle Corporation—South Plant	5	9
SWEPCO John W. Turk Jr. Power Plant	4	11
Ash Grove Cement Company/Foreman Cement Plant	1	5
Nucor—Yamato Steel Company	1	1

As shown in Table 12, Arkansas found that only three sources had a maximum Q/D value greater than or equal to 10: Entergy Independence, FutureFuel Chemical Company, and John W. Turk Jr. Power Plant. Arkansas noted that Entergy Independence is the second largest point source of SO_2 emissions in Arkansas, with average 2014–2016 emissions of 22,531 SO_2 tpy. In comparison, the FutureFuel Chemical Company and the John W. Turk Jr. Power Plant had much lower SO_2 emissions. FutureFuel Chemical Company had average 2013–2015 SO_2 emissions of 2,837 tpy, while the John W. Turk Jr. Power Plant had average 2014–2016 SO_2 emissions of 908 tpy. Arkansas noted that SO_2 emissions from the FutureFuel Chemical Company and the John W. Turk Jr. Power Plant are approximately an order of magnitude lower than emissions from Entergy Independence. In addition, Arkansas noted that the FutureFuel Chemical Company was previously identified as a BART eligible source, but was determined to be not subject to BART in the 2008 Arkansas Regional Haze SIP based on CALPUFF modeling performed in the development of that SIP. Therefore, ADEQ did not find it necessary to further evaluate controls under reasonable progress for this facility for this implementation period. The John W. Turk Jr. Power Plant, which began operation in 2012, has implemented best available control technology, which Arkansas noted is more stringent than BART. Therefore, ADEQ stated that it does not anticipate that more stringent controls would be available and/or reasonable for this facility in the first implementation period. Arkansas ultimately determined that since the Independence facility is a source not subject to BART and because it was required by the Arkansas Regional Haze FIP to install controls under reasonable progress, this particular source warrants further consideration and evaluation under the four reasonable progress factors.

We are proposing to find that Arkansas' overall method of identifying sources for potential further evaluation under the four reasonable progress factors is appropriate. We find that Arkansas' approach of narrowing down the list of sources to further evaluate under reasonable progress to only those sources that emitted at least 250 SO_2 tpy averaged over the most recent 3-year period for which data is available is reasonable. We agree with Arkansas that since White Bluff and Flint Creek are subject to BART and are addressed under this SIP revision, the BART analyses conducted to determine BART control requirements for these sources and the determinations adopted and incorporated by the state in this SIP revision are adequate to eliminate these sources from further consideration of additional controls under the reasonable progress requirements for the first implementation period. The EPA RPG Guidance explains that the BART analysis is based, in part, on an assessment of many of the same factors that must be addressed in establishing the RPGs, and therefore it is reasonable to conclude that any control requirements imposed in the BART determination also satisfy the RPG-related requirements for source review in the first implementation period.[120] The guidance provides that it is reasonable to conclude that any control requirements imposed in the BART determination also satisfy the RPG-related requirements for source review in the first RPG planning period.[121] The same rationale applies for the Domtar Ashdown Mill, although the August 8, 2018 SIP revision does not address the BART requirements for Domtar, which will remain satisfied by the FIP and the 2008 Arkansas Regional Haze SIP. Based on the consideration of the BART factors and resulting determinations in that FIP and the 2008 Arkansas Regional Haze SIP, it is reasonable for ADEQ to conclude that nothing further is needed to address emissions from Domtar under the requirement for reasonable progress analysis at this time. If ADEQ chooses to submit a SIP revision to address BART requirements for Domtar Power Boilers No. 1 and No. 2, we will evaluate that SIP submittal, including whether it also sufficiently addresses the reasonable progress requirements for Domtar for the first implementation period.

We are proposing to find that Arkansas' use of a Q/D value of 10 as a threshold for identifying sources to further evaluate for reasonable progress controls is reasonable and appropriate. We agree with Arkansas, that the FutureFuel Chemical Company was

[120] *Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program,* June 1, 2007, memorandum from William L. Wehrum, Acting Assistant Administrator for Air and Radiation, to EPA Regional Administrators, EPA Regions 1–10 (pp. 4–2, 4–3, and 5–1).

[121] *Id.*

found by the state to be not subject to BART in the 2008 Arkansas Regional Haze SIP, which is a determination that was approved by EPA in our March 2012 final action on the SIP.[122] The FutureFuel Chemical Company and the John W. Turk Jr. Power Plant are the fifth and ninth largest SO_2 point sources in Arkansas, based on average annual emissions from the most recent 3-year period.[123] In comparison to the SO_2 emissions from the 3 largest SO_2 point sources in Arkansas, emissions from these two facilities are relatively small.[124] Taking into consideration the significantly lower 3-year average SO_2 emissions from the FutureFuel Chemical Company and the John W. Turk Jr. Power Plant in comparison to the Independence Power Plant and considering that the John W. Turk Jr. Power Plant operates best available control technology, we are proposing to find that it is reasonable and appropriate for Arkansas to not further evaluate these sources for controls under reasonable progress for this planning period. We also consider it appropriate and reasonable for Arkansas to decide to conduct an analysis of the reasonable progress factors for the Independence facility. In particular, we consider it appropriate to evaluate the Independence facility because it is the second highest point source of SO_2 emissions in Arkansas, accounting for approximately 36% of the SO_2 point source emissions in Arkansas; its Q/D values as determined by ADEQ are high (see Table 12), especially when compared to other Arkansas point sources; and it is a source not subject to BART. Therefore, we are proposing to agree with Arkansas' decision to evaluate the four reasonable progress factors for the Independence facility.

4. Arkansas' Reasonable Progress Analysis for Independence Units 1 and 2

As noted above, ADEQ determined that application of the four factors to that specific source is also ''relevant'' in its reasonable progress analysis as a way of addressing EPA's previous analysis.

a. Arkansas' Evaluation of the Reasonable Progress Factors for SO_2 for Entergy Independence Units 1 and 2

Section 169(A)(g)(1) of the CAA requires states to evaluate the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected sources, when determining reasonable progress. In its evaluation of the four reasonable progress factors for the Independence facility, Arkansas relied on information provided by Entergy for the Independence facility in the evaluation of low sulfur coal and dry scrubbers. Arkansas also relied on data developed by EPA in support of the Arkansas Regional Haze FIP in the evaluation of wet scrubbers and dry scrubbers. The Entergy Independence Power Plant is a coal-fired electric generating station with two identical 900 MW boilers. The boilers burn Wyoming Powder River Basin sub-bituminous coal as their primary fuel and No. 2 fuel oil or bio-diesel as start-up fuel. The layout and boiler units at this facility are similar to those at Entergy White Bluff, but since the units at Independence were installed in 1983 (9 years after the installation of the White Bluff units), Independence Units 1 and 2 are not BART eligible.

There is currently no SO_2 control equipment in use at Units 1 and 2. Arkansas noted that the Independence units are subject to a prevention of significant deterioration (PSD) emission limit of 0.93 lb/MMBtu. Arkansas also noted that market trends for coal and natural gas have resulted in decreased dispatch of the Independence units, which has resulted in reduced emissions from the facility. The available SO_2 control technology options considered in Arkansas' analysis are as follows: Switching to coal with a lower sulfur content, dry FGD, and wet FGD, all of which Arkansas identified as being technically feasible. Switching to coal with a sulfur content of 0.6 lb/MMBtu (referred to herein as low sulfur coal) is expected to result in a 4 to 6% reduction in SO_2 emissions from 2009–2013 levels. Dry FGD systems typically have SO_2 control efficiencies ranging from 60 to 95% control, while wet FGD is typically capable of achieving 80 to 95% control of SO_2 emissions.

Degree of Improvement in Visibility: Although the degree of visibility improvement is not one of the four statutory factors that must be evaluated in a reasonable progress analysis, as noted above, Arkansas chose to consider visibility improvement since the ultimate goal of any controls under reasonable progress is to achieve visibility improvements. For switching to low sulfur coal, Entergy submitted CALPUFF modeling that estimated the visibility benefit of switching to low sulfur coal for Independence Units 1 and 2. This modeling showed that switching to low sulfur coal is anticipated to result in visibility improvements of 0.112 dv at Caney Creek and 0.236 dv at Upper Buffalo. For dry scrubbers, Arkansas relied on the visibility improvement estimates from the modeling conducted by EPA for the Arkansas Regional Haze FIP. Arkansas noted that the installation of dry FGD at Independence Units 1 and 2 is anticipated to result in visibility improvements of 1.096 dv at Caney Creek and 1.178 dv at Upper Buffalo.[125] As discussed above, Arkansas also estimated that the cost in terms of dollars per deciview of dry FGD at Independence Units 1 and 2 ranges from $63,580,175/dv to $71,672,197/dv at each of the four affected Class I areas (see Table 13).

Remaining Useful Life: Since there are no state- or federally-enforceable limitations on continued operations at the Independence facility, Arkansas' cost analysis for SO_2 controls assumed a 30-year amortization period for dry

[122] The 2008 Arkansas Regional Haze SIP showed that FutureFuel Chemical Company had a maximum visibility impact (*i.e.,* 1st high value) of 0.711 dv at Hercules Glades. EPA found that closer inspection of the visibility modeling results revealed that only this single day out of the 3 years modeled exceeded the 0.5 dv threshold used by ADEQ to determine if a source is subject to BART. Since only one day modeled above the threshold, EPA found in its final action on the 2008 Arkansas Regional Haze SIP that it is unlikely that a refined modeling approach using updated meteorological data, which would allow the use of the 98th percentile visibility impact instead of the max visibility impact, would show impacts above the 0.5 dv threshold. Therefore, EPA concluded in our March 2012 final action on the 2008 Arkansas Regional Haze SIP that it was not necessary to further evaluate controls under reasonable progress for the FutureFuel Chemical Company in the first implementation period.

[123] See the Arkansas Regional Haze SO_2 and PM SIP Revision, Table 11.

[124] The three largest SO_2 point sources in Arkansas, based on average annual emissions from the most recent 3-year period, are the Entergy White Bluff Plant, Entergy Independence Plant, and SWEPCO Flint Creek Plant (see Table 11 of the Arkansas Regional Haze SO_2 and PM SIP Revision). The Entergy White Bluff Plant and the SWEPCO Flint Creek Plant are subject to BART and controls for these facilities are already addressed in the SIP revision based on ADEQ's consideration of the 5 BART factors.

[125] We note that in the SIP revision, ADEQ relied on EPA's visibility modeling from the FIP for dry scrubbers at the Independence facility. In that visibility modeling, EPA modeled two baseline scenarios: (1) The BASE case emission rates for NO_X and SO_2 were from the maximum actual 24-hour emissions during the 2001–2003 period; and (2) the BASE 2 case emission rates for SO_2 were based on the maximum actual 24-hour emissions during the 2001–2003 period and the NO_X emissions were based on the maximum 24-hour emissions during the 2011–2013 period. Entergy's CALPUFF modeling for low sulfur coal at the Independence facility was based on a 2011–2013 baseline period for modeled emission rates. While Entergy's baseline for low sulfur coal differed from the two baselines modeled by EPA for dry scrubbers, ADEQ stated they do not expect that the difference would substantially impact the comparison of the visibility benefits among controls evaluated.

FGD and wet FGD.[126] However, Arkansas acknowledged Entergy's intention, as stated in comments to Arkansas regarding the draft SIP, to cease coal combustion at Independence Units 1 and 2 by the end of 2030. In addition, Arkansas noted that market pressures may also impact continued operations at the Independence facility, including changes in dispatch and economic decisions concerning the continued viability of the units. Therefore, Arkansas recognized that the amortization period of controls may end up being less than the 30 years assumed in Arkansas' cost analysis, potentially resulting in the controls being less cost effective than estimated in the analysis.

Costs of Compliance: In considering the costs of compliance, Arkansas noted that switching to low sulfur coal has no associated capital costs, but there would be a cost associated with guaranteeing that the sulfur content remains below 0.6 lb/MBtu. Arkansas stated it calculated cost estimates for switching to low sulfur coal using information provided by Entergy regarding cost premiums for low sulfur coal, U.S. Energy Information Administration fuel consumption data, and EPA Air Markets Program Data. Arkansas estimated that the annualized operation and maintenance costs of switching to low sulfur coal is $1.6 million for Unit 1 and $1.7 million for Unit 2.[127] Arkansas estimated that the cost effectiveness of switching to low sulfur coal is approximately $2,437/ton for Unit 1 and $2,345/ton for Unit 2.

In contrast to switching to low sulfur coal, the installation of dry FGD and wet FGD is expected to require a large capital investment. Entergy provided Arkansas with Independence-specific cost estimates for dry scrubbers for use in Arkansas' cost analysis. Entergy estimated total capital costs of dry scrubbers at Independence to be $491,893,500 per unit based on ''actual costs'' and $355,391,500 per unit based on costs allowed under EPA's Control Cost Manual. Entergy annualized the capital cost for both sets of numbers assuming a 9-year amortization period, based on Entergy's plans to cease coal combustion at Independence by the end of 2030. Additionally, Entergy based its calculations of SO_2 emissions reductions based on a 2009–2013 baseline. In the SIP revision, ADEQ based its evaluation of the cost of dry scrubbers on the set of capital costs that reflect the costs allowed under EPA's Control Cost Manual, and also assumed a 30-year amortization period in its calculation of the cost-effectiveness of dry scrubbers. Based on these assumptions, Arkansas estimated that the cost-effectiveness of dry scrubbers is $2,970/ton for Unit 1 and $2,742/ton for Unit 2.

Since Entergy did not provide Independence-specific cost estimates for wet scrubbers for Arkansas to base its cost analysis on, Arkansas relied on the cost estimates for Independence developed by EPA in the Arkansas Regional Haze FIP.[128] Based on a 30-year amortization period, our FIP estimated wet FGD to cost $3,706/ton at Unit 1 and $3,416/ton at Unit 2. Arkansas noted that in the Arkansas Regional Haze FIP, EPA eliminated wet scrubbers due to the high incremental cost-effectiveness but small incremental visibility benefit of wet scrubbers compared to dry scrubbers. Therefore, consistent with EPA's action in the FIP, ADEQ found that wet FGD did not warrant further consideration in its analysis.

In addition to considering cost-effectiveness calculations in the cost analysis, Arkansas found that other cost-related factors were of relevance in its evaluation of the reasonable progress factors for the Independence facility. This includes total capital costs, cost to Arkansas communities, and the cost in terms of dollar per dv improvement in visibility anticipated from the control options evaluated ($/dv). Arkansas considered the capital costs of dry scrubbers and wet scrubbers to be high, even though the costs in terms of $/ton of SO_2 emissions reduced for both dry and wet scrubbers (assuming a 30-year remaining useful life) are within a range that has been found to be cost effective in other regional haze actions. In addition, acknowledging Entergy's anticipated cessation of coal combustion at the Independence facility, although it is not state- or federally-enforceable, Arkansas noted that assuming a 9-year remaining useful life would likely result in scrubber controls no longer being cost-effective. In light of this, Arkansas considered it important to take into account the capital cost of controls along with the cost-effectiveness in terms of dollars per ton of emissions reduced. Arkansas also noted that these costs would be passed on to Arkansas ratepayers. Finally, Arkansas also took into account that the $/dv improvement in visibility for dry scrubbers is a little over 2 times higher than for low sulfur coal at Caney Creek and between 5 and 6 times higher at Upper Buffalo and the 2 Missouri Class I areas (see Table 13). Arkansas noted that consideration of the cost in terms of $/dv improvement demonstrates a greater disparity in costs among the control options compared to consideration of the cost in terms of $/ton reduced. Arkansas concluded that all the control options considered would result in millions of dollars spent to achieve what it considers to be little visibility benefit.

TABLE 13—COST OF SO_2 CONTROLS ($/dv) FOR INDEPENDENCE UNITS 1 AND 2

SO_2 control option	Class I Area			
	Caney Creek	Upper Buffalo	Hercules Glades	Mingo
Low Sulfur Coal	$29,469,780	$10,929,190	$13,985,658	$12,179,393
Dry FGD	68,337,085	63,580,175	70,925,611	71,672,197

Time Necessary for Compliance: Arkansas explained that the typical time necessary for compliance for dry FGD and wet FGD is 5 years. Considering the time left on existing coal supply contracts between Entergy and its coal

[126] As explained above, Entergy annualized the capital cost of controls on the Independence facility assuming a 9-year amortization period, based on Entergy's plans for ceasing coal combustion at Independence by the end of 2030. However, given that Entergy's plans to cease coal combustion by the end of 2030 are not state or federally-enforceable, ADEQ re-calculated the cost-effectiveness of controls by annualizing the capital cost of controls assuming a 30-year amortization period.

[127] ADEQ calculated annualized operation and maintenance costs of switching to low sulfur coal by multiplying average annual fuel consumption in tons for the years 2009–2013 by the $0.50/ton cost premium Entergy was quoted by its coal supplier, per Entergy's August 18, 2017, SO_2 BART analysis for White Bluff. ADEQ obtained annual fuel consumption data for the years 2009–2013 from U.S. Energy Information Administration Form EIA–923.

[128] See 80 FR 18992–18993. See also the Arkansas Regional Haze SO_2 and PM SIP Revision, Appendix F.

supplier, the time required to burn through current fuel stocks, and the time needed to build a stockpile of low sulfur coal to assure against potential fuel supply disruptions, Entergy informed Arkansas that the time necessary to comply with an SO_2 emission limit based on low sulfur coal is estimated to be 3 years.

Energy and Non-air Quality Environmental Impacts of Compliance: Arkansas noted that dry FGD utilizes lime slurry to remove SO_2 from flue gas and that in the process, particulate matter is generated that must be controlled through the use of a baghouse or ESP. Once collected, the waste material is disposed of through landfilling. Arkansas noted that the costs associated with control of particulate matter and additional power requirements were factored into the cost estimates used in its analysis. Arkansas determined that Entergy has not indicated unusual circumstances that would create greater problems than experienced in other cases where dry FGD has been utilized to meet regional haze requirements. Arkansas also noted that switching to low sulfur coal is not anticipated to result in any adverse energy or non-air environmental impacts.

b. Arkansas' Determination Regarding Reasonable Progress Requirements for Independence

Based on its evaluation of the reasonable progress factors for the Independence facility, ADEQ arrived at the conclusion that no additional controls are necessary for reasonable progress during the first implementation period. According to ADEQ, the controls it evaluated would cost millions of dollars annually, which would be passed on to Arkansas ratepayers, for what ADEQ considers to be little visibility benefit when Arkansas' Class I areas are already making more progress than the URP.

Although ADEQ concluded that none of the controls evaluated for the Independence facility are necessary for achieving reasonable progress in the first planning period, ADEQ acknowledged Entergy's intention to switch to low sulfur coal at Independence Units 1 and 2 within the next 3 years. ADEQ noted that this measure would strengthen the SIP and result in some visibility benefit at Arkansas' Class I areas, while having no associated capital costs. According to ADEQ, the lack of any capital costs will provide Entergy with flexibility regarding the company's planned cessation of coal combustion at the Independence facility by the end of 2030. Therefore, Entergy's commitment to switch to low sulfur coal at Independence Units 1 and 2 has now been made enforceable by ADEQ as part of the long-term strategy for this implementation period, through an Administrative Order that has been adopted and incorporated in the SIP revision. The Administrative Order requires Independence Units 1 and 2 to meet an SO_2 emission limit of 0.60 lb/MMBtu no later than 3 years from the effective date of the Administrative Order, which is August 7, 2018.[129]

5. Arkansas' Determination Regarding Additional Controls Necessary Under Reasonable Progress and Revised RPGs

After consideration of the statutory reasonable progress factors, along with an evaluation of the monitored trajectory of visibility impairment during the first implementation period, particulate source apportionment data, and SO_2 emissions relative to proximity to Arkansas Class I areas, Arkansas determined that no additional controls beyond BART and other Clean Air Act programs are necessary under the reasonable progress provisions for the first implementation period. Based on its analysis of the reasonable progress factors in the context of both the analysis of a group of sources as well as the source-specific analysis that applied the reasonable progress factors specifically to the Independence facility, Arkansas determined that all the evaluated controls would result in the expenditure of millions of dollars annually for what the state considers to be little visibility benefit. In addition, the costs of any control requirements would be passed on to Arkansas citizens and businesses through electricity rate increases. Arkansas deems that these costs are not warranted under reasonable progress given that Arkansas Class I areas are well below their respective 2018 URPs. Arkansas believes that its reasonable progress determination is consistent with EPA's decision to establish a 64-year lifespan for the regional haze program, which is broken down into several 10-year implementation periods. Arkansas stated that the way the regional haze program was set up allows for a fresh look at the changing landscape of sources that impact visibility and potential controls every 10 years. Arkansas noted that the EPA Reasonable Progress Guidance provides that it is reasonable for states to defer reductions to later planning periods in order to maintain a consistent glidepath toward the long-term goal of natural visibility conditions. Therefore, Arkansas determined that no SO_2 or PM controls beyond BART are necessary for reasonable progress during the first implementation period.

To reflect the control measures required in the Arkansas Regional Haze SO_2 and PM SIP revision and the Arkansas Regional Haze NO_X SIP revision, which was approved by EPA in a prior action,[130] Arkansas revised the RPGs for the 20% worst days for Caney Creek and Upper Buffalo that it had previously established in the 2008 Arkansas Regional Haze SIP. Arkansas did not revise its RPGs for the 20% best days included in the 2008 Arkansas Regional Haze SIP. In order to provide RPGs for the 20% worst days that account for emissions reductions from its SIP revisions, Arkansas utilized a method that is based on a scaling of modeled light extinction components in proportion to emissions changes anticipated from SIP controls for which compliance is required on or before December 31, 2018. Arkansas noted that this is the same method utilized by EPA to revise the RPGs in the Arkansas Regional Haze FIP. Arkansas scaled CENRAP's CAMx 2018 projection of light extinction components for SO_4 and NO_3 in proportion to the SIP revisions' emission reductions for SO_2 and NO_X from the CENRAP modeled 2018 emissions. Arkansas decided to use the most recent 3 years of data (2014–2016) as opposed to EPA's method in the Arkansas FIP, which involved using the 5 most recent years of data (2009–2013) with the exclusion of the minimum and maximum values. Arkansas explained that this was done to ensure that recent changes in dispatch at Arkansas EGUs were captured. Arkansas' revised RPGs for Caney Creek and Upper Buffalo are presented in Table 14.

TABLE 14—ARKANSAS' REVISED 2018 RPGS FOR CANEY CREEK AND UPPER BUFFALO

Class I area	2018 RPG 20% worst days (dv)
Caney Creek	22.47
Upper Buffalo	22.51

6. EPA's Evaluation and Conclusions on Arkansas' Reasonable Progress Analysis and Revised RPGs

As noted above, as part of its reasonable progress analysis, Arkansas

[129] The Administrative Order can be found in the Arkansas Regional Haze SO_2 and PM BART SIP Revision.

[130] 83 FR 5927.

conducted both a broad source analysis and a source-specific analysis that evaluated the four statutory factors for the Independence facility. The former analysis was ''broad'' in the sense that it did not quantify costs or visibility benefits for any particular source or source category, and discussed anticipated visibility benefits and costs in only general terms. We agree that an approach that involves a broad analysis of groups of sources or source categories may be appropriate in certain cases, as provided by EPA's RPG Guidance. However, we believe that the broad analysis of a group of sources provided by ADEQ does not clearly identify what sources or controls were evaluated in the state's weighing of the costs and other statutory factors. While informative, we find that the state's broad analysis of a group of sources was not a determinative component of the state's reasonable progress analysis given that the state's determination was also informed by an evaluation of large point sources individually to identify sources for potential further evaluation under the four reasonable progress factors and by a more narrow and focused analysis conducted for those sources identified, specifically the Independence facility, which included consideration of various control options and weighing of costs and the other statutory factors.

We are proposing to find that the reasonable progress requirements under section 51.308(d)(1) have been fully addressed for the first regional haze planning period. Specifically, we are proposing to find that the following components of Arkansas' analysis satisfy the reasonable progress requirements: Arkansas' discussion of the key pollutants and source categories that contribute to visibility impairment in Arkansas Class I areas based on the CENRAP's source apportionment modeling; the identification of a group of large SO_2 point sources for potential consideration of controls under reasonable progress and the eventual narrowing down of the list to the Independence facility; [131] and the evaluation of the four reasonable progress factors for SO_2 controls on the Independence facility.

We are proposing to agree with Arkansas' cost analysis for dry scrubbers and switching to low sulfur coal for Independence Units 1 and 2, and with the state's decision to assume a 30-year capital cost recovery period in the cost analysis. It is appropriate to assume a 30-year capital cost recovery period in the cost analysis since Entergy's plans to cease coal combustion at the Independence facility are not state or federally-enforceable. We also agree with Arkansas' estimates of the cost of dry scrubbers, and note that the state's estimates of the cost effectiveness of dry scrubbers for Units 1 and 2 are very similar to the cost effectiveness estimates we developed in the Arkansas Regional Haze FIP.[132]

Since the White Bluff and Independence facilities are sister facilities with nearly identical units and comparable levels of annual SO_2 emissions, and since both DSI and enhanced DSI were evaluated in the BART analysis for White Bluff Units 1 and 2, we believe it would be appropriate to consider these controls in the four-factor analysis for the Independence facility as well. However, neither the SIP revision nor Entergy's four factor analysis for controls on the Independence facility considered DSI or enhanced DSI as control options. Therefore, relying on Entergy's estimates of the capital costs and annual operation and maintenance costs for DSI and enhanced DSI for White Bluff Units 1 and 2 from Entergy's August 18, 2017, White Bluff BART analysis,[133] and assuming a 30-year equipment life, we estimate the cost-effectiveness of DSI at the Independence facility to be approximately \$4,963/SO_2 ton removed for Unit 1 and \$4,593/SO_2 ton removed for Unit 2.[134] We estimate the cost-effectiveness of enhanced DSI to be approximately \$4,951/SO_2 ton removed for Unit 1 and \$4,581/SO_2 ton removed for Unit 2.[135] Based on our cost estimates for DSI, we find that DSI is less cost-effective than dry scrubbers or wet scrubbers for Independence Units 1 and 2.[136] Although the anticipated visibility benefits of DSI at the Independence facility were not modeled, we expect that these would be less than that for dry scrubbers or wet scrubbers, since DSI and enhanced DSI typically have a lower SO_2 removal efficiency than scrubber controls. Further, we expect that the installation and operation of DSI or enhanced DSI would likely present the same potential issues discussed by Entergy in its SO_2 BART analysis for White Bluff. Specifically, Entergy stated that before DSI technology could be selected as BART for White Bluff, a demonstration test would need to be performed to confirm its feasibility, achievable performance, and balance of plant impacts (brown plume formation, ash handling modifications, landfill/leachate considerations, and impact to mercury control). In addition, Entergy claimed that DSI has not yet been demonstrated on units comparable to those at White Bluff. Because of the similarities between the White Bluff and Independence facilities, we expect that these same potential issues related to the installation and operation of DSI or enhanced DSI would also apply to the Independence facility. In light of all this, we expect that even if ADEQ had considered DSI and enhanced DSI in its reasonable progress analysis for the Independence facility, it likely would not have changed the state's final determination on reasonable progress. Therefore, under these particular circumstances, we do not consider the omission of consideration of DSI and enhanced DSI as control options for SO_2 at the Independence facility an impediment to approving the reasonable progress analysis.

In its reasonable progress analysis for the Independence facility, the statutory factor that appears to have been the most significant in Arkansas' reasonable progress determination is the cost of compliance, as well as visibility, which the state deemed to be a relevant factor for consideration in its analysis. Arkansas discussed its concerns regarding the significant capital cost of scrubber controls, noted that the evaluation of the \$/dv metric demonstrated a greater difference in cost between dry FGD and low sulfur coal compared to the \$/ton metric, and ultimately concluded that all the controls it evaluated would cost millions of dollars for what it considers to be little visibility benefit. We believe

[131] As explained elsewhere in this notice, ADEQ relied on the fact that a FIP is in place to satisfy the BART requirements for the Domtar Ashdown Mill to find that nothing further is needed to address the reasonable progress requirements with regard to this source for the first implementation period. EPA is proposing to agree that it is appropriate to rely on the FIP in this manner.

[132] Compare Arkansas' estimates of the cost effectiveness of dry scrubbers for the Independence facility (\$2,970/ton for Unit 1 and \$2,742/ton for Unit 2) with EPA's estimates of the cost effectiveness of dry scrubbers for the facility (\$2,853/ton for Unit 1 and \$2,634/ton for Unit 2). See 81 FR 66352.

[133] We are relying on Entergy's ''adjusted costs,'' which reflect Entergy's exclusion of line items not allowed under EPA's Control Cost Manual. See ''Entergy Updated BART Five-Factor Analysis for Units 1 and 2,'' dated August 18, 2017, Table 4–4. This analysis is found under Appendix D of the Arkansas Regional Haze SO_2 and PM SIP revision.

[134] See the file titled ''EPA Cost Calcs_DSI and enhanced DSI_Independence.xlsx,'' which can be found in the docket for this proposed rulemaking.

[135] *Id.*

[136] This is based on a comparison of our cost estimates for DSI with Entergy's cost estimates for dry scrubbers and the FIP's cost estimates for wet scrubbers for Independence Units 1 and 2. Entergy's cost estimates for dry scrubbers and the FIP's cost estimates for wet scrubbers for Independence Units 1 and 2 are discussed earlier in this notice under Section II.C.4.a.

that Arkansas' weighing of the four statutory factors and other factors it deemed relevant in its reasonable progress analysis for the Independence facility was reasonable. Considering the state's concerns about the high capital costs and high $/dv of the evaluated controls and given that the state is requiring Independence Units 1 and 2 to switch to low sulfur coal within 3 years under the long-term strategy, which is expected to reduce SO_2 emissions and result in visibility improvements at Arkansas' Class I areas, it is not unreasonable for Arkansas to conclude that SO_2 controls under the reasonable progress requirements are not necessary for the Independence facility in the first implementation period. We are proposing to fully approve Arkansas' focused reasonable progress analysis, which applied the four statutory factors directly to the Independence facility, and its determination that no additional controls under the reasonable progress requirements are necessary to achieve reasonable progress for the first implementation period. Our proposed approval is based on the following: (1) The state's discussion of the key pollutants and source categories that contribute to visibility impairment in Arkansas' Class I areas per the CENRAP's source apportionment modeling; (2) the state's identification of a group of large SO_2 point sources in Arkansas for potential evaluation of controls under reasonable progress; (3) the state's rationale for narrowing down its list of potential sources to evaluate under the reasonable progress requirements; [137] and (4) the state's evaluation and reasonable weighing of the four statutory factors along with consideration of the visibility benefits of controls for the Independence facility.

We are also proposing to find that the method used by Arkansas to estimate revised 2018 RPGs for the 20% worst days for Caney Creek and Upper Buffalo is appropriate. We agree with Arkansas that this is the same method utilized by us to revise the RPGs in the Arkansas Regional Haze FIP. We are also proposing to find that Arkansas' use of the most recent 3 years of data (2014–2016) as opposed to use of the 5 most recent years of data (2009–2013) with the exclusion of the minimum and maximum values, as we used in the Arkansas FIP, is appropriate because it reflects updated data and we also agree with Arkansas that it will ensure that recent changes in dispatch at Arkansas EGUs are captured. Therefore, we are proposing to agree with Arkansas' revised 2018 RPGs of 22.47 dv for Caney Creek and 22.51 dv for Upper Buffalo.

As discussed elsewhere in this proposed rulemaking, BART controls for Domtar Power Boilers No. 1 and 2 are not addressed in the Arkansas Regional Haze SO_2 and PM SIP Revision, and we are not proposing to withdraw the FIP's BART emission limits for the facility at this time. If and when ADEQ submits a SIP revision to address BART requirements for Domtar Power Boilers No. 1 and No. 2, we will evaluate any conclusions ADEQ has drawn in that submission with respect to the need to conduct a reasonable progress analysis for Domtar. As long as the BART requirements for Domtar continue to be addressed by the measures in the FIP, however, we propose to agree with ADEQ's conclusion that nothing further is needed to satisfy the reasonable progress requirements for the first implementation period. With respect to the RPGs for Arkansas' Class I areas, if and when ADEQ submits a SIP revision addressing Domtar, we will assess that future SIP revision to determine if changes are needed based on any differences between the SIP-based measures and the measures currently contained in the FIP.

D. Long-Term Strategy

Section 169A(b) of the CAA and 40 CFR 51.308(d)(3) require that states include in their SIPs a 10 to 15-year strategy, referred to as the long-term strategy, for making reasonable progress for each Class I area within their state. This long-term strategy is the compilation of all control measures a state will use during the implementation period of the specific SIP submittal to meet any applicable RPGs for a particular Class I area. The long-term strategy must include ''enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals'' for all Class I areas within, or affected by emissions from, the state.[138]

Section 51.308(d)(3)(v) requires that a state consider certain elements in developing its long-term strategy for each Class I area. These considerations are the following: (1) Emission reductions due to ongoing air pollution control programs, including measures to address reasonably attributable visibility impairment (RAVI); (2) measures to mitigate the impacts of construction activities; (3) emissions limitations and schedules for compliance to achieve the reasonable progress goal; (4) source retirement and replacement schedules; (5) smoke management techniques for agricultural and forestry management purposes including plans as currently exist within the state for these purposes; (6) enforceability of emissions limitations and control measures; and (7) the anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the long-term strategy. Since states are required to consider emissions limitations and schedules of compliance to achieve the RPGs for each Class I area, the BART emission limits that are in a state's regional haze SIP are elements of the state's long-term strategy for each Class I area. In our March 12, 2012, final action on the 2008 Arkansas Regional Haze SIP, since we disapproved a portion of Arkansas' BART determinations for Arkansas' two Class I areas, we also disapproved the corresponding emissions limitations and schedules of compliance elements of the state's long-term strategy, while approving remaining elements under section 51.308(d)(3)(v).

As discussed above, the state is making enforceable Entergy's commitment to switch Independence Units 1 and 2 to low sulfur coal and comply with an SO_2 emission limit of 0.60 lb/MMBtu within 3 years as part of the long-term strategy. We are proposing to approve Arkansas' decision to make enforceable the 0.60 lb/MMBtu SO_2 emission limit for Independence Units 1 and 2 as part of the long-term strategy and we are also proposing to approve the other components of the long-term strategy addressed by the August 8, 2018 SIP revision. We are proposing to find that Arkansas' long-term strategy is approved with respect to sources other than the Domtar Ashdown Mill. Because we disapproved the majority of ADEQ's 2008 BART determinations for the Domtar facility and promulgated a FIP to satisfy these requirements, the corresponding components of the long-term strategy for Domtar are also currently satisfied by the FIP. No further action by ADEQ is required at this time; the Domtar-related components will remain covered by the FIP and the approved portion of the 2008 Arkansas Regional Haze SIP unless and until EPA

[137] As explained above, part of ADEQ's basis for determining the sources for which to conduct a narrow reasonable progress analysis was that certain sources were subject to BART analyses and determinations in the first implementation period. For the Domtar facility in particular, the state relied on the fact that a FIP is in place to address the BART requirements. We propose to agree that this is an appropriate basis on which find that nothing further is needed for reasonable progress at this source. If, in the future, Arkansas submits a further SIP revision addressing the Domtar Ashdown Mill, EPA will evaluate whether the analysis and determinations therein satisfy the reasonable progress requirements as well as BART.

[138] 40 CFR 51.308(d)(3).

has received and approved a SIP revision containing the required analyses and determinations for this facility.

E. Required Consultation

The Regional Haze Rule requires states to provide the designated Federal Land Managers (FLMs) with an opportunity for consultation at least 60 days prior to holding any public hearing on a SIP revision for regional haze for the first implementation period. Arkansas sent letters to the FLMs on October 27, 2017, providing notification of the proposed SIP revision and providing electronic access to the draft SIP revision and related documents.[139] ADEQ also engaged in telephone communications with the FLMs and considered and addressed comments submitted by the FLMs on the proposed SIP revision.[140]

The Regional Haze Rule at section 51.308(d)(3)(i) also provides that if a state has emissions that are reasonably anticipated to contribute to visibility impairment in a Class I area located in another state, the state must consult with the other state(s) in order to develop coordinated emission management strategies. Since Missouri has two Class I areas impacted by Arkansas sources, Arkansas sent a letter to the Missouri Department of Natural Resources (MDNR) on October 27, 2017, providing notification of the proposed SIP revision and providing electronic access to the draft SIP revision and related documents.[141] Missouri did not provide comments to Arkansas on the proposed SIP revision.

We are proposing to find that Arkansas provided an opportunity for consultation to the FLMs and to Missouri on the proposed SIP revision, as required under section 51.308(i)(2) and 51.308(d)(3)(i). We are also proposing to find that Arkansas has appropriately considered and provided written responses to comments from the FLMs in the final SIP submission. Therefore, we are proposing to find that Arkansas has satisfied the consultation requirements under sections 51.308(i)(2) and 51.308(d)(3)(i).

F. Interstate Visibility Transport Under Section 110(a)(2)(D)(i)(II)

The SIP revision also includes a discussion on interstate visibility transport. Specifically, the SIP revision discusses the impacts of Arkansas sources on Missouri's Class I areas, as well as the most recent IMPROVE monitoring data for Missouri's Class I areas. The SIP revision concludes that Missouri is on track to achieve its visibility goals, that the visibility progress observed indicates that sources in Arkansas are not interfering with the achievement of Missouri's RPGs for Hercules Glades and Mingo, and that no additional controls on sources within Arkansas are necessary to ensure that other states' visibility goals for their Class I areas are met. We are deferring proposing action on the interstate visibility transport portion of the SIP revision until a future proposed rulemaking.

G. Clean Air Act Section 110(l)

Section 110(l) of the CAA states that ''[t]he Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of this chapter.'' We believe an approval of the Arkansas Regional Haze SO_2 and PM SIP revision and concurrent withdrawal of the corresponding parts of the FIP, as proposed, will meet the Clean Air Act's 110(1) provisions concerning attainment and maintenance. No areas in Arkansas are currently designated nonattainment for any NAAQS pollutants. As all areas in Arkansas are attaining the NAAQS with current emissions levels, further reductions from current emission levels because of compliance with the emission limits contained in this SIP revision will not interfere with attainment or maintenance. The SIP will result in emission reductions beyond the status quo.

Additionally, we do not believe an approval of the Arkansas Regional Haze SO_2 and PM SIP revision and concurrent withdrawal of the corresponding parts of the FIP would interfere with the CAA requirements for BART or reasonable progress because our proposed approval of the SIP revision is supported by our evaluation of the state's conclusions and our rationale explaining why we are proposing to find that the BART and reasonable progress requirements under the CAA are met, as discussed under sections II.B and II.C of this notice. With respect to BART requirements, the SIP would replace federal determinations regarding SO_2 and PM control requirements for EGUs in Arkansas with the state's own determinations. We do note that the majority of the state's SO_2 and PM BART determinations in the SIP revision are essentially identical to the BART determinations contained in the Arkansas Regional Haze FIP. The only exception to this is White Bluff Units 1 and 2, for which the FIP requires an SO_2 emission limit of 0.06 lb/MMBtu with a 5-year compliance date, based on the installation of dry scrubbers. The Arkansas Regional Haze SO_2 and PM SIP revision does not require the SO_2 emission limit of 0.06 lb/MMBtu, but it does require that Entergy move forward with its announced plans to cease coal combustion at White Bluff Units 1 and 2 by the end of 2028 and to meet an interim SO_2 emission limit of 0.60 lb/MMBtu prior to ceasing coal combustion. Once the units cease coal combustion, SO_2 emissions from White Bluff Units 1 and 2 are expected to significantly decrease. Therefore, we expect that the BART controls contained in the SIP revision are comparable to the BART controls required under the FIP in the long term. More importantly, our proposed approval of the SIP revision does not violate CAA section 110(l) with respect to BART requirements because the state's BART decisions in the SIP revision, which we are proposing to approve, are adequately supported by BART five factor analyses that have been adopted and incorporated into the SIP revision.

With respect to reasonable progress, we are proposing to approve Arkansas' determination that no additional controls under the reasonable progress requirements are necessary to achieve reasonable progress for the first implementation period. In contrast to the Arkansas Regional Haze FIP, the Arkansas Regional Haze SO_2 and PM SIP revision does not require an SO_2 emission limit of 0.06 lb/MMBtu with a 5-year compliance date for Independence Units 1 and 2 based on the installation of dry scrubber controls under the reasonable progress requirements. Nevertheless, as discussed in Section II.C of this notice, we are proposing to find that the reasonable progress requirements under section 51.308(d)(1) have been fully addressed for the first implementation period, based on Arkansas' discussion of the key pollutants and source categories that contribute to visibility impairment in Arkansas' Class I areas per the CENRAP's source apportionment modeling; its identification of a group of large SO_2 point sources in Arkansas for potential evaluation of controls under reasonable progress; the state's rationale for narrowing down its list of potential sources to evaluate under the reasonable progress requirements; and its analysis

[139] See Arkansas Regional Haze SO_2 and PM SIP revision, Tab E.

[140] ADEQ included copies of correspondence with the FLM's, included comments received from the FLMs in Tab E of the Arkansas Regional Haze SO_2 and PM SIP revision.

[141] See Arkansas Regional Haze SO_2 and PM SIP revision, Tab E.

with reasonable weighing of the four statutory factors along with consideration of the visibility benefits of controls for the Independence facility. Therefore, even though the SIP revision would allow for an increase in SO_2 emissions from the Independence facility compared to the FIP, our proposed approval of the SIP revision and concurrent withdrawal of the corresponding parts of the FIP does not violate CAA section 110(l) with respect to reasonable progress because we are proposing to find that Arkansas has provided a reasoned basis to support its determination that the scrubber controls are not needed for reasonable progress.

III. Proposed Action

A. Arkansas Regional Haze SIP Revision

The EPA is proposing to approve the following revisions to the Arkansas Regional Haze SIP submitted to EPA on August 8, 2018: The SO_2 and PM BART requirements for the AECC Bailey Plant Unit 1; the SO_2 and PM BART requirements for the AECC McClellan Plant Unit 1; the SO_2 BART requirements for Flint Creek Plant Boiler No. 1; the SO_2 BART requirements for the White Bluff Plant Units 1 and 2; the SO_2, NO_X, and PM BART requirements for the White Bluff Auxiliary Boiler; and the prohibition on burning of fuel oil at Lake Catherine Unit 4 until SO_2 and PM BART determinations for the fuel oil firing scenario are approved into the SIP by EPA. These BART requirements have now been made enforceable by the state through Administrative Orders that have been adopted and incorporated in the SIP revision. We are proposing to approve these Administrative Orders as source-specific BART revisions to the SIP. The BART requirements and associated Administrative Orders are listed under Table 15 below. We are proposing to withdraw our February 12, 2018,[142] approval of Arkansas' reliance on participation in the CSAPR ozone season NO_X trading program to satisfy the NO_X BART requirement for the White Bluff Auxiliary Boiler given that Arkansas erroneously identified the Auxiliary Boiler as participating in CSAPR for ozone season NO_X. We are proposing to replace our prior approval of Arkansas' determination for the White Bluff Auxiliary Boiler with our proposed approval of the source specific NO_X BART emission limit contained in the August 8, 2018, SIP revision. We are proposing to approve ADEQ's revised identification of the 6A Boiler at the Georgia-Pacific Crossett Mill as BART-eligible and the additional information and technical analysis presented in the SIP revision in support of the determination that the Georgia-Pacific Crossett Mill 6A and 9A Boilers are not subject to BART.

We are also proposing to find that the reasonable progress requirements under section 51.308(d)(1) have been fully addressed for the first implementation period. Specifically, we are proposing to approve the state's focused reasonable progress analysis and the reasonable progress determination that no additional SO_2 controls at Independence Units 1 and 2 or any other Arkansas sources are necessary under reasonable progress for the first implementation period. We are also proposing to agree with the state's revised RPGs for Arkansas' Class I areas. We are basing our proposed approval of the reasonable progress provisions and revised RPGs on the state's discussion of the key pollutants and source categories that contribute to visibility impairment in Arkansas' Class I areas per the CENRAP's source apportionment modeling; the state's identification of a group of large SO_2 point sources in Arkansas for potential evaluation of controls under reasonable progress; the state's rationale for narrowing down its list of potential sources to evaluate under the reasonable progress requirements; and the state's evaluation and reasonable weighing of the four statutory factors along with consideration of the visibility benefits of controls for the Independence facility. The August 8, 2018, SIP revision does not address BART and associated long-term strategy requirements for the Domtar Ashdown Mill Power Boilers No. 1 and 2, and we are not proposing to withdraw the FIP's BART emission limits for the facility at this time. If and when ADEQ submits a SIP revision to address BART requirements for Domtar Power Boilers No. 1 and No. 2, we will evaluate any conclusions ADEQ has drawn in that submission with respect to the need to conduct a reasonable progress analysis for Domtar. As long as the BART requirements for Domtar continue to be addressed by the measures in the FIP, however, we propose to agree with ADEQ's conclusion that nothing further is needed to satisfy the reasonable progress requirements for the first implementation period. With respect to the RPGs for Arkansas' Class I areas, if and when ADEQ submits a SIP revision addressing Domtar, we will assess that future SIP revision to determine if changes are needed based on any differences between the SIP-based measures and the measures currently contained in the FIP.

We are proposing to approve the components of the long-term strategy under section 51.308(d)(3) addressed by the August 8, 2018, SIP revision, including the BART measures contained in the SIP revision and the SO_2 emission limit of 0.60 lb/MMBtu for Independence Units 1 and 2 based on the use of low sulfur coal. These requirements for Independence Units 1 and 2 have now been made enforceable by the state through an Administrative Order that has been adopted and incorporated in the SIP revision. We are proposing to approve this Administrative Order as a source-specific revision to the SIP. The SO_2 emission limit and associated Administrative Order for the Independence facility are listed under Table 16 below. We are proposing to find that Arkansas' long-term strategy is approved with respect to sources other than the Domtar Ashdown Mill. We are also proposing to find that Arkansas has provided an opportunity for consultation to the FLMs and to Missouri on the proposed SIP revision, as required under section 51.308(i)(2) and 51.308(d)(3)(i). The BART emission limits we are proposing to approve are presented in Table 15; the SO_2 emission limits under the long-term strategy and associated Administrative Order we are proposing to approve for the Independence facility are presented in Table 16; and Arkansas' revised 2018 RPGs are presented in Table 17.

[142] 83 FR 5927.

TABLE 15—SIP REVISION BART EMISSION LIMITS AND ADMINISTRATIVE ORDERS PROPOSED FOR APPROVAL

Subject-to-BART source	SIP revision SO_2 BART emission limits	SIP revision PM BART emission limits	SIP revision NO_X BART emission limits	Administrative order
AECC Bailey Unit 1	0.5% limit on sulfur content of fuel combusted*.	0.5% limit on sulfur content of fuel combusted*.	Already SIP-approved	Administrative Order LIS No. 18–071.
AECC McClellan Unit 1	0.5% limit on sulfur content of fuel combusted*.	0.5% limit on sulfur content of fuel combusted*.	Already SIP-approved	Administrative Order LIS No. 18–071.
AEP Flint Creek Boiler No. 1.	0.06 lb/MMBtu*	Already SIP-approved	Already SIP-approved	Administrative Order LIS No. 18–072.
Entergy Lake Catherine Unit 4 (fuel oil firing scenario).	Unit is allowed to burn only natural gas*.	Unit is allowed to burn only natural gas*.	Already SIP-approved	Administrative Order LIS No. 18–073.
Entergy White Bluff Unit 1	0.60 lb/MMBtu (Interim emission limit with a 3-year compliance date and cessation of coal combustion by end of 2028).	Already SIP-approved	Already SIP-approved	Administrative Order LIS No. 18–073.
Entergy White Bluff Unit 2	0.60 lb/MMBtu (Interim emission limit with a 3-year compliance date and cessation of coal combustion by end of 2028).	Already SIP-approved	Already SIP-approved	Administrative Order LIS No. 18–073.
Entergy White Bluff Auxiliary Boiler.	105.2 lb/hr*	4.5 lb/hr*	32.2 lb/hr*	Administrative Order LIS No. 18–073.

*This BART emission limit required by the SIP revision is the same as what was required under the Arkansas Regional Haze FIP.

TABLE 16—SIP REVISION EMISSION LIMITS UNDER REASONABLE PROGRESS AND ADMINISTRATIVE ORDERS PROPOSED FOR APPROVAL

Source	SIP revision SO_2 emission limits	Administrative order
Entergy Independence Unit 1	0.60 lb/MMBtu	Administrative Order LIS No. 18–073.
Entergy Independence Unit 2	0.60 lb/MMBtu	Administrative Order LIS No. 18–073.

TABLE 17—ARKANSAS' REVISED 2018 RPGS

Class I area	2018 RPG 20% worst days (dv)
Caney Creek	22.47
Upper Buffalo	22.51

B. Partial FIP Withdrawal

We are proposing to withdraw those portions of the Arkansas Regional Haze FIP at 40 CFR 52.173 that impose SO_2 and PM BART requirements on Bailey Unit 1; SO_2 and PM BART requirements on McClellan Unit 1; SO_2 BART requirements on Flint Creek Boiler No. 1; the provisions concerning BART for the fuel oil firing scenario for Lake Catherine Unit 4; SO_2 BART requirements for White Bluff Units 1 and 2; SO_2 and PM BART requirements for the White Bluff Auxiliary Boiler; and the SO_2 emission limits under reasonable progress for Independence Units 1 and 2. We are proposing that these portions of the FIP will be replaced by the portion of the Arkansas Regional Haze SO_2 and PM SIP revision that we are proposing to approve in this action. Since we are proposing to withdraw certain portions of the FIP, we are also proposing to redesignate the FIP by revising the numbering of certain paragraphs under section 40 CFR 52.173. Our proposed redesignation of the numbering of these paragraphs is non-substantive and does not mean we are reopening these parts for public comment in this proposed rulemaking.

C. Clean Air Act Section 110(l)

We are proposing to find that an approval of a portion of the Arkansas Regional Haze SO_2 and PM SIP revision and concurrent withdrawal of the corresponding parts of the FIP, as proposed, will meet the Clean Air Act's 110(1) provisions.

IV. Incorporation by Reference

In this action, we are proposing to include in a final rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are proposing to incorporate by reference revisions to the Arkansas source specific requirements as described in the Proposed Action section above. We have made, and will continue to make, these documents generally available electronically through *www.regulations.gov* and in hard copy at the EPA Region 6 office (please contact Dayana Medina, 214–665–7241, *medina.dayana@epa.gov* for more information).

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;

• Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because this action does not involve technical standards; 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 proposed 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, Best available retrofit technology, Incorporation by reference, Intergovernmental relations, Ozone, Particulate matter, regional haze, Reporting and recordkeeping requirements, Sulfur dioxide, Visibility.

Dated: November 21, 2018.

David Gray,

Acting Regional Administrator, Region 6.

Title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart E—Arkansas

■ 2. In § 52.170:

■ a. In paragraph (d), the table titled ''EPA-Approved Arkansas Source-Specific Requirements'' is amended by revising the heading ''Permit No.'' to ''Permit or Order No.'' and adding the entries ''Arkansas Electric Cooperative Corporation Carl E. Bailey Plant'', ''Arkansas Electric Cooperative Corporation John L. McClellan'', ''Entergy Arkansas, Inc. Lake Catherine Plant'', ''Entergy Arkansas, Inc. White Bluff Plant'', and ''Entergy Arkansas, Inc. Independence Plant''.

■ b. In paragraph (e), the third table titled ''EPA-Approved Non-Regulatory Provisions and Quasi-Regulatory Measures in the Arkansas SIP'' is amended by adding the entry ''Arkansas Regional Haze SO_2 and PM SIP Revision'' at the end of the third table.

The revision and additions read as follows:

§ 52.170 Identification of plan.

* * * * *

(d) * * *

(e) * * *

* * * * *

EPA-APPROVED ARKANSAS SOURCE-SPECIFIC REQUIREMENTS

Name of source	Permit or order no.	State approval/ effective date	EPA approval date	Comments
Arkansas Electric Cooperative Corporation Carl E. Bailey Plant.	Administrative Order LIS No. 18–071.	8/7/2018	[Date of publication of the final rule in the **Federal Register**] [**Federal Register** citation of the final rule].	Unit 1.
Arkansas Electric Cooperative Corporation John L. McClellan.	Administrative Order LIS No. 18–072.	8/7/2018	[Date of publication of the final rule in the **Federal Register**] [**Federal Register** citation of the final rule].	Unit 1.
Entergy Arkansas, Inc. Lake Catherine Plant.	Administrative Order LIS No. 18–073.	8/7/2018	[Date of publication of the final rule in the **Federal Register**] [**Federal Register** citation of the final rule].	Unit 4.
Entergy Arkansas, Inc. White Bluff Plant.	Administrative Order LIS No. 18–073.	8/7/2018	[Date of publication of the final rule in the **Federal Register**] [**Federal Register** citation of the final rule].	Units 1, 2, and the Auxiliary Boiler.
Entergy Arkansas, Inc. Independence Plant.	Administrative Order LIS No. 18–073.	8/7/2018	[Date of publication of the final rule in the **Federal Register**] [**Federal Register** citation of the final rule].	Units 1 and 2.

EPA-APPROVED NON-REGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE ARKANSAS SIP

Name of SIP provision	Applicable geographic or nonattainment area	State submittal/ effective date	EPA approval date	Explanation
*	*	* *	*	* *
Arkansas Regional Haze SO_2 and PM SIP Revision.	Statewide	August 8, 2018	[Date of publication of the final rule in the **Federal Register**] [**Federal Register** citation of the final rule].	Regional Haze SIP submittal addressing SO_2 and PM BART requirements for Arkansas EGUs, NO_X BART requirement for the White Bluff Auxiliary Boiler, and reasonable progress requirements for SO_2 for the first implementation period.

■ 3. Section 52.173 is amended by:
■ a. Revising the introductory text of paragraph (c) and paragraph (c)(1);
■ b. In paragraph (c)(2) revising the definition ''*Boiler-operating-day*'';
■ c. Removing paragraphs (c)(3) through (12), and (22) through (24);
■ d. Redesignating paragraphs (c)(13) through (21) as paragraphs (c)(3) through (11);
■ e. Redesignating paragraphs (c)(25) through (27) as paragraphs (c)(12) through (14);
■ f. Revising newly redesignated paragraphs (c)(4), (c)(5),(c)(7), (c)(8), (c)(10), (c)(11), and (c)(12);
■ g. Adding paragraphs (g) and (h).

The revisions and additions read as follows:

§ 52.173 Visibility protection.

* * * * *

(c) *Federal implementation plan for regional haze.* Requirements for Domtar Ashdown Paper Mill Power Boilers No. 1 and 2 affecting visibility.

(1) *Applicability.* The provisions of this section shall apply to each owner or operator, or successive owners or operators of the sources designated as Domtar Ashdown Paper Mill Power Boilers No. 1 and 2.

(2) * * *

Boiler-operating-day means a 24-hr period between 6 a.m. and 6 a.m. the following day during which any fuel is fed into and/or combusted at any time in the power boiler.

* * * * *

(4) *Compliance dates for Domtar Ashdown Mill Power Boiler No. 1.* The owner or operator of the boiler must comply with the SO_2 and NO_X emission limits listed in paragraph (c)(3) of this section by November 28, 2016.

(5) *Compliance determination and reporting and recordkeeping requirements for Domtar Ashdown Paper Mill Power Boiler No. 1.* (i)(A) SO_2 emissions resulting from combustion of fuel oil shall be determined by assuming that the SO_2 content of the fuel delivered to the fuel inlet of the combustion chamber is equal to the SO_2 being emitted at the stack. The owner or operator must maintain records of the sulfur content by weight of each fuel oil shipment, where a ''shipment'' is considered delivery of the entire amount of each order of fuel purchased. Fuel sampling and analysis may be performed by the owner or operator, an outside laboratory, or a fuel supplier. All records pertaining to the sampling of each shipment of fuel oil, including the results of the sulfur content analysis, must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives. SO_2 emissions resulting from combustion of bark shall be determined by using the following site-specific curve equation, which accounts for the SO_2 scrubbing capabilities of bark combustion: $Y = 0.4005 * X - 0.2645$

Where:

Y = pounds of sulfur emitted per ton of dry fuel feed to the boiler.

X = pounds of sulfur input per ton of dry bark.

(B) The owner or operator must confirm the site-specific curve equation through stack testing. By October 27, 2017, the owner or operator must provide a report to EPA showing confirmation of the site specific-curve equation accuracy. Records of the quantity of fuel input to the boiler for each fuel type for each day must be compiled no later than 15 days after the end of the month and must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives. Each boiler-operating-day of the 30-day rolling average for the boiler must be determined by adding together the pounds of SO_2 from that boiler-operating-day and the preceding 29 boiler-operating-days and dividing the total pounds of SO_2 by the sum of the total number of boiler operating days (*i.e.,* 30). The result shall be the 30 boiler-operating-day rolling average in terms of lb/day emissions of SO_2. Records of the total SO_2 emitted for each day must be compiled no later than 15 days after the end of the month and must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives. Records of the 30 boiler-operating-day rolling averages for SO_2 as described in this paragraph (c)(5)(i) must be maintained by the owner or operator for each boiler-operating-day and made available upon request to EPA and ADEQ representatives.

(ii) If the air permit is revised such that Power Boiler No. 1 is permitted to burn only pipeline quality natural gas, this is sufficient to demonstrate that the boiler is complying with the SO_2 emission limit under paragraph (c)(3) of this section. The compliance determination requirements and the reporting and recordkeeping requirements under paragraph (c)(5)(i) of this section would not apply and confirmation of the accuracy of the site-specific curve equation under paragraph (c)(5)(i)(B) of this section through stack testing would not be required so long as Power Boiler No. 1 is only permitted to burn pipeline quality natural gas.

(iii) To demonstrate compliance with the NO_X emission limit under paragraph (c)(3) of this section, the owner or operator shall conduct stack testing using EPA Reference Method 7E, found at 40 CFR part 60, Appendix A, once every 5 years, beginning 1 year from the effective date of our final rule, which corresponds to October 27, 2017. Records and reports pertaining to the stack testing must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives.

(iv) If the air permit is revised such that Power Boiler No. 1 is permitted to burn only pipeline quality natural gas, the owner or operator may demonstrate compliance with the NO_X emission limit under paragraph (c)(3) of this section by calculating NO_X emissions using fuel usage records and the applicable NO_X emission factor under AP–42, Compilation of Air Pollutant Emission Factors, section 1.4, Table 1.4–1. Records of the quantity of natural gas

input to the boiler for each day must be compiled no later than 15 days after the end of the month and must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives. Records of the calculation of NO_X emissions for each day must be compiled no later than 15 days after the end of the month and must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives. Each boiler-operating-day of the 30-day rolling average for the boiler must be determined by adding together the pounds of NO_X from that day and the preceding 29 boiler-operating-days and dividing the total pounds of NO_X by the sum of the total number of hours during the same 30 boiler-operating-day period. The result shall be the 30 boiler-operating-day rolling average in terms of lb/hr emissions of NO_X. Records of the 30 boiler-operating-day rolling average for NO_X must be maintained by the owner or operator for each boiler-operating-day and made available upon request to EPA and ADEQ representatives. Under these circumstances, the compliance determination requirements and the reporting and recordkeeping requirements under paragraph (c)(5)(iii) of this section would not apply.

* * * * *

(7) *SO_2 and NO_X Compliance dates for Domtar Ashdown Mill Power Boiler No. 2.* The owner or operator of the boiler must comply with the SO_2 and NO_X emission limits listed in paragraph (c)(6) of this section by October 27, 2021.

(8) *SO_2 and NO_X Compliance determination and reporting and recordkeeping requirements for Domtar Ashdown Mill Power Boiler No. 2.* (i) NO_X and SO_2 emissions for each day shall be determined by summing the hourly emissions measured in pounds of NO_X or pounds of SO_2. Each boiler-operating-day of the 30-day rolling average for the boiler shall be determined by adding together the pounds of NO_X or SO_2 from that day and the preceding 29 boiler-operating-days and dividing the total pounds of NO_X or SO_2 by the sum of the total number of hours during the same 30 boiler-operating-day period. The result shall be the 30 boiler-operating-day rolling average in terms of lb/hr emissions of NO_X or SO_2. If a valid NO_X pounds per hour or SO_2 pounds per hour is not available for any hour for the boiler, that NO_X pounds per hour shall not be used in the calculation of the 30 boiler-operating-day rolling average for NO_X. For each day, records of the total SO_2 and NO_X emitted for that day by the boiler must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives. Records of the 30 boiler-operating-day rolling average for SO_2 and NO_X for the boiler as described in this paragraph (c)(8)(i) must be maintained by the owner or operator for each boiler-operating-day and made available upon request to EPA and ADEQ representatives.

(ii) The owner or operator shall continue to maintain and operate a CEMS for SO_2 and NO_X on the boiler listed in paragraph (c)(6) of this section in accordance with 40 CFR 60.8 and 60.13(e), (f), and (h), and appendix B of 40 CFR part 60. The owner or operator shall comply with the quality assurance procedures for CEMS found in 40 CFR part 60. Compliance with the emission limits for SO_2 and NO_X shall be determined by using data from a CEMS.

(iii) Continuous emissions monitoring shall apply during all periods of operation of the boiler listed in paragraph (c)(6) of this section, including periods of startup, shutdown, and malfunction, except for CEMS breakdowns, repairs, calibration checks, and zero and span adjustments. Continuous monitoring systems for measuring SO_2 and NO_X and diluent gas shall complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute period. Hourly averages shall be computed using at least one data point in each fifteen-minute quadrant of an hour. Notwithstanding this requirement, an hourly average may be computed from at least two data points separated by a minimum of 15 minutes (where the unit operates for more than one quadrant in an hour) if data are unavailable as a result of performance of calibration, quality assurance, preventive maintenance activities, or backups of data from data acquisition and handling system, and recertification events. When valid SO_2 or NO_X pounds per hour emission data are not obtained because of continuous monitoring system breakdowns, repairs, calibration checks, or zero and span adjustments, emission data must be obtained by using other monitoring systems approved by the EPA to provide emission data for a minimum of 18 hours in each 24-hour period and at least 22 out of 30 successive boiler operating days.

(iv) If the air permit is revised such that Power Boiler No. 2 is permitted to burn only pipeline quality natural gas, this is sufficient to demonstrate that the boiler is complying with the SO_2 emission limit under paragraph (c)(6) of this section. Under these circumstances, the compliance determination requirements under paragraphs (c)(8)(i) through (iii) of this section would not apply to the SO_2 emission limit listed in paragraph (c)(6) of this section.

(v) If the air permit is revised such that Power Boiler No. 2 is permitted to burn only pipeline quality natural gas and the operation of the CEMS is not required under other applicable requirements, the owner or operator may demonstrate compliance with the NO_X emission limit under paragraph (c)(6) of this section by calculating NO_X emissions using fuel usage records and the applicable NO_X emission factor under AP–42, Compilation of Air Pollutant Emission Factors, section 1.4, Table 1.4–1. Records of the quantity of natural gas input to the boiler for each day must be compiled no later than 15 days after the end of the month and must be maintained by the owner or operator and made available upon request to EPA and ADEQ representatives. Records of the calculation of NO_X emissions for each day must be compiled no later than 15 days after the end of the month and must be maintained and made available upon request to EPA and ADEQ representatives. Each boiler-operating-day of the 30-day rolling average for the boiler must be determined by adding together the pounds of NO_X from that day and the preceding 29 boiler-operating-days and dividing the total pounds of NO_X by the sum of the total number of hours during the same 30 boiler-operating-day period. The result shall be the 30 boiler-operating-day rolling average in terms of lb/hr emissions of NO_X. Records of the 30 boiler-operating-day rolling average for NO_X must be maintained by the owner or operator for each boiler-operating-day and made available upon request to EPA and ADEQ representatives. Under these circumstances, the compliance determination requirements under paragraphs (c)(8)(i) through (iii) of this section would not apply to the NO_X emission limit.

* * * * *

(10) *PM compliance dates for Domtar Ashdown Mill Power Boiler No. 2.* The owner or operator of the boiler must comply with the PM BART requirement listed in paragraph (c)(9) of this section by November 28, 2016.

(11) Alternative *PM Compliance Determination for Domtar Ashdown Paper Mill Power Boiler No.2.* If the air permit is revised such that Power Boiler No. 2 is permitted to burn only pipeline quality natural gas, this is sufficient to demonstrate that the boiler is complying

with the PM BART requirement under paragraph (c)(9) of this section.

(12) *Reporting and recordkeeping requirements.* Unless otherwise stated, all requests, reports, submittals, notifications, and other communications to the Regional Administrator required under paragraph (c) of this section shall be submitted, unless instructed otherwise, to the Director, Multimedia Division, U.S. Environmental Protection Agency, Region 6, to the attention of Mail Code: 6MM, at 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. For each unit subject to the emissions limitation under paragraph (c) of this section, the owner or operator shall comply with the following requirements, unless otherwise specified:

* * * * *

(g) *Measures addressing best available retrofit technology (BART) for electric generating unit (EGU) emissions of sulfur dioxide (SO_2) and particulate matter.* The BART requirements for SO_2 and PM emissions from EGUs in Arkansas and NO_X emissions from the White Bluff Auxiliary Boiler are satisfied by the Arkansas Regional Haze SO_2 and PM SIP Revision approved [Date 30 days after date of publication of the final rule in the **Federal Register**].

(h) *Other measures addressing reasonable progress.* The reasonable progress requirements for SO_2 and PM emissions are satisfied by the Arkansas Regional Haze SO_2 and PM SIP Revision approved [Date 30 days after date of publication of the final rule in the **Federal Register**], the Arkansas Regional Haze FIP, and the 2008 Arkansas Regional Haze SIP.

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